No. 19-___

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

SHAWN FORD,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the test for determining whether someone is "intellectually disabled" for purposes of the Eighth Amendment?

LIST OF PARTIES

The petitioner is the State of Ohio.

The respondent is Shawn Ford.

LIST OF RELATED CASES

1. *State v. Ford*, No. CR 2013 04 1008(A) (Summit County, Ohio Court of Common Pleas) (judgment entered June 30, 2015)
2. *State v. Ford*, 2019-Ohio-4539, 158 Ohio St.3d 139 (judgment entered November 7, 2019)

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INTRODUCTION

"Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). Legal standards too unclear to provide such notice call to mind "the practice of Caligula, who reportedly 'wrote his laws in a very small character, and hung them up upon high pillars,'" making them harder to read and thus harder to follow. *Flores-Figueroa v. United States*, 556 U.S. 646, 658 (2009) (Scalia, J., concurring in the judgment) (quoting 1 W. Blackstone, Commentaries on the Laws of England 46 (1765)).

This Court's cases regarding the Eighth Amendment's application to intellectually disabled offenders stray too close to Caligula's practice. In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits executing the intellectually disabled. *Id.* at 321. But the Court has never defined "intellectual disability." *Atkins* left "to the States the task of developing appropriate ways to enforce" the bar on executing the intellectually disabled. *Id.* 536 U.S. at 317 (internal quotation omitted). In every case since, the Court has muddied its approach by invalidating States' methods for adjudicating "intellectual disability" without ever saying how, exactly, "intellectual disability" ought to be measured. *Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas* (*Moore I*), 137 S. Ct. 1039 (2017); *Moore v. Texas* (*Moore II*), 139 S. Ct. 666 (2019) (*per curiam*). This Court has thus provided little "guidance" regarding how "to enforce the holding of *Atkins*." *Moore I*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting).

The States deserve better. If the Court is going to bar the States from executing a class of defendants convicted of the most heinous murders, it owes them a "judicially discoverable and manageable standard[]" for determining when the bar applies. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019). The Court should grant *certiorari* and provide such a standard.

OPINIONS BELOW

The Supreme Court of Ohio's decision below is published at *State v. Ford*, 2019-Ohio-4539, 158 Ohio St.3d 139, and reproduced at Pet.App.1a.

The Summit County Court of Common Pleas' opinion addressing Ford's *Atkins* argument is unpublished, but reproduced at Pet.App.207a.

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio issued its opinion and judgment on November 7, 2019. On January 13, 2020, this Court granted the State of Ohio fifty-eight additional days—until April 3, 2020—to file a petition for certiorari. The State timely filed and, because the Supreme Court of Ohio's decision is sufficiently "final," *see below* 30–33, this Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. On a Friday in 2013, Chelsea Schoebert celebrated her eighteenth birthday with friends. Among them, her then-boyfriend Shawn Ford. At some point, Ford asked Chelsea for sex. She said no. So Ford picked up a brick and beat Chelsea nearly to death with it. He also stabbed her in the neck and back, causing lasting damage to Chelsea's spinal cord. Chelsea might have died if another partygoer had not intervened and persuaded Ford to leave Chelsea at a nearby hospital. Pet.App.2a–3a, 8a.

While Chelsea recovered in the hospital, Ford worked with friends to cover up his crime. He convinced multiple witnesses—including Chelsea—to identify an innocent man as the assailant. Police even arrested the wrongfully accused man, though they released him upon determining that the accusations were false. Pet.App.3a–4a.

Even before the police determined they had the wrong guy, Chelsea's parents—Jeffrey and Margaret Schoebert—distrusted Ford. With the support of law enforcement, they barred Ford from visiting Chelsea in the hospital. Pet.App.4a.

That angered Ford. So he hatched a plan to kill Jeffrey and Margaret. On April 1, at about 8:00 p.m., Jeffrey left Margaret at their daughter's bedside and returned home to New Franklin, Ohio. Pet.App.4a. That night, Ford and an accomplice broke into the home and beat Jeffrey to death with a sledgehammer. Pet.App.8a. (The accomplice apparently stabbed Jeffrey, but none of the wounds was life threatening. Pet.App.8a). With Jeffrey dead, Ford turned his attention to Margaret, who was still at the hospital. Ford began texting her from Jeffrey's phone, trying to

lure her back to the house where he laid in wait. Here is a sample of the texts he sent:

> Ford: "you still at hospital"
>
> …
>
> Margaret: "Have u been up all night"
>
> Ford: "Yea."
>
> Ford: "How Chelsea doin"
>
> Ford: "What time you coming home"
>
> Margaret: "Who is at the house"
>
> Ford: "Just me i know you called but my phone not working right now I dobt know why"
>
> Margaret: we have been up since 4 … She is crying bc she can't eat cereal and wants to see shawn [Ford]"

Pet.App.110a–11a.

A few hours later, Margaret returned. Pet.App.110a–12a. Ford beat her to death with the same sledgehammer he used to kill Jeffrey. Pet.App.8a–9a. Ford then took the keys to Jeffrey's car and drove off with it. Pet.App.116a–17a.

A local contractor discovered the gruesome scene the next day. Pet.App.4a.

2. Police found and arrested Ford. The Summit County Prosecutor charged him with aggravated murder and associated crimes. And the jury, once it heard the overwhelming evidence, convicted Ford on all counts and recommended a death sentence. Pet.App.10a–11a.

Ford fought the jury's death-sentence recommendation by claiming to be intellectually disabled. That condition, he said, made him ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). On this basis, Ford moved for (and received) a hearing to determine whether he should be deemed ineligible for the death penalty under *Atkins*. (Ford thereby introduced the federal issue on which this Court's jurisdiction rests. *See* S. Ct. Rule 14(1)(g)(i).)

