No. 19-1191

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*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*

# BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI


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**CAPITAL CASE — NO EXECUTION DATE SET**

## QUESTION PRESENTED

In *Hall v. Florida*, 572 U.S. 701 (2014); *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*); and *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam) (*Moore II*), this Court provided guidance on how to determine whether an individual has an intellectual disability rendering him ineligible for the death penalty under the Eighth Amendment framework first established in *Atkins v. Virginia*, 536 U.S. 304 (2002). Here, looking to *Hall*, *Moore I*, and *Moore II*, the Supreme Court of Ohio found its 2002 precedent "outdated" and decided "to provide guidance to the trial court and other courts to apply going forward." App. 31-32a. The Ohio high court thus instructed the trial court to use "current diagnostic standards" in assessing intellectual functioning, rather than the standards that prevailed in 2002. App. 31a. Given "the context of a capital case," the Court remanded to the trial court rather than attempting to "glean [the necessary] finding from the record" itself. *Id*.

Despite the interlocutory posture of this case; Ohio's confidence that it should prevail under *any* standard; Ohio's inability to show any error in the decision below under this Court's current doctrine and even under one of the merits approaches *it suggests*; and Ohio's inability to show, barely a year after *Moore II*, that *Moore I* and *Moore II* have left state courts "hopelessly confused," Pet. 22, Ohio seeks this Court's immediate intervention. The question presented is:

Whether the Court should reiterate that states must follow "the holdings of *Atkins*, *Hall*, or *Moore I*," Pet. 27, or instead entirely "revisit *Atkins*" and its Eighth

Amendment intellectual disability precedent under the guise of "refining" it, Pet. 27-28.

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## INTRODUCTION

The principal reason that certiorari should be denied is clear from Ohio's question presented: "What is the test for determining whether someone is 'intellectually disabled' for purposes of the Eighth Amendment?" This Court has repeatedly answered that question, and this case presents no occasion to revisit it, especially barely a year after *Moore II*: As long as state courts do not materially deviate from the consensus definition provided by the medical community, state courts are free to "'develop[] appropriate ways to enforce'" the Eighth Amendment's categorical bar against executing "*any* intellectually disabled individual." *Moore I*, 137 S. Ct. at 1048 (quoting *Atkins*, 536 U.S. at 317, 321); *see Hall*, 572 U.S. at 719; *Moore II*, 139 S. Ct. at 669. That is precisely what the Ohio Supreme Court did here in updating its 2002 precedent in light of *Hall*, *Moore I*, and *Moore II* and remanding for the trial court to apply it in the first instance. That interlocutory, factbound ruling does not warrant this Court's review.

There is no certworthy confusion here, barely a year after *Moore II* and before *Moore I* has even made it into the *U.S. Reports*. Indeed, Ohio and its amici have identified no meaningful conflict on the question presented or any of the supposed subsidiary questions they tick off, most of which are not even implicated here. And, tellingly, Ohio's two merits suggestions are to tell lower courts to keep following "the holdings of *Atkins*, *Hall*, or *Moore I*," or to overrule these cases entirely. Pet. 27-28. For its part, the amicus brief of Texas and several other states is little more than an attempt to relitigate Texas' unavailing arguments in *Moore I* and *Moore II* by

drumming up irrelevant questions and failing (again) to confront what this Court actually said in those decisions.

On top of all that, the decision here is interlocutory, because the Ohio Supreme Court has remanded for the trial court to conduct the *Atkins* inquiry again under the updated standard. Because the federal issue has not been finally decided, Ohio cannot show that the decision below final judgment for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).

For all of these reasons, the Court should deny certiorari.

**A. Legal background**

The Court has defined the Eighth Amendment prohibition against executing individuals with intellectual disabilities in a series of decisions beginning with *Atkins*. Although the Court's cases leave to the states "the task of developing appropriate ways to enforce" the restriction, *Moore I*, 137 S. Ct. at 1048 (quoting *Hall*, 572 U.S. at 719 (quoting *Atkins*, 536 U.S. at 317)), they do not give states "unfettered discretion to define the full scope of the constitutional protection." *Hall*, 572 U.S. at 719. Instead, *Atkins*, *Hall*, and *Moore I* all provide binding guidance as to how to identify individuals with intellectual disabilities.

In *Atkins*, the Court held that the Constitution forbids a state to take the life of "*any* intellectually disabled individual." *Moore I*, 137 S. Ct. at 1048 (citing *Atkins*, 536 U.S. at 321). Executing individuals with disabilities "serves no penological purpose," the Court explained, and it "runs up against a national consensus against the practice." *Id.* The Court noted that the medical community defines intellectual disability by reference to significantly subaverage intellectual functioning, deficits in

adaptive functioning, and the manifestation of these deficits before age 18. *See Atkins*, 536 U.S. at 308 n.3; *Hall*, 572 U.S. at 710.

