No. 24-872

# In The
# Supreme Court of the United States

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
*Petitioner,*

v.

JOSEPH CLIFTON SMITH,
*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF OF IDAHO, ARKANSAS, FLORIDA, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND THE ARIZONA LEGISLATURE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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### Other Authorities

## INTERESTS OF *AMICI*

Like other States, the States of Idaho, Arkansas, Indiana, Florida, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Utah, as well as the Arizona Legislature ("*Amici* States"),[1] have a "historic right and obligation . . . to maintain peace and order within their confines." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). In discharging this obligation, *Amici* States have authorized capital punishment, and they have the solemn responsibility to carry out death sentences imposed according to their laws after a trial by jury.

The Eleventh Circuit's decision—like similar decisions in other circuits, *see* Pet. 16–19—frustrates *Amici* States' ability to fulfill their duty. Unfortunately, obstructions like this are not new. *Amici* States have often encountered previously unknown Eighth Amendment obstacles ever since this Court bound the Amendment to "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). That standard has become a potent tool for judges to rewrite democratically enacted state laws.

*Amici* States wish to restore their authority to choose and apply their own penological policies and rules. *Amici* States celebrate the Constitution's protections against cruel and unusual punishments, but the text, history, and tradition of the Eighth

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[1] Pursuant to Rule 37.2, *Amici* States provided timely notice of their intent to file this brief to all parties in the case.

Amendment do not license the sorts of intrusion into State policy that have occurred under the "evolving standards" framework. The Eleventh Circuit's extension of *Atkins v. Virginia*—which itself was the product of the "evolving standards" framework—must be undone if the Court is to move towards restoring the proper balance of federalism prescribed by the Constitution. 536 U.S. 304, 312 (2002).

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Eleventh Circuit's decision is not only a "departure from *Atkins*," as Petitioner has capably explained, Pet. 23; it's also a symptom of a deeper problem in this Court's Eighth Amendment jurisprudence. Nearly 50 years ago, the Court decided to tie the Amendment's scope to "the evolving standards of decency that mark the progress of a maturing society," *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), an ahistorical—indeed, affirmatively *anti*-historical—standard that asks judges to consult their own sense of morality or to divine the current prevailing morality of the People. In so doing, the Court unmoored the Eighth Amendment from the considerations that ordinarily inform constitutional decisionmaking—namely, "text, history, and tradition." *United States v. Rahimi*, 602 U.S. 680, 714 (2024) (Kavanaugh, J., concurring).

Without these ordinary indicia of constitutional meaning to anchor the Eighth Amendment's interpretation, courts are left with few objective grounds for their decisions. They can exhaust the reasoning of precedent (like *Atkins*), but when that reasoning runs out, they will eventually rely on the

same sorts of considerations as other "evolving standards of decency" cases—like the views of other jurisdictions, the views of medical associations, and the judges' own sense of morality.

That's what happened here. Although the Eleventh Circuit provided little explanation, it appears to have believed it would be unethical to execute someone given *any chance* that the person is intellectually disabled, even though Alabama has made its own moral judgment that the person must prove his intellectual disability to avoid capital punishment. Considerations like the text, history, and tradition of the Eighth Amendment certainly played no role in the Eleventh Circuit's decision—given *Atkins*' origin, there's no way they could have.

While some have feared that the "evolving standards of decency" framework "has no discernible end point," *Miller v. Alabama*, 567 U.S. 460, 501 (2012) (Roberts, C.J., dissenting), the Court can begin slowing its momentum now by granting the petition, refusing to extend *Atkins*, and reversing the Eleventh Circuit.

Reversing would also fulfill the promise of *Atkins* to "leave to the State[s] the task of developing appropriate ways to enforce [*Atkins*'] constitutional restriction upon [their] execution of sentences." 536 U.S. at 317. The Court left these matters to the States because "[t]he power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty." *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022) (cleaned up). As the Eleventh Circuit's decision has shown, however, federal courts all too often ignore that sovereignty and make decisions that the Constitution reserves for States.

## REASONS FOR GRANTING CERTIORIARI

### I. The Court Should Pare Back Its "Evolving Standards Of Decency" Jurisprudence.

The Eleventh Circuit's decision has its roots in a single line of dicta from the 1950s—a line the Court later made into the Eighth Amendment's guiding star. But the Court should never have told judges to chase after the country's "evolving standards of decency"—the concept was invented out of whole cloth, has no support in the text or history of the Eighth Amendment, and subverts the rule of law. It is time for the Court to move away from that framework and begin harmonizing its Eighth Amendment jurisprudence with that of other amendments.