Atkins did indeed hold that the Eighth Amendment prohibits executing the intellectually disabled. 536 U.S. at 321. But it announced no test for determining whether a defendant *is* intellectually disabled. Instead, it tasked the States with "developing appropriate ways to enforce the constitutional restriction." *Id*. at 317 (quotation omitted). The Supreme Court of Ohio announced its test for implementing *Atkins* in *State v. Lott*, 97 Ohio St. 3d 303 (2002). *Lott* held that defendants bear the burden of proving intellectual disability "by a preponderance of the evidence." *Id*. at 307. To carry that burden, defendants had to establish: "(1) significantly subaverage intellectual functioning, (2) significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction, and (3) onset before the age of 18." *Id*. at 305. *Lott* additionally recognized "a rebuttable presumption that defendant is not" intellectually disabled "if his or her IQ is above 70." *Id*.

The trial court applied this standard using evidence gathered at a two-day *Atkins* hearing. Three experts—one offered by Ford, one by the State, and one appointed by the court itself—testified. All three agreed that Ford was *not* intellectually disabled. Pet.App.218a, 223a, 225a–26a, 232a. And the only two experts with whom Ford agreed to speak reached

that conclusion after applying the most up-to-date medical guidelines. Pet.App.159a (DeWine, J., dissenting). Those guidelines require proof of "significant adaptive-skill deficits in one or more," out of three, "activities of daily life." Pet.App.13a–14a. That is different than *Lott*'s requirement that offenders claiming intellectual disability prove "significant limitations in *two or more*," out of ten, "adaptive skills." *Lott*, 97 Ohio St. 3d at 305.

The trial court agreed with the experts and held that Ford had not carried his burden of proving intellectual disability. Indeed, Ford failed to prove *any* of the three *Lott* requirements:

First, Ford did not exhibit "significantly subaverage intellectual functioning." *Lott*, 97 Ohio St. 3d at 305. Ford was "below average" in terms of intelligence, with IQ scores ranging from the 60s into the 80s. Pet.App.230a. But no expert testified that Ford exhibited *significantly* subaverage intellectual functioning, and his two sub-70 scores presented serious "reliability concerns." Pet.App.230a.

Second, Ford failed to carry his burden with respect to adaptive deficits. "All three experts who specifically evaluated [Ford's] adaptive skills and functioning testified that … he could not be characterized as having 'significant limitations in two or more adaptive skills.'" Pet.App.232a.

Finally, "[n]one of the three experts was of the opinion that Mr. Ford has ever been intellectual disabled within the standards recognized by the American Psychiatric Association, the American Association on Intellectual and Developmental Disabilities, or *State v. Lott*." Pet.App.230.

After rejecting Ford's *Atkins* argument, the trial court sentenced Ford to death. Pet.App.2a.

3. Ford appealed directly to the Supreme Court of Ohio. That court unanimously affirmed Ford's conviction. But it vacated Ford's death sentence and remanded for a new *Atkins* analysis. The Supreme Court of Ohio held that the trial court misapplied *Atkins* in numerous ways.

First, the Supreme Court faulted the trial court for supposedly "disregarding the SEM" when deciding "whether Ford's intellectual functioning was below average." Pet.App.27a. The acronym SEM stands for "standard error of measurement." *Hall v. Florida*, 572 U.S. 701, 713 (2014). The test "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score," and that an "individual's score is best understood as a range of scores on either side of the recorded score." *Id*. According to the Supreme Court of Ohio, *Hall* mandates treating all IQ-test results as a range. Pet.App.26a–27a. The court additionally held that courts must consider evidence of intellectual disability other than IQ "where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." Pet.App.27a (quoting *Moore I*, 137 S. Ct. at 1050). The court never explained precisely how the trial court violated these principles. Reading between the lines, however, it appears the Supreme Court faulted the trial court for not addressing the fact that *one* test, on which Ford scored a 75, had a standard error of measurement of 69 to 83. It apparently concluded that the court should have explained its reason for finding Ford not to have carried his burden even though one of his tests showed a potential sub-70 IQ. Pet.App.26a–27a.

Second, the court below held that "the trial court should have discussed evidence presented on the Flynn Effect." Pet.App.30a. The Flynn Effect "is a generally recognized phenomenon in which the average IQ scores produced by any given IQ test tend to rise over time." Pet.App.27a–28a (internal quotation omitted). The Supreme Court of Ohio never said where the duty to discuss the Flynn Effect comes from. Indeed, it recognized that no binding decision "mention[ed] the Flynn Effect or require[ed] its application." Pet.App.28a. Nonetheless, the majority held that the trial court violated the Eighth Amendment by failing to discuss, in its opinion, the Flynn Effect's significance.

Third, the Supreme Court of Ohio held that the trial court violated the Eighth Amendment by failing to apply the most up-to-date clinical guidelines relating to intellectual disability. Recall that the trial court rejected the *Atkins* claim based in part on its determination that Ford "could not be characterized as having 'significant limitations *in two or more* adaptive skills.'" Pet.App.232a (quoting *Lott*, 97 Ohio St. 3d at 305) (emphasis added). At the time of *Lott*, clinical guidelines did indeed require proof of significant limitations in two or more areas. But in the years since, professional bodies have updated their standards. Those updated standards required proof of "significant adaptive-skill deficits in *one or more* activities of daily life." Pet.App.13a–14a. The Supreme Court of Ohio interpreted *Moore I* as holding that the Eighth Amendment requires application of the most up-to-date guidelines. Pet.App.30a–31a. Thus, it reasoned, the trial court violated the Eighth Amendment when it assessed intellectual disability using a standard derived from older versions of those clinical guidelines.