In *Hall*, 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." 572 U.S. at 723. Thus, the Court rejected a Florida statute providing "that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited." *Id.* at 711-12. The Court explained that assessing an individual's intellectual and adaptive functioning involves "conjunctive and interrelated" inquiries that cannot be reduced to the "single factor" of an IQ score—especially when the medical community, which "design[s] and use[s] the tests," recognizes "that the IQ test is imprecise." *Id.* at 723.

In *Moore I*, the Court reiterated that states must "be[] informed by the medical community" and its "current medical standards," even though they need not "adhere[] to everything stated in the latest medical guide." 137 S. Ct. at 1049. The Court "recognized as valid the three underlying legal criteria" that the Texas courts had applied: "(1) deficits in intellectual functioning—primarily a test-related criterion … ; (2) adaptive deficits … ; and (3) the onset of these deficits while the defendant was still a minor." *Moore II*, 139 S. Ct. at 668 (summarizing *Moore I*, 137 S. Ct. at 1045-46). But this Court reversed based on five errors: The Texas court (1) "overemphasized Moore's perceived adaptive strengths" while the medical

community "focuses … on adaptive *deficits*"; (2) "stressed Moore's improved behavior in prison" even though clinicians "caution against reliance on adaptive strengths developed in a controlled setting" like prison; (3) relied on "traumatic experiences" as evidence that Moore wasn't intellectually disabled, even though the medical community recognizes such as experiences as "*risk factors for* intellectual disability"; (4) required "Moore to show that his adaptive deficits were not related to a 'personality disorder'," even though clinicians acknowledge that the "existence of a personality disorder or mental-health issue is not evidence that a person does not also have intellectual disability"; and (5) relied on a seven-factor test developed in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), reflecting "lay stereotypes" and lacking any basis in medical practice. *Id.* at 668-69 (quoting *Moore I*, 137 S. Ct. at 1049-51). Indeed, the Court *unanimously* agreed that the *Briseno* factors were "an unacceptable method of enforcing the guarantee of *Atkins*." *Id.* at 669-70 (quoting *Moore I*, 137 S. Ct. at 1053 (Roberts, C.J., dissenting)).

Finally, in *Moore II*, the Court summarily reversed the Texas Court of Criminal Appeals on remand from *Moore I*. Although even the prosecutor agreed that Moore was intellectually disabled and could not be executed, the Texas court, defended by the Texas Attorney General, "repeat[ed] the analysis [that this Court] previously found wanting." 139 S. Ct. at 670.

**B. Factual and procedural background**

**1.** A jury convicted Shawn Ford of aggravated capital murder for killing Jeffrey and Margaret Schobert when he was 18. The Schoberts were the parents of Shawn's girlfriend, Chelsea. Believing that Shawn was involved in assaulting

Chelsea, the Schoberts had banned him from visiting her in the hospital. App. 4a. Shawn and 14-year-old Jamall Vaughn went to the Schoberts' after talking about stealing items from the home. App. 7a-8a. After breaking in, Shawn found a sledgehammer in the garage and used it to kill Jeffrey. Margaret returned home early the next morning after receiving text messages Shawn sent from Jeffrey's phone. App. 110a-11a, App. 185a; Tr. Ex. 255. Margaret quickly suspected that her husband, an attorney, was not sending the text messages that were riddled with spelling and grammatical errors. *Id*; App. 185a. She even responded, "Is this Shawn." Tr. Ex. 255. (As the prosecutor noted, although Shawn seemed to be wondering about Margaret's arrival, "[t]hose text messages do not appear to lure Mrs. Schobert home." Tr. Vol. 50, 5293.) When Margaret returned home, Shawn and Jamall killed her with the sledgehammer. App. 5a.

Shawn was immediately suspected of the homicides and was soon arrested for Chelsea's assault. App. 5a-6a, 60a. Within hours of being jailed, Shawn had spontaneously given a fellow inmate enough details about the homicides that the inmate could relay to law enforcement the location of key pieces of evidence, including Jeffrey's car, several pairs of gloves, and a knife. App. 60a. Shawn subsequently admitted during interrogation that he killed the Schoberts. App. 7a. When he was returned to the jail, he called his brother from a recorded line and again admitted to the robbery and homicides. *Id*.

**2.** At sentencing, a psychiatrist testified about Shawn's documented learning disability and special education classes, as well as his low IQ, noting that he

had "difficulty processing information, thinking through things as well as the average person, maybe understanding consequences." Tr. Vol. 54, 496-97. After the doctor's testimony, defense counsel moved to dismiss the death specifications based on Shawn's IQ scores. *Id.* at 624-25. Shawn's previous intelligence testing had resulted in scores from 62 to 80. Dkt. 395, 396. Ultimately, the trial court granted a delayed motion for an *Atkins* hearing and allowed three experts to evaluate Shawn. App. 18a-19a.