#### A. The "evolving standards of decency" framework began as scarcely reasoned dicta.

The story of the Court's Eighth Amendment jurisprudence begins like many other novel constitutional announcements. A plurality of the Warren Court unnecessarily "waxed historical" about the Eighth Amendment, *see United States v. Grant*, 9 F.4th 186, 202 (3d Cir. 2021) (Hardiman, J., concurring), and declared for the first time that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality). That stray line of dicta from *Trop v. Dulles* was later repurposed to be the Amendment's overarching framework.

In 1958, this Court considered whether American private Albert Trop had lost his national citizenship as a consequence of being convicted of desertion in time of war by a court martial. *Trop*, 356 U.S. at 88 & n.1. The Second Circuit, with Judge Learned Hand writing for the majority, interpreted the relevant statute and concluded that Trop had lost his citizenship, rejecting the private's Due Process challenge to the statute in the process. *Trop v. Dulles*, 239 F.2d 527, 529 (2d Cir. 1956).

In a 4-1-4 decision, this Court reversed. Chief Justice Earl Warren's plurality opinion and Justice Brennan's concurring opinion both concluded that "citizenship . . . cannot be divested in the exercise of" "the general powers of the National Government." *Trop*, 356 U.S. at 92; *id.* at 105 (Brennan, J., concurring) ("expatriat[ing] the wartime deserter . . . lies beyond Congress' power"). On that "ground alone," the Court acknowledged it should reverse. *Id.* at 93.

But Chief Justice Warren did not stop there. Instead, noting that the Court had "had little occasion to give precise content to the Eighth Amendment," *id.* at 100–01, he decided to apply the Amendment to the case even though Trop had not pleaded or argued the issue before the district court and neither the district nor the circuit had addressed it. 239 F.2d at 529–30. What should have been a clear instance of constitutional avoidance, *see Steamship Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885), was instead embraced as an invitation to begin a new and completely unnecessary line of constitutional precedent.

In interpreting the Eighth Amendment, Chief Justice Warren's plurality opinion barely addressed the text. Instead, it quickly declared that the words of the Amendment were "not precise" and that its "scope is not static," so courts "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 100–01. On that understanding, the plurality invalidated the statute's punishment of denaturalization for war-time deserters because denaturalization is "a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development." *Id.* at 101.

The plurality ignored the Amendment's history too, looking instead to "the international community of democracies." *Id.* at 102. Historically, desertion had been a capital offense in America "from the first year of Independence." *Id.* at 125 (Frankfurter, J., dissenting) ("Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"). But rather than base its reasoning in "pre-ratification American laws and practices [that] formed part of the foundation on which the Framers constructed the Constitution and Bill of Rights," *Rahimi*, 602 U.S. at 720 (Kavanaugh, J., concurring), the *Trop* plurality preferred to give weight to the current views of "civilized nations of the world," which—according to a "United Nations' survey"—largely did not "impose denaturalization as a penalty for desertion." 356 U.S. at 102–03.

The "'evolving standards of decency' . . . phrase went unmentioned in [this] Court for ten years after *Trop*, until it surfaced in a footnote in a death-penalty case," after which "it was then quoted only in passing in seven death-penalty cases in the 1970s." *Grant*, 9 F.4th at 202–03 (Hardiman, J., concurring). But in 1976, the Court fully entrenched the phrase as constitutional doctrine by holding that "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society'" violate the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (cleaned up). Although the *Trop* plurality had merely said that the Eighth Amendment must "draw its meaning" from the evolving standards of decency, *Estelle* turned "*Trop*'s dicta [in]to a constitutional test." *Grant*, 9 F.4th at 203 (Hardiman, J., concurring).

In the following years, that test has been "a standard bearer for the view that the Constitution's meaning changes over time." *Id.* And in one Justice's assessment, the "evolving standards of decency" framework "has caused more mischief . . . than any other that comes to mind." *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring).

### B. The "evolving standards of decency" framework erodes the rule of law.

Chief Justice Warren may not have intended his homiletic words to become a barometer for all constitutionally permissible punishments, but they have. And they have been used to overturn precedent after precedent and to justify the ever-encroaching reach of the Eighth Amendment. Our Constitution made the law king, and the rule of law means that

"bedrock principles [] founded in the law"—not "the proclivities of individuals"—govern. *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986). But the "evolving standards of decency" jurisprudence is contrary to basic rule-of-law norms: it invites judges to follow their own sensibilities rather than objective standards, it cannot be applied consistently, and it lacks notice and predictability.