Finally, the court concluded that *Lott*'s "rebuttable presumption that a defendant is not intellectually disabled if his or her IQ score is above 70 is no longer valid." Pet.App.31a–32a. This, it reasoned, followed from *Hall v. Florida*, which recognized that IQ scores are "imprecise and 'should be read not as a single fixed number but as a range.'" Pet.App.32a (quoting *Hall*, 572 U.S. at 712). Because the trial court's holding did not rest on the rebuttable presumption, this portion of the Supreme Court of Ohio's opinion is dicta. Still, no trial court in Ohio is likely to ignore the court's guidance.

Justice DeWine dissented, joined by Justice Kennedy. The majority, he argued, mischaracterized the trial court's decision. For example, it accused the trial court of "disregarding the SEM and failing to consider that the lower end of the SEM range could include an IQ score below 70." Pet.App.157a. That is not what happened. Instead of ignoring the lower end of the tests, the trial court "concluded that Ford hadn't met his burden of proving he has significantly subaverage intellectual functioning." Pet.App.157a. Ample evidence supported the trial court's conclusion. For example: three of the six tests in the record were above 70 even accounting for the standard error of measurement; every expert agreed that two of the other three underestimated Ford's intelligence; and the remaining test had a standard error of measurement range of 69–83. *See* Pet.App.157a–58a.

The other supposed errors were harmless if they were errors at all. For example, the application of outdated clinical standards could not have mattered. The only two experts with whom Ford agreed to speak applied *current* diagnostic standards in assessing adaptive deficits. Both concluded that Ford was *not*

intellectually disabled. Pet.App.159a. Indeed, no one even suggested the outcome would be different under the new standards. Along the same lines, the failure to expressly consider the Flynn Effect was harmless: "The relevance of the Flynn Effect … is just that it might trigger a more searching look at adaptive functioning." Pet.App.160a–61a. Since the trial court already "engaged in that more searching inquiry, with the aid of three experts," a more express consideration of the Flynn Effect could not possibly have made a difference. Pet.App.161a.

4. Because the Supreme Court of Ohio's decision rested squarely on the United States Constitution—its opinion granted relief under the Eighth Amendment and *Atkins* without even citing the Ohio Constitution's ban on cruel and unusual punishment, *see* Ohio Const., art. I, §9—the State decided to file a *certiorari* petition. After obtaining an extension of time in which to file, *Ohio v. Ford*, 19A753 (Jan. 13, 2020), the State timely filed this petition.

REASONS FOR GRANTING THE PETITION

This Court's cases prohibit executing the intellectually disabled. *See Atkins,* 536 U.S. at 321. But those cases have consistently refused to "provide definitive procedural or substantive guides for determining" what intellectual disability means. *Hall*, 572 U.S. at 718 (internal quotations omitted). As a result, neither "the Court's articulation of" the prohibition on executing the intellectually disabled, "nor its application" of that prohibition in particular cases, "sheds any light on what it means." *Moore I*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting). This leaves the States to guess as to what is required of them. They often guess differently: the States' high courts (and at least one

federal appeals court) are hopelessly split regarding the proper method of implementing *Atkins*. The Court should grant *certiorari* to resolve that split.

I. This Court has not defined "intellectual disability."

This Court has consistently refused to announce a test for determining whether an offender is "intellectually disabled." All the while, the Court has consistently reversed state courts for *mis*defining "intellectual disability." Each such opinion rests on a collection of seemingly *ad hoc* justifications. Each decision thus leaves the States with even less guidance than they had beforehand. Only this Court can restore order to its case law.

***Atkins v. Virginia*.** The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." As originally understood, the phrase "cruel and unusual punishments" referred exclusively to "those methods of execution that are deliberately designed to inflict pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1121 (2019) (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2750 (2015) (Thomas, J., concurring)). This prohibition on certain *methods* of punishment was not understood to bar the application of otherwise-constitutional methods to certain classes of offenders. *Graham v. Florida*, 560 U.S. 48, 101 (2010) (Thomas, J., dissenting).

This Court long ago moved beyond the original meaning. Today, to decide "whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 58 (majority) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). This sense-of-decency test prohibits the

imposition of punishments against which "a national consensus" has formed. *Id.* at 61. When the Court identifies a national consensus against executing "an entire class of offenders," it has interpreted the Eighth Amendment as making the entire class ineligible for the death penalty. *Id.*

In *Atkins v. Virginia*, this Court held that the Eighth Amendment prohibits executing the intellectually disabled. 536 U.S. at 321. The Court never suggested that the cruel-and-unusual punishments clause, as originally understood, contained such a prohibition. *Atkins* nonetheless concluded that evolving standards of decency prohibited executing the intellectually disabled. The Court based this conclusion on two overarching considerations.

First, eighteen of the thirty-eight States that allowed the death penalty had banned executing the intellectual disabled. *Id.* at 314–15. This—especially when viewed in light of public polling, foreign laws, and the positions of various religious groups—suggested a national consensus against such executions. *Id.* at 316–17 n.21

Second, the Court's "independent evaluation of the issue" confirmed the wisdom of prohibiting executions of intellectually disabled offenders. *Id.* at 321. These offenders, the Court explained, are less able to conform their conduct to the law and thus less culpable and less capable of being deterred. Executing such offenders advances neither of the legitimate state interests underlying the death penalty: retribution and deterrence. *Id.* at 318–20.

The Court's holding gave rise to the following question: What is an intellectual disability? In a footnote, the Court noted that the leading psychiatric groups

defined "mental retardation" (the now-antiquated term for "intellectual disability") to require proof of: (1) "significantly subaverage intellectual functioning," (2) adaptive deficits, and (3) onset before age eighteen. *Id.* at 308 n.3. But the Court stopped short of formally adopting this standard or adopting a test through which the States might apply it. Instead, *Atkins* left "to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317 (internal quotation omitted).