Shawn cooperated with the evaluators to varying degrees. He told the trial court's expert, Dr. Katie Connell, that "he did not want to participate as he did not think the evaluation would have any impact on his situation and explained that either way, he would either 'die' or get life in prison." And, he said, he had taken tests "in the past and found some of the tests way too long." Dr. Connell asked about testing administered during the competency evaluation, and Shawn told her, "I don't know if I tried or not … Very possible I didn't try … How the fuck you take an IQ test … I'm not doing any more testing." Dkt. 694.

Shawn refused to cooperate with the defense expert, Dr. James Karpawich, App. 211a, so Dr. Karpawich's evaluation was based only on his review of the records. Dr. Karpawich concluded that Shawn has had intellectual limitations since early childhood and that he has had "significant limitations in his adaptive skills, including social behavior and social adjustment," while "his other adaptive behaviors are in the average range or above." Dkt. 692.

Shawn completed the WAIS-IV and the Vineland-II tests administered by Dr. Sylvia O'Bradovich, the state's expert. Dkt. 689. Dr. O'Bradovich did not provide any of those quantitative scores in her report, a decision the trial court found to be "odd." App. 221a. She claimed that was because "[t]here's confidence intervals that you have to take into consideration, and oftentimes that range places somebody in more than one classification." Tr. Vol. 59, 111-12. Dr. O'Bradovich began her summary and opinion by noting Shawn's "maladaptive personality traits," referring to him as a "deceptive and manipulative young man" who is "impulsive and irresponsible." She concluded that Shawn "did not demonstrate any indication of having an Intellectual Disability or adaptive functioning deficits." Dkt. 689.

**3.** At trial, all three experts specifically applied the standards of *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002), to reach their opinions. Dkt. 689, 692, 694. The trial court noted that "[a]ll three experts who specifically evaluated defendant's adaptive skills and functioning testified that while Mr. Ford had limits in certain areas of adaptive skills, he could not be characterized as having 'significant limitations in two or more adaptive skills.'" App. 232a; *see* App. 25a. Applying *Lott*, the trial court concluded that Shawn is not intellectually disabled. App. 213a-14a; *see* App. 25a.

**4.** **a.** The Ohio Supreme Court reversed and remanded. App. 25a-33a. The court made three rulings, although it grounded remand specifically on only one of them. *First*, the court explained that "the trial court erred in disregarding the [standard error of measurement (SEM)]" of one of Ford's IQ tests, with a range of 69

to 83, “thus failing to recognize the lower end of the range in determining whether Ford’s intellectual functioning was below average.” App. 27a. *Second*, the Ohio Supreme Court held “that the trial court should have discussed evidence presented on the Flynn Effect,” “a generally recognized phenomenon in which the average IQ scores produced by any given IQ test tend to rise over time.” App. 27a-28a, 30a. Even so, recognizing that this Court has not required consideration of the Flynn Effect, the Ohio high court held that “it was in the trial court’s discretion whether to include [the Flynn Effect] as a factor in the IQ scores.” App. 28a-30a.

*Finally*, the Ohio Supreme Court remanded because “the trial court used the wrong standard in finding that Ford did not have significant limitations in his adaptive skills.” App. 31a. The high court explained that the “the trial court applied the test developed in *Lott* … , and determined that Ford ‘could not be characterized as having significant limitations in two more adaptive skills.’” App. 30a. But “the current diagnostic standards,” the Ohio Supreme Court explained, “require significant deficits in *any* of the three adaptive-skill sets (conceptual, social, and practical) in determining whether a defendant is intellectually disabled.” App. 31a. The court acknowledged that the dissenters thought that “the evidence reflected the experts’ application of the current standards and that any problem with *Lott* was not prejudicial to Ford.” *Id.* But “[i]n the context of a capital case, [the majority] decline[d] to glean this finding from the record,” having “no confidence in the trial court’s determination based on its application of an improper standard.” *Id.*

The Ohio Supreme Court summarized its "guidance to the trial court and other courts to apply going forward." App. 32a. The court held that,

> [f]or purposes of eligibility for the death penalty, a court determining whether a defendant is intellectually disabled must consider 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 or lower when adjusted for the standard error of measurement, (2) significant adaptive deficits in any of, and practical), and (3) the onset of these deficits while the defendant was a minor.

App. 33a.