A few cases suffice to show the framework's volatile character. Start with *Estelle*. Before that case, the Court understood that the Eighth Amendment prohibited the affirmative "*infliction* of cruel and unusual punishment." *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (emphasis added). But *Estelle* used the "evolving standards" framework to extend the Eighth Amendment to prohibit the government from *failing to act*. 429 U.S. at 104. That extension lacked constitutional grounding, and the Court later attempted to "stabilize *Estelle*'s flimsy foundation" by converting it into a two-part test. *Trozzi v. Lake Cnty., Ohio*, 29 F.4th 745, 751–52 (6th Cir. 2022) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

The framework picked up steam at the turn of the 21st century. As relevant here, the Court held in 2002—without historical support, *Atkins*, 536 U.S. at 337 (Scalia, J., dissenting)—that the Eighth Amendment prohibits the execution of mentally disabled persons. *Id.* at 321. That decision overturned the Court's holding in *Penry v. Lynaugh* from just thirteen years prior, when the Court addressed the very same question and held the opposite. 492 U.S. 302, 340 (1989).

Perhaps *Penry*'s short-lived holding should not have come as a surprise, given that its closing sentences noted that "a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* Still, the new supposed "national consensus" *Atkins* relied on was that 18 of the 38 States with capital punishment excused mentally incompetent persons in some way. *Atkins*, 536 U.S. at 343 (Scalia, J., dissenting) ("How is it possible that agreement among 47% of the death penalty jurisdictions amounts to 'consensus'?"). As the Court saw it, determining consensus depended more on "the consistency of the direction of change" than on there being an actual majority view. *Id.* at 315.

Soon after *Atkins*, the Court again used the "evolving standards" framework to overturn another of its 1989 decisions. In *Stanford v. Kentucky*, the Court held that the Eighth Amendment did not prohibit capital punishment for juvenile murderers. 492 U.S. 361, 380 (1989). In 2005, however, the Court held just the opposite. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). The "national consensus" on which the Court relied was the same as in *Atkins*: 18 of 38 States with the death penalty excluded juveniles from its sanction. *Id.* at 564. The Court explained that "objective indicia of consensus" are just a starting point—the Court must also "exercise [its] own independent judgment" in assessing whether the punishment sufficiently comports with standards of decency. *Id.* at 564.

The pace quickened following *Roper*. In 2008, the Court held that a national consensus had formed against executing child rapists. *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008). In 2010, the Court held that life-without-parole sentences for non-homicide juvenile offenders violated the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 82 (2010). In 2012, the Court held that mandatory life-without-parole sentences for juveniles—even those convicted of murder—violated the Eighth Amendment. *Miller*, 567 U.S. at 479. And in 2014, the Court held that the Eighth Amendment requires States to consider an IQ test's standard error of measurement when applying *Atkins* to death-row inmates. *Hall v. Florida*, 572 U.S. 701, 724 (2014). Each of these decisions were 5-vote majorities with sharp dissents.

Unsurprisingly, the "evolving standards of decency" jurisprudence has expanded well beyond death-penalty and life-without-parole cases. Of course, *Trop* itself involved denaturalization. 356 U.S. at 102. But the Ninth Circuit has even cited "evolving standards of decency" in concluding that the Eighth Amendment guaranteed a prisoner the right to "gender confirmation surgery." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 797 & n.21 (9th Cir. 2019). And the Fifth Circuit applied the same framework to prohibit "punishing felons by permanently barring them from the ballot box" before it reversed the decision *en banc*. *Hopkins v. Sec'y of State Delbert Hosemann*, 76 F.4th 378, 407 (5th Cir. 2023), *rev'd*, 108 F.4th 371 (5th Cir. 2024), *cert. denied*, No. 24-560, (U.S. Jan. 27, 2025).

Any expectation that the "evolving standards of decency" jurisprudence is just a modest method to

address modern punishments is now naïve. The standard has lost any tie to "objective factors." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). Eighth Amendment jurisprudence instead is hopelessly uncertain, merely reflecting "the subjective views of individual Justices" who seek to "shap[e] the societal consensus of tomorrow" instead of "divining the societal consensus of today." *Id.* (first quote); *Miller*, 567 U.S. at 509 (Thomas, J., dissenting) (second and third quotes).

### C. The Court should take steps to return Eighth Amendment jurisprudence to analyzing text, structure, and history

The Court should recenter its Eighth Amendment jurisprudence on text, history, and tradition, instead of continuing to require judges to act as sociologists and tempting them to exercise their own will. "It is emphatically the province and duty of the judicial department to say what the law *is*," not what it should be. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasis added).