Both Chief Justice Rehnquist and Justice Scalia wrote dissents. They characterized the majority's analysis as "a *post hoc* rationalization for the majority's subjectively preferred result," *id.* at 322 (Rehnquist, C.J., dissenting), and disparaged *Atkins*' holding as resting "obviously upon nothing but the personal views of its members," *id.* at 338 (Scalia, J., dissenting). It is not worth recounting here the dissents' many criticisms. But it is worth noting one especially prescient passage. *Atkins*, Justice Scalia predicted, would "turn[] the process of capital trial into a game." *Id.* at 353. "One need only read the definitions of mental retardation adopted by" professional organizations "to realize that the symptoms of this conditions can readily be feigned." *Id.* "And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured (and then tried and executed), the capital defendant who feigns mental retardation risks nothing at all." *Id.* The all-upsides approach to claiming intellectual disability, especially when coupled with the *Atkins* majority's inability to announce a test, threatened endless litigation.

Hall v. Florida. Perhaps some hoped that empowering the States to define "intellectual disability"

would avoid the problems Justice Scalia feared. If so, *Hall* dashed those hopes.

In *Hall*, the Court considered a Florida law that "define[d] intellectual disability to require an IQ test score of 70 or less." 572 U.S. at 704. Florida did not pull that IQ-score threshold out of thin air. To the contrary, an IQ of 70 is two standard deviations below the average IQ (which is 100). And it is the very same number that one leading diagnostic manual, according to *Atkins* itself, listed as the top of the "[m]ild" mental retardation range. *Atkins*, 536 U.S. at 308 n.3.

Still, the Court struck down the 70-IQ threshold. It relied largely on the medical community's approach to diagnosing intellectual disability. The "medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning," and "onset of [those] deficits during the developmental period." *Hall*, 572 U.S. at 710. While IQ is relevant to the first of these criteria—intellectual functioning—medical experts regard IQ scores as inherently "imprecise." *Id.* at 712. They account for that by viewing IQ in light of its "standard error of measurement" *Id.* at 713. The standard error of measurement recognizes that "an individual's score is best understood as a range of scores on either side of the recorded score." *Id.* In other words, an offender's "true" IQ might be less than his tested score. To account for this, the Court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. Florida's law violated this rule by categorically prohibiting anyone with an IQ-test score of 70 or more from

proving intellectual disability. *Id.* That strict threshold meant that someone who took a test in which the standard error of measurement dipped below 70—and whose "true" IQ might therefore be less than 70—would remain eligible for the death penalty. That, the Court held, violated *Atkins*.

Hall brought little clarity. It recognized that *Atkins* "did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation falls within the protection of the Eighth Amendment." *Hall*, 572 U.S. at 718 (internal quotation omitted). But it also declared that "*Atkins* did not give the States unfettered discretion to define the full scope of the constitutional protection." *Id.* at 719. How much discretion *do* the States have? And what guides that discretion? *Hall* never said. The most it suggested was that States must "consult the medical community's opinions" when they decide who qualifies as "intellectually disabled." *Id.* at 710. But to what degree? Florida consulted the medical community's opinion at least somewhat—it derived the IQ threshold with reference to clinical guidelines. Why was that not enough?

Justice Alito, joined by three other Justices, dissented, predicting that *Hall*'s "reliance on the views of" the medical community would "lead to serious practical problems." *Id.* at 731 (Alito, J., dissenting). "First, because the views of professional associations often change, tying Eighth Amendment law to these views will lead to instability and continue to fuel protracted litigation." *Id.* at 731–32. "Second, the Court's approach implicitly calls upon the judiciary either to follow every new change in the thinking of those professional organizations or to judge the validity of each new change." *Id.* at 732. Is that a role for which

lawyers and judges are even minimally suited? "Third, the Court's approach requires the judiciary to determine which professional organizations are entitled to special deference. And what if professional organizations disagree?" *Id.* at 733. Finally, the medical community's definitions of intellectual disability "are promulgated for use in making a variety of decisions that are quite different from the decision whether the imposition of a death sentence in a particular case serves a valid penological end." *Id.*

In sum, *Hall* provided the States with "guidance" that was anything but clear. The only clear rule to come out of that case was this: at least until the medical community changes its clinical standards, anyone with an IQ-test score whose standard error of measurement dips below 70 is entitled to show other evidence of intellectual disability. *Id.* at 723. In all other respects, *Hall* confused the *Atkins* analysis by requiring States to consult, to some uncertain degree, the views of medical professionals on issues that might divide the medical profession.

Moore I. Then came the first *Moore v. Texas*. In *Moore I*, the Court reversed a Texas Court of Criminal Appeals decision finding the petitioner (Moore) not to be intellectually disabled. 137 S. Ct. at 1044. *Moore I* faulted the lower court for assessing intellectual disability using seven factors with no basis in "any authority, medical or judicial." *Id.* at 1046.

If *Moore I* had stopped there, it would have done relatively little harm. Even the dissent agreed that the seven made-up factors were "an unacceptable method of enforcing the guarantee of *Atkins*," since they had no clear connection to the concept of intellectual disability. *Id.* at 1053, 1055 (Roberts, C.J.,

dissenting). The trouble is, *Moore I* did not stop there. In a mixture of analysis, alternative holdings, and dicta, *Moore I* announced that States, in determining whether an offender exhibits the three features of intellectual disability, must be "informed by the medical community." *Id.* at 1049. As for what that means, the Court made seemingly contradictory statements. On the one hand, *Moore I* stressed that it was not requiring "adherence to everything in the latest medical guide." *Id.* In the very next sentence, however, the Court declared that its opinions do not "license disregard of current medical standards." *Id.* How are States to thread that needle? The majority never said. Indeed, it narrowed the needle's eye with this passage: the "medical community's current standards supply one constraint on States' leeway in this area. Reflecting improved understanding over time, current manuals offer the best available description of how mental disorders are expressed and can be recognized by trained clinicians." *Id.* at 1053 (citation omitted).