**b.** Justice DeWine, joined by Justice Kennedy, dissented in relevant part. The dissenters did not disagree with any of the majority's rule statements. They disagreed only with the majority's *application* of those rules because, in their view, "the evidence adduced at the *Atkins* hearing that was already held shows that even under the most current diagnostic standards," Ford could not carry his burden. App. 154a-55a. *First*, the dissenters agreed that "[t]he majority correctly notes that in *Hall v. Florida* the Supreme Court explained that 'an individual's intellectual functioning cannot be reduced to a single numerical score.'" App. 156a-57a (quoting *Hall*, 572 U.S. at 713). They simply thought that the trial court complied with *Hall* by "carefully considering the various IQ test results and expert testimony about each" and then moving on "to other evidence of intellectual disability, including Ford's adaptive functioning." App. 157a. *Second*, taking stock of *Lott*, the dissenters agreed that "[a] better rule would tie the assessment to contemporary standards." App. 160a. They simply believed that Mr. Ford could not carry his burden "under either set of standards." App. 159a. *Finally*, the dissenters did not dispute the relevance of the

Flynn Effect generally. *See* App. 160a-61a. Instead, they opined that "applying the Flynn Effect doesn't change the analysis" in Ford's case. App. 161a. In sum, the dissenters disagreed with the majority not about rules to be applied, but rather about the factbound application of those rules to Ford's case.

## REASONS FOR DENYING THE PETITION

### I. Ohio has identified no confusion or split of authority

Ohio, joined by Texas and several other states as amici, claims that there is widespread confusion about how to apply this Court's Eighth Amendment intellectual disability cases. Pet. 22-25; Tex. Br. 6-14. The states even go so far as to liken their difficulty identifying intellectual disability to the difficulty of crafting a judicially manageable standard in partisan gerrymandering cases. Pet. 2; Tex. Br. 15-16 (both quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2496 (2019)). But state high court cases after *Moore I* and *Moore II* evince little of the confusion—much less outcome-determinative confusion—that would traditionally warrant this Court's review. This Court should decline to accept Ohio's invitation to overturn two decades of doctrine, especially given the states' inability to show any real conflict.

#### A. Courts consistently consult the latest clinical guidelines to define intellectual disability

**1.** Ohio claims that "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.'" Pet. 22. But the cases Ohio cites show just the opposite: State courts consult the latest guides, just as this Court did in *Moore I*, 137 S. Ct. at 1050-53. Indeed, despite its grumblings, the Florida Supreme Court

looked to current medical standards in *Wright v. State*, 256 So. 3d 766, 770-71 & n.2, 775 (Fla. 2018) (per curiam), noting that Florida's statutory definition of intellectual disability "parallels the current medical consensus" (citing latest guides) and explaining that the record "demonstrates that the postconviction court and the medical experts below relied on current medical standards," which "served as the basis for the rejection of Wright's claim." The Kentucky Supreme Court also looks to current standards, explaining in *Woodall v. Commonwealth*, 563 S.W.3d 1, 6 (Ky. 2018)—contrary to Ohio's claim (at 24)—that "prevailing medical standards" are the current standards. *See also id.* (explaining that this Court in *Moore* "appl[ied] prevailing medical standards," that "prevailing medical standards change as new medical discoveries are made," and that "prevailing medical standards should always take precedence in a court's determination"). In the end, Ohio itself eventually admits that some courts "apply the most recent version of the clinical guidelines." Pet. 23 (citing App. 31a; *In re Cathey*, 857 F.3d 221, 238-39 (5th Cir. 2017); *State v. Thurber*, 420 P.3d 389, 450 (Kan. 2018)).

Ohio next contends that the California Supreme Court, by stating that lower courts have "discretion" to consider current guidelines, has implicitly "suggest[ed that courts] have discretion not" "to consider the most-up-to-date standards." Pet. 24. That argument doesn't wash. The California high court's statement represented only its narrow *rejection* of *the state's* argument that the referee should not have relied on "the most current authority." *In re Lewis*, 417 P.3d 756, 766 (Cal. 2018). It was in that context that the California court noted that *Atkins* and its earlier case law "do not

preclude reliance on more current [American Association on Intellectual and Developmental Disabilities (AAIDD)] criteria," and that under *Moore* and *Hall*, "the referee had discretion to consider current medical standards in assessing petitioner's adaptive behavior." *Id.* at 766-67. That holding evinces no confusion and does not suggest that courts may rely on outdated clinical guidance.

Ohio also claims that some courts have concluded that they "need not shift their tests every time the clinical guidelines are updated." Pet. 24. But that assertion is so vague as to be meaningless, and the cases Ohio cites do not support it. The Florida Supreme Court in *Wright* concluded that "the postconviction court and the medical experts below relied on current medical standards" and that nothing in *Moore* altered its prior conclusion. 256 So. 3d at 776-78. And the Arizona Supreme Court case that Ohio cites predates *Moore* and, in any event, contains little more than a conclusory assertion that "Arizona's failure to precisely align its definition of adaptive behavior with the prevailing medical definition does not violate the Eighth Amendment." *State v. Escalante-Orozco*, 386 P.3d 798, 812 (Ariz. 2017). Since *Moore I*, the Arizona Supreme Court has correctly observed that "states do not have unfettered discretion to reject medical community standards in defining [intellectual disability]." *State v. Gates*, 410 P.3d 433, 435 (Ariz. 2018) (citing *Moore I*, 137 S. Ct. at 1048-49).