Text, history, and tradition paint a reasonably clear picture of what the Eighth Amendment prohibits. The text of the Eighth Amendment came straight from the English Bill of Rights of 1689, which stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 1 W. & M., Sess. 2, c. 2; 8 ENGLISH HISTORICAL DOCUMENTS, 1660–1714, p. 122 (Andrew Browning ed. 1953). Similar provisions were in Virginia's Constitution of 1776, the constitutions of seven other States, and the Northwest Ordinance.

*Furman v. Georgia*, 408 U.S. 238, 243–44 (1972) (Douglas, J., concurring).

The history of those enactments confirms that "the evil the Eighth Amendment targets is intentional infliction of gratuitous pain" through "torturous punishments." *Baze v. Rees*, 553 U.S. 35, 97, 102 (2008) (Thomas, J., concurring). In particular, the Founders intended to prohibit "modes of punishment akin to those" "barbarous" punishments that had "dwindled away" by the time of Ratification. *Id.* at 97, 99 (cleaned up). Such punishments included "embowelling alive, beheading, and quartering." 4 William Blackstone, Commentaries 376 (Joseph Chitty ed. 1826).

That's not to say that the Eighth Amendment has nothing to say about punishments that were not contemplated in 1789—all agree that it does. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Roper*, 543 U.S. at 589 (O'Connor, J., dissenting); *Bucklew v. Precythe*, 587 U.S. 119, 152 (2019) (Thomas, J., concurring). But embracing an "evolving standards" approach is not the only way to protect the Amendment from becoming "little more than a dead letter today." *Roper*, 543 U.S. at 589 (O'Connor, J., dissenting). The Court has been able to address modern situations when applying other amendments without casting off text, history, and tradition. *See Rahimi*, 602 U.S. at 692 (when applying the Second Amendment, "[a] court must ascertain whether the new law is relevantly similar to laws that our tradition is understood to permit, applying faithfully the balance struck by the founding generation to modern circumstances") (cleaned up).

* * *

Fortunately, the Court has already signaled an interpretive course correction in Eighth Amendment jurisprudence. In 2019, the Court held that the Eighth Amendment must be interpreted according to its "original and historical understanding." *Bucklew*, 587 U.S. at 129. And just last year, the Court rejected an expansion of the Eighth Amendment that sat "uneasily with the Amendment's terms" and "original meaning." *City of Grants Pass, Oregon v. Johnson*, 603 U.S. 520, 549 (2024). These "standard grounds for constitutional decisionmaking" have been repeatedly reaffirmed as the proper foundation of *all* constitutional interpretation. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 279 (2022).

The Court can stay the new course by continuing to undercut the "evolving standards of decency" framework. In so doing, it will dramatically reduce arbitrary judicial decisionmaking. As experience has shown, when there is no "text or history" to "confine or guide" judicial review, courts are "left to write into the Constitution [their] own formulas, many of which would likely prove unworkable in practice" and "would interfere with essential considerations of federalism that reserve to the States primary responsibility for drafting their own criminal laws." *Grants Pass*, 603 U.S. at 551 (cleaned up). This has been the case with every other constitutional standard invented out of whole cloth. *See Dobbs*, 597 U.S. at 281, 286 (undue burden standard for right to abortion could not be "applied in a consistent and predictable manner" and charged judges with the "unwieldy and inappropriate task" of making policy).

That arbitrary decisionmaking was on full display in the Eleventh Circuit's decision below. Given the lack of instruction from *Atkins* and its progeny on whether States may require capital defendants to carry the burden of proof to show intellectual disability, the court decided with little explanation that the State could not carry out an execution if there was *any chance* the person was intellectually disabled. *See* App.5a ("the record evidence plausibly supports the district court's finding that Smith's true IQ score *could be* less than or equal to 70") (emphasis added). The court gave no regard to text, history, tradition, or the moral judgment of the people of Alabama—apparently opting instead to consult its own sense of fairness. This is the inevitable result when the Court adopts a framework like "evolving standards" that affirmatively eschews text, history, and tradition in favor of judge-discerned morality.

This petition presents the next step in scaling back "evolving standards," even if it does not ask for the framework to be overruled. *Atkins* itself is the product of "evolving standards," 536 U.S. at 312, and *Hall* extended *Atkins* by dictating additional rules that States must apply when assessing intellectual disability. 572 U.S. at 718–21. But given the specious rationale on which the entire line of precedents rests, *see Atkins*, 536 U.S. at 337 (Scalia, J., dissenting) (finding "no support in the text or history of the Eighth Amendment"), it is time at least to stop propagating the line further. The Court should grant the petition and reverse the Eleventh Circuit to prevent *Atkins* from being extended once again.