The Court's application of these vague, contradictory principles managed to confuse things still more. *Moore I* determined that the Texas Court of Criminal Appeals disregarded medial standards by deeming "Moore's adaptive strengths" to constitute "evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits." *Id.* at 1050. This passage is puzzling because the medical community *does* look to adaptive strengths when diagnosing intellectual disability. *Id* at 1059 (Roberts, C.J., dissenting). The decision also faulted the Texas court for stressing "Moore's improved behavior in prison." *Id.* at 1050 (majority op.). "Clinicians," it explained, "caution against reliance on adaptive strengths developed in a controlled setting." *Id.* (internal quotation

omitted). The Court acknowledged, however, that clinicians do not *prohibit* looking to behavior in controlled settings. *See id.* So does *Moore I* mean that courts are barred from considering anything that clinicians consider only cautiously?

Chief Justice Roberts, joined by Justices Thomas and Alito, dissented. As an initial matter, he explained, "clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment." *Id.* at 1054 (Roberts, C.J., dissenting). Yet the majority rested its holding entirely on what it perceived to be the consensus *of the medical community*. *Id.* It did not even consider whether the state laws or other objective indicia suggested a national consensus against executing offenders who exhibit particular traits. That approach created "a real danger that Eighth Amendment judgments" would "embody merely the subjective views of individual Justices." *Id.* at 1061–62 (internal quotation omitted).

"A second problem with the Court's approach" was "the lack of guidance it offer[ed] to States seeking to enforce the holding of *Atkins*." *Id.* at 1058. Take the majority's confusing insistence that States, while not *bound* by the latest medical guidelines, must not "disregard" current medical standards. "Neither the Court's articulation of this standard nor its application sheds any light on what it means." *Id.* What does it mean to "disregard" current standards? The Court of Criminal Appeals had *expressly* "considered clinical standards and explained why it decided that departure from those standards was warranted." *Id.* If that constituted "disregard," it was unclear what the word meant.

Along the same lines, the majority's analysis left unclear what "flexibility" the States retained. The majority faulted the lower court for "*over*emphasizing" and "stressing" considerations that the medical community thinks insignificant. *Id.* (internal quotation and alternations omitted; emphasis added). This implied that States retained freedom to engage in "some—but not *too much*—consideration of" factors of little relevance (or wholly irrelevant) to the medical community. *Id.* at 1059. How are courts supposed to apply this Goldilocks standard? The "Court's only guidance" consisted of "[c]itations to clinical guides." *Id.* But that provided no clarity at all: "if courts do have 'flexibility' in enforcing the guarantee of *Atkins* and need not 'adhere' to these guides in every instance or particular, then clinical texts, standing alone, cannot answer the question of why" the lower court "placed too much weight" on factors the medical community does not (supposedly) care about. *Id.* (quoting majority op. (alteration omitted)).

In sum, after *Moore I*, the "line between the permissible … and the forbidden … is not only thin, but totally undefined." *Id.* The problem is made even worse by the majority's apparent constitutionalization of principles "for which there is not even clinical consensus." *Id.* For example, the majority faulted the lower court for considering adaptive strengths to offset adaptive weaknesses, even though at least some medical professionals would deem it appropriate to do just that. *Id.* If the States are not even safe in looking to indicia of intellectual disability that are of *contested* value in the medical community, it is unclear what precisely they can do except apply the very latest version of each clinical guideline and hope for the best.

Moore II. On remand from *Moore I*, Texas's Court of Criminal Appeals again deemed Moore not intellectually disabled. This Court summarily reversed, concluding that the Court of Criminal Appeals had made all the same mistakes upon which *Moore I* rested. *Moore II*, 139 S. Ct. at 670.

This time, the Chief Justice concurred. But he did so only because he believed the Court of Criminal Appeals "repeated the same errors that this Court previously condemned—if not quite *in haec verba*, certainly in substance." *Id.* at 672 (Roberts, C.J., concurring). Still, he adhered to his criticism of the standards announced in *Moore I*: "When this case was argued two years ago, I wrote in dissent that the majority's articulation of how courts should enforce the requirements of *Atkins v. Virginia*, lacked clarity. It still does." *Id.* (citation omitted).

* * *

And it *still* does. It is impossible to dispute the Chief Justice's description of the Court's modern jurisprudence. The Court seems to have established that States ought to define "intellectual disability" as consisting of: (1) significantly subaverage intellectual functioning; (2) adaptive deficits; and (3) onset before age eighteen. *See, e.g.*, *Hall*, 572 U.S. at 710. None of these three elements, however, is self-defining. *Hall* and *Moore* seem to establish that the first requirement is satisfied if the standard-error measurement associated with an inmate's test score dips below 70. But it is unclear if States must count even tests on which the inmate appears to be feigning disability or that are unreliable for some other reason. It is clear that States cannot wholly "disregard" modern clinical guidelines when deciding if the foregoing factors are

satisfied. But must the States apply the most recent edition of each modern guideline? What should States do if the guidelines conflict? In what circumstances may a State part ways with a modern guideline? The States are left to guess.

II. The States have adopted numerous, sometimes inconsistent tests for intellectual disability.

The States have had little success figuring out what they are supposed to be doing. Because *Atkins* "provided states with virtually no meaningful guidance on how to define" intellectual disability, the States "adopted widely varying definitions" in the decision's aftermath. 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). Recall that *Atkins* alluded to the three elements of intellectual disability: significantly subaverage intellectual functioning, adaptive deficits, and onset before eighteen. Still, after that decision, a "large majority of states" with legislation implementing *Atkins* "either failed to mention all three elements" or "failed to operationally define some or all of the elements in a meaningful manner." *Id.* at 789.