**2.** Ohio bemoans (at 23) the Kansas Supreme Court's invalidation of a portion of a Kansas law limiting intellectual disability to offenders "having significantly subaverage general intellectual functioning … to an extent which

substantially impairs [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, 218, 420 P.3d 389, 444 (2018) (quoting Kan. Stat. Ann. § 21–4623(e)). But there is nothing confusing, unexpected, or out-of-line about that decision. Reaching that result required the Kansas Supreme Court to go no farther than recognizing "that states are constrained *at least to some extent* by the clinical definition of intellectual disability used in the medical community, i.e., states must be informed by—and cannot disregard—current medical community standards on this subject." *Id.* at 452; *accord Moore I*, 137 S. Ct. at 1049 ("[B]eing informed by the medical community does not demand adherence to everything stated in the latest medical guide.").

Indeed, the Kansas statute was clearly unconstitutional under *any* medically sound approach, as even *Atkins* made plain *more than a decade and a half earlier*. Justice Scalia, dissenting there, noted that Kansas' "definition of retardation … is analogous to the Model Penal Code's definition of a 'mental disease or defect' excusing responsibility for criminal conduct, which would not include mild mental retardation." 536 U.S. at 343 & n.2 (citing Model Penal Code § 4.01); *see* Model Penal Code § 4.01 ("A person *is not responsible for criminal conduct* if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." (emphasis added)). That, of course, was not the majority's test, which recognized that "[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial." *Atkins*, 536

U.S. at 318. As this Court has made clear, "[m]ild levels of intellectual disability, although they may fall outside [state] citizens' consensus, nevertheless remain intellectual disabilities, and States may not execute anyone in the *entire category* of intellectually disabled offenders." *Moore I*, 137 S. Ct. at 1051 (cleaned up) (citing *Hall*, 572 U.S. at 719; *Atkins*, 536 U.S. at 307 & n.3). Persistence against this Court's precedents doesn't make those precedents confusing.

**3.** Ohio also grossly overstates the purported difficulties of applying the clinical guidelines following *Moore I*. This Court's cases "do[] not demand adherence to everything stated in the latest medical guide," *Moore I*, 137 S. Ct. at 1049, and it's far from clear that minor differences between versions of the guides, or among the different guides, will make a difference in most cases. And to the extent there *might* be any such difficulty, this case doesn't present it, because the trial court has not yet even had the opportunity to apply the current clinical guidelines. *See* App. 31a.

**4.** For their part, Texas and the other amici states complain (at 6-9) about the confusion *Moore I* has supposedly caused. But those arguments are little more than poorly disguised attempts to relitigate Texas' meritless arguments in *Moore I* and *Moore II*. Texas can't even bring itself to acknowledge the crucial point that *Briseno*, for whatever it said about clinical standards, created a seven-factor test from whole cloth laced with lay stereotypes. Texas is intransigent, not confused.

Unlike any minor differences that may have emerged as states have implemented *Moore I,* Texas' *Briseno* factors—as *Ohio* concedes—had "no basis in 'any authority, medical or judicial.'" Pet. 17 (quoting *Moore I*, 137 S. Ct. at 1046).

Indeed, the Texas court had eschewed "medical and clinical standards" as "exceedingly subjective" in favor of "lay perceptions of intellectual disability." *Moore I*, 137 S. Ct. at 1051. Even the dissenters "agree[d] with the Court … that those factors are an unacceptable method of enforcing the guarantee of *Atkins*." *Id.* at 1053 (Roberts, C.J., dissenting). It was in *that* circumstance that this Court intervened—not merely to tell states (as Ohio and its amici would imply) to adhere to every jot and tittle of the latest guides and thereby hand the Eighth Amendment to academics. Thus, even if the two current standard clinical manuals "occasionally contradict one another," *Wright*, 256 So. 3d at 776 n.9, that does not mean such apparent contradiction cannot be reconciled by experts, that choice of one manual over the other would cause an Eighth Amendment violation, or even that it has any determinative bearing on the outcome of any particular case. Indeed, in *Wright* itself, the Florida Supreme Court was able to unanimously conclude "that *Moore* does not require a different result in this case." *Id.* at 768.

### B. Neither Ohio nor its amici have pointed to any other conflict warranting this Court's attention

**1.** Ohio next asserts that "*Atkins* and its progeny have spawned numerous other disagreements." Pet. 24. Not so.

Ohio claims (at 24-25) that the California and South Carolina high courts have split over whether adaptive strengths can offset adaptive deficits. Wrong again. This Court in *Moore I* cautioned against "overemphasiz[ing] … perceived adaptive strengths," because, according to the AAIDD, "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in

some adaptive skills." 137 S. Ct. at 1050. Consistent with that guidance, the California Supreme Court rejected the state's "focus on petitioner's adaptive strengths … to counter evidence of intellectual disability." *Lewis*, 417 P.3d at 767. That reasoning is not inconsistent with the South Carolina Supreme Court's footnote observation in *State v. Blackwell*, 801 S.E.2d 713, 721 & n.11 (S.C. 2017), that the trial court had not erred, before *Moore I*, when it "carefully considered and weighed Blackwell's adaptive strengths against his adaptive deficits," having already "declined to find [that evidence that Blackwell had difficulty living independently after the dissolution of his marriage] translated into deficits in Blackwell's adaptive behavior."