## II. The Eleventh Circuit's Decision Invades States' Sovereign Functions.

Paring back the "evolving standards of decency framework" will reduce the role of federal courts in determining the appropriate punishment for criminal offenders. At the same time, it will restore States to their "paramount role . . . in setting standards of criminal responsibility" and deciding "when a person should be held criminally accountable for his antisocial deeds." *Kahler v. Kansas*, 589 U.S. 271, 280 (2020) (cleaned up).

"From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States." *Kansas v. Garcia*, 589 U.S. 191, 212 (2020). Ratification did not change that. "The power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty." *Shinn*, 596 U.S. at 376 (cleaned up); *Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("The Constitution leaves in the possession of each State 'certain exclusive and very important portions of sovereign power,'" and "[f]oremost among" them is "the power to create and enforce a criminal code") (quoting THE FEDERALIST NO. 9, at 55 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

However, "the power of a State to pass laws means little if the State cannot enforce them." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (cleaned up). States have an obligation to provide for the security of their citizens, and society, particularly victims of crime, rightly expects that its "moral judgment[s] will be carried out." *Shinn*, 596 U.S. at 376. "To unsettle these expectations is to inflict a

profound injury to the powerful and legitimate interest in punishing the guilty." *Id.* at 376–77.

The Court therefore has consistently been careful not to impose constitutional standards that interfere with States' enforcement of criminal laws. For example, the Court refused to hold that Due Process prohibits a State from placing the burden on criminal defendants to prove an extreme emotional disturbance, reasoning that it "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977). Likewise, the Court declined to extend *Apprendi*'s limitations on States' ability to set sentencing standards because of "States' interest in the development of their penal systems, and their historic dominion in this area." *Oregon v. Ice*, 555 U.S. 160, 170 (2009).

The Court has been particularly reluctant to establish constitutional standards of criminal responsibility regarding a defendant's mental accountability. As the Court explained long 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 v. Texas*, 392 U.S. 514, 536 (1968) (plurality) (rejecting addiction as a constitutional defense to punishment for otherwise voluntary conduct). Instead, "doctrine[s] of criminal responsibility" must remain "the province of the States." *Id.* at 534, 536.

And the Court has held that line time and again. In 1958, it rejected an invitation to "require the states" to use a particular insanity test because the

choice of test rested on "questions of basic policy." *Leland v. Oregon*, 343 U.S. 790, 801 (1952); *id.* at 803 (Frankfurter, J., dissenting) (agreeing that "it would be indefensible to impose upon the States . . . one test rather than another for determining criminal culpability"). It did the same thing half a century later, reasoning that States have the "traditional . . . capacity to define crimes and defenses," so "the insanity rule . . . is substantially open to state choice." *Clark v. Arizona*, 548 U.S. 735, 749, 752 (2006). And it rejected the argument a third time just a few years ago. *Kahler*, 589 U.S. at 297 ("That choice is for Kansas to make").

It's easy to see why the Eighth Amendment should not be rewritten to impose a single conception of mental accountability. Whether the question is insanity or intellectual disability, determining standards of criminal responsibility will involve assessing enormous amounts of psychological research, which contain "perennial gaps" and "uncertainties." *Kahler*, 589 U.S. at 280–81. "Even as some puzzles get resolved, others emerge," causing "differing opinions about how far, and in what ways, mental illness," for example, "should excuse criminal conduct." *Id.* at 280. "[F]ormulating a constitutional rule would reduce, if not eliminate, [the States'] fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." *Powell*, 392 U.S. at 536–537.

Of course, *Atkins* imposed a standard of criminal responsibility based on a particular conception of mental accountability. But even in doing so, it

resolved that it would leave the task of "determining which offenders are in fact" intellectually disabled to the States—"[a]s was [its] approach . . . with regard to insanity." 536 U.S. at 317 (citing *Ford v. Wainwright,* 477 U.S. 399 (1986)). The Court promised to "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.*

Now is the time for the Court to make good on that promise. Many aspects of determining which persons are intellectually disabled are "complicated." *Hall*, 572 U.S. at 714. The standards for making those determinations should not be arrogated by federal courts or outsourced to medical associations—who do not have the same "historic right and obligation" as States "to maintain peace and order within their confines." *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). Instead, "questions about whether an individual who has committed a proscribed act with the requisite mental state should be relieved of responsibility due to a lack of moral culpability are generally best resolved by the people and their elected representatives." *Grants Pass*, 603 U.S. at 552 (cleaned up).

By deciding for itself the proper burden of proof to determine intellectual disability, the Eleventh Circuit's decision ignored the space this Court reserved for States. The Court should grant the petition and reverse to restore States' power to decide these questions.

## CONCLUSION

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

Respectfully submitted,

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