The confusion is getting worse, not better. For one thing, courts around the country are hopelessly confused and conflicted regarding the need to consider the most up-to-date version of clinical guidelines defining "intellectual disability"—just as the dissents in *Hall* and *Moore I* predicted they would be. State supreme courts bemoan "the difficult position that the States are placed in due to the Supreme Court's lack of clear guidance." *Wright v. State*, 256 So. 3d 766, 776

n.9 (Fla. 2018). Indeed, the lack of guidance leaves the state courts in what amounts to a "catch-22": while they "need not follow everything in the latest clinical guide, the failure to do so is a potential ground for reversal." *Id.* (citing *Moore I*, 137 S. Ct. at 1049, 1053). To make matters worse, the "clinical manuals" States are bound to consider "caution people like us [non-doctors] from making untrained" diagnoses, and they "occasionally contradict one another." *Id.*

Some of the courts in this unenviable position think themselves bound to apply the most recent version of the clinical guidelines. (It is unclear what that would mean in a case where the guidelines "contradict one another." *Id.*) The Supreme Court of Ohio adopted that position below. Pet.App.31a. The Fifth Circuit appears to have taken the same position. *See Cathey v. Davis (In re Cathey)*, 857 F.3d 221, 238–39 (5th Cir. 2017). Along the same lines, the Kansas Supreme Court thought *Moore I* compelled it to invalidate a state law that limited intellectual-disability status to offenders whose intellectual functioning "substantially impair[ed] their capacity to appreciate the criminality of their conduct or to conform their conduct to the requirements of law." *State v. Thurber*, 308 Kan. 140, 228 (2018). It reasoned that, "since the medical community does not treat capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law as conclusively demonstrating the absence of an intellectual disability, Kansas" could not either. *Id.*

In sharp contrast, some courts do not interpret the Eighth Amendment as requiring immediate adherence to updated medical standards. These courts seem to read *Moore I* as resting entirely on the Texas court's use of a standard unmoored from *any* clinical

guidelines. Under this reading, courts need not shift their tests every time the clinical guidelines are updated. *Wright*, 256 So. 3d at 776–78; *Rodriguez v. State*, 219 So. 3d 751, 756 & n.6 (Fla. 2017); *State v. Escalante-Orozco*, 241 Ariz. 254, 267–68 (2017). Other courts at least arguably agree. The California Supreme Court, for example, held that courts have "discretion" to consider the most up-to-date standards—which suggests they have discretion not to. *In re Lewis*, 4 Cal. 5th 1185, 1201 (2018). And the Mississippi Supreme Court held that *Moore I* merely "reiterated *Atkins* and did not alter the *Atkins* landscape." *Carr v. State*, 283 So. 3d 18, 22 (Miss. 2019). Since *Atkins* indisputably did not constitutionalize the latest clinical guidelines, *Carr* necessarily reads *Moore I* not to either.

Finally, at least one court seems to require the use of "prevailing" standards. *Woodall v. Commonwealth*, 2018 Ky. LEXIS 247, at *12 n.30 (Ky. June 14, 2018). It is unclear what that means: Does a practice become "prevailing" simply because it appears in the newest American Psychological Association guideline? Depending on the answer to that question, Kentucky may ultimately end up fitting into one of the two camps discussed above.

Moving on, *Atkins* and its progeny have spawned numerous other disagreements. For example, some courts treat each of the three intellectual-disability elements as distinct, *Salazar v. State*, 188 So. 3d 799, 812 (Fla. 2016); Pet.App.32a–33a, while others say that "subaverage intellectual functioning (the first criterion) must be considered conjunctively with—and balanced with—adaptive functioning (the second criterion)," *Carr*, 196 So. 3d 926, 943 (Miss. 2016). Some courts say that adaptive strengths cannot offset

adaptive deficits, while others say they can. *Compare, e.g.*, *In re Lewis*, 4 Cal. 5th at 1202 *with State v. Blackwell*, 420 S.C. 127, 143 n.11 (2017). And while some courts interpret the Eighth Amendment as requiring trial courts to consider (or even discuss expressly) the Flynn Effect, others do not. *Compare* Pet.App.30a; *Woodall*, 2018 Ky. LEXIS 247 at *12 n.30 *with Quince v. State*, 241 So. 3d 58, 62 (Fla. 2018), *Bean v. State*, 448 P.3d 574, 2019 Nev. Unpub. LEXIS 1045, *4–5 (Nev. Sept. 20, 2019) (unpublished table decision).

The confusion among the States' courts on so important an issue of federal law calls out for this Court's review.

III. The Court should, for the first time, announce a standard that States may follow to comply with *Atkins*.

At the *certiorari* stage, the most important question is *whether* the States need guidance regarding the meaning of "intellectual disability." The question of what form that guidance should take is better left for the merits stage. Still, one might naturally wonder about the answer to the following question: Is it possible to craft a rule that honors this Court's precedents while giving States the guidance they so desperately need?

The answer is "yes." There are at least two possibilities.

1. The first option entails holding that *Atkins*, *Hall*, and *Moore I* jointly state the outer bounds of the *Atkins* inquiry. In other words, States comply with the Eighth Amendment whenever they assess intellectual disability in a manner that does not contradict the holdings in these cases.