Ohio also claims that only "some courts interpret the Eighth Amendment as requiring trial courts to consider (or even discuss) the Flynn Effect." Pet. 25. But Ohio points to no decision making the Flynn Effect an outcome-determinative factor (or, conversely, stating that it can't be one). State courts' varying approaches to opinion writing don't warrant this Court's intervention. *See also infra* p. 23-24.

**2.** For its part, Texas suggests that *other* cases "confirm that it is time for the Court to answer at least three questions." Tex. Br. 13. But Texas doesn't bother to substantiate any claimed conflict or even to explain why this case implicates the questions that it wants the Court to take up. There is no conflict and this case doesn't present Texas' questions anyway. Perhaps that is unsurprising given that Texas' real beef is with *Moore I* and *Moore II*.

Texas first suggests that courts disagree about whether they may "consider adaptive strengths and prison conduct." *Id.* But this case doesn't present that question, because Ford's prison conduct has never been at issue. And there is no disagreement anyway. Courts merely consider whether adaptive strengths are probative in the case-specific circumstances before them. *See Jackson v. Kelley*, 898 F.3d 859, 865 (8th Cir. 2018) (noting that *Moore* "cautioned against relying too heavily on adaptive strengths developed in controlled settings such as prisons," and noting that the district court erred in giving "significant weight" to skills developed in prison, but not ruling out consideration of such skills); *Wright*, 256 So. 3d at 776-78 & n.8 (explaining that while its ruling "discussed some of Wright's adaptive strengths and behavior in prison," "the crux of [its] decision rested on the competing expert and medical testimony" instead); *Blackwell*, 801 S.E.2d at 718, 720-21 & n.11 (rejecting argument that "the trial court overemphasized Blackwell's adaptive strengths"; relying instead on strengths outside of prison, such as Blackwell's "ab[ility] to successfully obtain a commercial driver's license and be employed as a truck driver," as well as his "school performance and full employment history," and finding that Blackwell's difficulties did not "translate[] into deficits in Blackwell's adaptive behavior"); *Ex parte Carroll*, No. 1170575, 2019 WL 1499322, at *7, *11-12 (Ala. Apr. 5, 2019) (upholding trial court's discretionary determination that the testimony of a particular defense expert was not credible because the expert "was the only psychologist to conclude that Carroll suffered from significant adaptive deficits," and, in that context, finding that trial court had discretion to look to the Carroll's

experiences in prison (among other things) to "discredit[] the opinion of [that expert]"). The cases Texas cites do not present conflicting rule statements, much less outcome-determinative conflict.

Texas next suggests that courts disagree about whether an individual with an IQ score range below 70 can "prove subaverage intellectual functioning." Tex. Br. 13. While Texas' point is not entirely clear, any such question is not implicated here anyway, because (as all agree) one of Ford's IQ score ranges dipped below 70, so the trial court had to move on to consider Ford's adaptive functioning. *See Moore*, 137 S. Ct. at 1050; App. 26a-27a, 158a. In any event, Texas' question does not appear to be implicated even in the cases Texas itself cites. One of those cases—an unpublished decision, to boot—did not involve a score below 70. *Bean v. State*, 448 P.3d 575, at *2 (Nev. 2019) ("test results … placed Bean's IQ between 78 and 83 when the SEM is taken into account"). And the other two decisions both (a) agree that a score range below 70 requires the court to move on to consider adaptive functioning and (b) deny relief because the defendant failed to carry his burden on adaptive functioning. *See Carr v. State*, 283 So. 3d 18, 26-28 (Miss. 2019) (finding no need to "make a specific finding as to the existence of significantly subaverage intellectual functioning" where the trial court moved on to adaptive functioning, on which it found Carr failed to carry his burden); *Wright*, 256 So. 3d at 772 & n.3 (noting that "Wright was allowed to offer evidence of adaptive functioning" because his adjusted IQ range "dipped 1 point beneath 70"; and explaining that the court *was not* addressing "[w]hether the failure

on one prong of the [intellectual disability test] is dispositive," and that Wright "failed to prove deficits in his adaptive functioning").

Finally, Texas claims that courts disagree about whether they can "discredit unreliable test scores based on evidence that the test was not properly taken or administered." Tex. Br. 13. Even assuming such conflict, this case, once again, is not a vehicle for resolving it, because here, all agree, there is "one test … which established an IQ range of 69-83." App. 157a-58a (DeWine, J., dissenting). And it is not clear that there is disagreement anyway. Contrary to Texas' suggestion, the Pennsylvania Supreme Court's brief statement in *Commonwealth v. Cox*, 204 A.3d 371, 388 (Pa. 2019), that the trial court impermissibly "discounted the results of the 1987 WAIS-R test based on the possibility that testing conditions affected the result" does not state a categorical rule that tests can never be discounted as unreliable.[1]

### C. In any event, review based on confusion or difficulty of application would be premature

The thrust of Ohio's argument is that this Court should intervene because "[t]he confusion is getting worse, not better." Pet. 22. But Ohio and its amici cannot substantiate that assertion. At the very least, this Court should allow these supposed

[1] Texas also claims that "federal habeas courts compound the confusion by articulating different standards." Tex. Br. 15. But here again Texas quotes language out of context: The Ninth Circuit, recognizing the guidance this Court has provided over time, stated that "it was not apparent in 2008 that states were required to adhere closely to the clinical definitions of intellectual disability" in finding that the state high court had not unreasonably applied *Atkins*. *Pizzuto v. Yordy*, 947 F.3d 510, 527 (9th Cir. 2019) (per curiam). The court did not issue a broad holding requiring state courts to adhere "to everything stated in the latest medical guide." *Id.* at 521 (quoting *Moore*, 137 S. Ct. at 1048-49).

issues to percolate before drawing the drastic conclusion Ohio advocates that its precedent is unworkable—before *Moore I* has even reached the *U.S. Reports*.

## II. Ohio's position is meritless

Although Ohio cannot identify a split and this case is a poor vehicle for multiple reasons (see *infra* pp. 11-16), Ohio's two merits arguments confirm that this case is unfit for further review.

### A. Ohio first suggests that this Court should grant review to tell state courts to keep following *Atkins*, *Hall*, and *Moore* after all

After generally bewailing this Court's case law for more than ten pages (at 12-22), Ohio pivots to defending *stare decisis* before announcing that its first "better" idea is to tell states to continue following *Atkins*, *Hall*, and *Moore I* after all (at 25-28). Ohio's only purported clarification is that states should "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." Pet. 27-28.

It is hard to imagine a test providing less guidance or inviting more abuse and gamesmanship. As Ohio admits, its approach would *still* produce "disputes about what medical guidelines existing at the time of *Atkins* or later say." Pet. 28. And far from providing "concrete guidance," the state's approach would cause further litigation about what "*some* basis in *some* clinical guidelines" means. *Id.* Indeed, it is *Ohio's* proposed standard that is so expansive and meaningless that it would not be judicially manageable. And, for the reasons described further below (*see infra* pp. 25-27), that approach would enable states would execute individuals the Eighth

Amendment has protected since *Atkins*. Ohio thus invites the very type of arbitrary imposition of capital punishment that this Court has long refused to tolerate. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 440 (2008) ("[W]e have spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder."). Caligula would be proud. *See* Pet. 1.

**B. The Supreme Court of Ohio's decision here was correct under this Court's existing case law**

Ohio claims that the Ohio Supreme Court erred "in quite a few ways." Pet. 33. But the state is wrong on each point. And, most tellingly, Ohio would not prevail under *its own* suggested merits approach (unless this Court seeks to upend the entire line of *Atkins* precedent it recently reaffirmed just over a year ago in *Moore II*).

**1.** Ohio first claims that the Ohio Supreme Court's holding that courts should use the current clinical guidelines "is precisely what *Moore I* said was *not* required." Pet. 33-34. Ohio has it backwards. For starters, *Moore I* made clear that courts may not "disregard … current medical standards," 137 S. Ct. at 1049, just as *Hall* made clear that courts must be "informed by the medical community's diagnostic framework" even though "'the views of medical experts do not 'dictate' a court's intellectual-disability determination," *id.* at 1048 (quoting *Hall*, 572 U.S. at 721). Nothing in either case *prohibited* a state court from adhering closely to the most recent clinical guides. And here, both the majority *and* the dissent agreed that Ohio law needed updating to reflect current diagnostic standards. *See* App. 31a, 160a. They simply disagreed about the outcome of Ford's own case based on application of the

correct test. *Compare* App. 31a (majority opinion) ("declin[ing] to glean this finding [under the correct standard] from the record") *with* App. 159a (DeWine, J., dissenting) ("Ford came nowhere near showing by a preponderance of the evidence that under either set of standards, he is intellectually disabled.").

At the end of the day, Ohio's argument is that this Court should tell the Ohio Supreme Court that it cannot require adherence to the latest clinical guidelines, despite *this Court's* reliance on the latest guidelines in *Moore I* and *Hall* and this Court's promise that states have some latitude in enforcing the Eighth Amendment. That argument makes no sense, and it also contravenes Ohio's *own* argument that this Court should "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317. The Ohio Supreme Court determined in *Lott*—when "develop[ing] its own procedures for resolving *Atkins* claims"—that "[c]linical definitions of mental retardation … provide a standard for evaluating an individual's claim of mental retardation." 779 N.E.2d at 1014 (quotation marks omitted). The court merely updated those standards in the decision below. *See* App. 31a-32a.