Stare decisis generally compels adherence to settled decisions. It does not require courts to extend wrongly decided cases beyond their holdings. Thus, one principled way of respecting *stare decisis* while cabining mistakes is to give precedent effect only in cases that "cannot be distinguished." *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1811 (2015) (Scalia, J., dissenting) (taking this approach to the dormant Commerce Clause). It is easy to find examples of this approach in the U.S. Reports. For example, while the Court has never overruled its decisions permitting Congress to create independent administrative agencies, it has refused to extend those cases to permit novel administrative structures that would give Executive branch officials even greater independence from the President. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010); *see also PHH Corp. v. Consumer Fin. Prot. Bureau,* 881 F.3d 75, 165 (D.C. Cir. 2018) (*en banc*) (Kavanaugh, J., dissenting). Along similar lines, the Court has held unconstitutional congressional acts that could be upheld only by extending this Court's already-overbroad Commerce Clause decisions. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) (Roberts., C.J., op.); *United States v. Morrison*, 529 U.S. 598, 609 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995).

This approach to *stare decisis* ought to be applied to *Atkins*. No one argues that the Eighth Amendment, as originally understood, barred executing the intellectually disabled. *Atkins*, 536 U.S. at 340 (Scalia, J., dissenting). *Atkins* thus rests on a sort of common-law constitutionalism, in which judges propound constitutional rules and hone them through subsequent applications. The trouble is, the Court has had no

success honing *Atkins*. Instead, it has taken a seemingly *ad hoc* approach that gives the States no guidance whatsoever.

The Court need not revisit *Atkins* to keep things from getting worse. It can instead hold that States comply with *Atkins* whenever they assess intellectual disability in a manner that does not contradict the holdings of *Atkins*, *Hall*, or *Moore I*. A rule along those lines would permit the States to measure intellectual disability as they see fit, subject to the following three limits:

First, States would have to assess an offender's "intellectual disability" using "the generally accepted, uncontroversial intellectual-disability diagnostic definition." *Moore I*, 137 S. Ct. at 1045. That generally accepted definition "identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score approximately two standard deviations below the mean—*i.e.*, a score of roughly 70—adjusted for the standard error of measurement; (2) adaptive deficits (the inability to learn basic skills and adjust behavior to changing circumstances); and (3) the onset of these deficits while still a minor." *Id.* (internal quotation omitted).

Second, States would be barred from assessing "intellectual-functioning deficits," *id.*, using IQ-score cutoffs that automatically deny *Atkins* relief even to some offenders whose standard-error-of-measurement ranges include scores less than 70. *Hall*, 572 U.S. at 723; *Moore I*, 137 S. Ct. at 1050.

Finally, States would be barred from assessing the three core elements of intellectual disability based on considerations with *no* relation to clinical guidelines existing at the time of *Atkins* or at some point

afterward. *Moore I*, 137 S. Ct. 1049–51. But as long as a State considers only factors with *some* basis in *some* clinical guidelines existing at the time of *Atkins* or later, it would not have to apply the most up-to-date version of clinical guidelines.

This approach is admittedly imperfect. For example, it is easy to imagine disputes about what medical guidelines existing at the time of *Atkins* or later say. But the perfect ought not be the enemy of the good. And this solution is a good one. It would allow the Court to embrace its existing case law—including its insistence that the States have "some flexibility" in defining intellectual disability, *Moore I*, 137 S. Ct. at 1053—while simultaneously providing the States with concrete guidance regarding the application of *Atkins*.

2. The second option entails refining the *Atkins* inquiry. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019). The refinement would allow States to comply with *Atkins* by requiring offenders seeking *Atkins* relief to show that they are incapable of appreciating the criminality of their conduct or conforming their conduct to the law.

This refinement rests on the "national consensus" that gave rise to *Atkins*. The *Atkins* Court found a "national consensus" against executing the intellectually disabled based on the fact that a minority of death-penalty States had barred executing the "mentally retarded." 536 U.S. at 314–16. The Court concluded that this consensus "unquestionably reflect[ed] widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." *Id*. at 317. In

particular, the Court stressed that people with intellectual disabilities are, as a class, less able to conform their conduct to the law or appreciate the criminality of their conduct. Executing such offenders, the Court reasoned, does not promote the legitimate deterrence and retributive purposes underlying the death penalty. *Id*. at 318–20.

This Court's post-*Atkins* cases have assumed that the clinical definition of "intellectual disability" picks out the same class of "intellectually disabled" offenders with which *Atkins* was concerned. But that is dubious. Why not go right to the point, asking whether the offender has an intellectual disability that keeps him from appreciating the criminality of his conduct or conforming his behavior to the law? One of the laws on which *Atkins* relied did just that, limiting its prohibition on executing the intellectually disabled to offenders who exhibited this trait. *See* Kan. Sta. Ann. §21–4623(e) (2001). If that is the group of offenders around which a national consensus has formed, then that is the only group of offenders *Atkins* covers.

If this Court were to hold as much, it would provide States with one option for litigating *Atkins* claims that spares them from having to consult with vague, ever-changing medical texts. While they would be free to consult clinical guidelines in the alternative, as courts have done since *Atkins*, they would be free not to as long as they prohibited executing anyone with a disability that prevented him from appreciating the wrongness of his actions or conforming his behavior to the law. A holding along these lines would give the States more freedom to make "hard choices among values, in a context replete with uncertainty, even at a single moment in time." *Kahler v. Kansas*, No. 18-6135, Slip Op. at 24 (U.S., March 23, 2020). And it

would therefore respect the principle that making such choices should be "a project for state governance, not constitutional law." *Id.*

* * *

In sum, this Court has options for clarifying the *Atkins* framework without overruling any of this Court's precedents.

IV. This case is a good vehicle for defining "intellectual disability."

A. The Court has jurisdiction to decide this case.

The Court has jurisdiction to review the final judgment of the Supreme Court of Ohio. As an initial matter, the case presents no adequate-and-independent-state-ground problem. The Supreme Court of Ohio's decision rests exclusively on the Eighth Amendment; the court did not even cite the Ohio Constitution's analogous prohibition of cruel and unusual punishments. Ohio Const., art. I, §9.

Additionally, even though the Supreme Court of Ohio remanded this case for further *Atkins* proceedings, its decision is sufficiently "final" to permit review under §1257. In general, §1257 bars this Court from reviewing a state-court judgment if "anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has been finally adjudicated by the highest court of the State." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). But the Court administers this rule pragmatically, not in a "mechanical fashion." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). And it has recognized "*at least* four categories" of "cases in

which the Court has treated the decision on the federal issue as a final judgment" for purposes of §1257, and "has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id*. (emphasis added). Two such categories of cases are relevant here.

The first applies in cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id*. at 481. In these cases, "if the party seeking interim review ultimately prevails on the merits" in state court, "the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." *Id*.; *see, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 168 (2006). So it is here. If Ohio prevails at the *Atkins* hearing in state court, there will no longer be any need to address the correctness of the Supreme Court of Ohio's *Atkins* analysis. But if Ohio loses, "state law would not permit" the State "again to present" its "federal claims for review." *Cox*, 420 U.S. at 481. Ohio law permits prosecutors to appeal in only very limited circumstances—for example, when a sentence is "contrary to law." *See* Ohio Rev. Code §2953.08(B)(2), (D)(3). There is no mechanism that would allow the State to appeal a decision that Ford is not disabled under the Supreme Court of Ohio's newly announced standard. To be sure, there are hypothetical worlds in which the trial court does something so illegal in connection with a collateral issue (like sentencing Ford to a day in prison) that the State would be able to appeal that collateral issue. But, "consistent with the pragmatic approach" this Court has "followed in the past

in determining finality," *Cox*, 420 U.S. at 486, the remote possibility of an appeal on a collateral issue ought not affect finality.

In the alternative, this case falls into the exception for cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. This exception is most often applied in cases where the remaining proceedings involve only collateral issues, such as an accounting. *Radio WOW*, 326 U.S. at 127. But nothing limits the category to such cases. And, by its terms, the exception applies here if the State has some yet-to-be-discovered way of appealing an adverse *Atkins* ruling: the question of what "intellectual disability" means for Eighth Amendment purposes will survive no matter what happens in State courts. After all, if the State prevails then *Ford* will have a legitimate gripe that the state courts are misapplying *Atkins* (since no one knows what *Atkins* requires). If Ford wins, and if one assumes the State has some mechanism for appealing, then Ohio will be able to present the same question.

Even if none of *Cox*'s four exceptions maps perfectly onto this case, that is irrelevant. *Cox* made no claim to exhaust the list of exceptions to the rule that a case is "final" only once there are no further proceedings. To the contrary, it recognized that there were "at least" four exceptions to the general rule, it made clear that the Court's approach to "determining finality" truly is "pragmatic," and it heard a case in which there remained further proceedings to be had. A "pragmatic" approach to defining finality ought to regard as "final" any decision that remands for continued litigation on a question that is certain or nearly certain to evade further review, and that will

otherwise "survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Without saying so explicitly, this Court has already adopted that rule by granting review in a case with the same pattern as here. In *California v. Ramos*, the California Supreme Court had vacated a death sentence and "remanded for a new penalty phase." 463 U.S. 992, 996 (1983). This Court reviewed the California judgment and reversed.

B. Ford is not entitled to relief under *Atkins*, and the Supreme Court of Ohio erred in holding he might be.

This is a particularly worthy case for review because no plausible definition of "intellectual disability" would apply to Ford. All three of the experts who testified, including Ford's own, agreed that Ford is not intellectually disabled. And every expert with whom Ford agreed to speak made that determination applying up-to-date clinical guidelines. Pet.App.159a (DeWine, J., dissenting). Moreover, the nature of Ford's murder makes it hard to take seriously his claim of intellectual disability. Are the People of Ohio really to believe that criminals sophisticated enough to lay in wait while sending text messages aimed at luring victims to their deaths are "intellectually disabled" for *Atkins* purposes? Is that the type of criminal around which the national consensus emerged?

Another appealing thing about this vehicle is that the Supreme Court of Ohio's Eighth Amendment analysis went wrong in quite a few ways.

First, the court held that *Moore I* requires courts assessing *Atkins* claims to require the most up-to-date versions of clinical guidelines pertaining to

intellectual disability. Pet.App.31a. That is precisely what *Moore I* said was *not* required. 137 S. Ct. at 1049.

Second, the Supreme Court of Ohio held that sentencing courts violate the Eighth Amendment unless they expressly discuss in their opinions evidence regarding the Flynn Effect. Pet.App.30a. Nothing in this Court's Eighth Amendment case law requires even considering the Flynn Effect, let alone writing an opinion discussing it.

Third, the Supreme Court below held that the trial court ran afoul of *Hall* by failing to account for the standard error of measurement in one of Ford's IQ tests. In fact, the trial court did account for the entire range. Pet.App.157a (DeWine, J., dissenting). But more fundamentally, "the relevance of looking to the SEM is that when the lower end of the SEM falls in the intellectually disabled range, a court should also consider adaptive functioning." Pet.App.158a (DeWine, J., dissenting) (citing *Moore I*, 137 S. Ct. at 1049). Since the trial court indisputably considered adaptive functioning, it could not possibly have violated *Hall*.

Finally, though it appeared only in dicta, the Court concluded that *Hall* forbids courts from applying "a rebuttable presumption that a defendant is not intellectually disabled if his or her IQ score is above 70." Pet.App.31a–32a. That is wrong. The only thing *Hall* forbids is a strict cutoff under which anyone without an IQ score of 70 or less is *automatically* disqualified from proving intellectual disability. Since a rebuttable presumption can be rebutted, it does not categorically exclude anyone from proving intellectual disability, and thus comports with *Hall*.

CONCLUSION

The Court should grant this petition for *certiorari*.

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