**2.** Ohio next claims that "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. 34. That is not what the Ohio court's opinion says. An Eighth Amendment violation would be executing an individual with a disability, not erring in a methodological approach, much less drafting a less comprehensive opinion. What the Ohio Supreme Court actually said is that "the trial

court should have discussed evidence presented on the Flynn Effect, although it was in the trial court's discretion whether to include it as a factor in the IQ scores." App. 30a. The Ohio Supreme Court did not even go so far as to require trial courts to independently assess the Flynn Effect, cabining its instruction to discussing "evidence *presented* on the Flynn Effect." App. 30a. Nor did the court, which was remanding anyway, say that failure to discuss the Flynn Effect is reversible error.

Requiring trial courts to discuss a defendant's evidence of intellectual disabilities is a sensible exercise of a state high court's supervisory power. And this Court "ha[s] no power to tell state courts how they must write their opinions" anyway. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Intervening on this issue "would place [this Court] in just the kind of tutelary relation to the state courts" that the petition generally deplores. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997).

**3.** Ohio contends that the Ohio Supreme Court erred in holding "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." Pet. 34. But *all agree* on the correct rule here: Under *Hall*, a court must consider adaptive functioning when the lower end of the IQ range falls below 70. *See* App. 26a-27a, 157a; Pet. 15 (describing *Hall*); Pet. 27 (accepting *Hall*'s rule). Ohio's contention is that "[s]ince the trial court indisputably considered adaptive functioning; it could not possibly have violated *Hall*." Pet. 34. Ohio's grievance is thus not with the rule, but with its factbound application.

There is no error anyway. As the Ohio Supreme Court explained, the trial court mistakenly determined that Ford's "tests had never placed him in the intellectually

disabled range," even though the range on one of Ford's tests was 69 to 83. App. 26a. The Ohio Supreme Court did not err by correcting the trial court's misapprehension and explaining *Hall* to ensure that other Ohio trial courts understand it as well.

### C. Ohio's other suggested approach, "refining the *Atkins* inquiry," is little more than an attempt to scrap this Court's current case law by relitigating *Moore I* and *Atkins*

Ohio's second suggestion is "refining the *Atkins* inquiry" to "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." Pet. 28. But that would not be "refinement." It would be abandonment of *Atkins*, *Hall*, and *Moore*, notwithstanding Ohio's claims to support of *stare decisis*.

More specifically, Ohio proposes adopting the approach the Kansas statute that the Kansas Supreme Court struck down as "run[ning] afoul of *Moore* and *Hall*." *Thurber*, 420 P.3d at 450 (discussing Kan. Stat. Ann. § 21–4623(e)). That statute defined "mentally retarded" as "having significantly subaverage general intellectual functioning … to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law." *Id.* at 444 (quoting Kan. Stat. Ann. § 21–4623(e)). If that sounds more like the standard for an insanity defense than a definition for intellectual disability, that's because it is. As explained above, Kansas' approach wasn't a constitutional method of identifying intellectual disability in 2002 under *Atkins*, and it isn't constitutional now. This Court's cases protect even those with mild intellectual disabilities. As

Justice Scalia recognized, however, the Kansas statute "permit[ted] execution of all except the *severely* mentally retarded." *Id.* at 342-43; *see supra* pp. 13-14.

Ohio (with Texas by its side) wants to relitigate *Moore I* to achieve a different result. *See* Pet. 21 ("It is impossible to dispute the Chief Justice's description [in his *Moore I* dissent and *Moore II* concurrence] of the Court's modern jurisprudence."); Tex. Br. 9 (complaining about Texas' "experience in *Moore I* and *Moore II*"). It is true that Ohio's preferred "holding … would give the states more freedom" to execute offenders. Pet. 29. But that is a vice, not a virtue. "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Hall*, 572 U.S. at 720-21. And here, as Justice Scalia's *Atkins* dissent confirms, Ohio wants the freedom to execute everyone except those with *severe* intellectual disabilities. No "evolving standard[] of decency" there. *Id*. at 708; *see id.* at 719 (explaining the "national consensus" in *Atkins* and that *Atkins* covers "mild" intellectual disability).

In short, Ohio and its amici want to turn this Court's constitutional floor into a constitutional ceiling, barely a year after *Moore II*. But they cannot even explain how their hands-off approach would produce any greater predictability than this Court's decades-long approach under *Atkins*, *Hall*, and *Moore I* and *Moore II*. Indeed, Ohio's breezy treatment of *stare decisis* is startling in the wake of *Ramos v. Louisiana*, No. 18-5924, 2020 WL 1906545 (U.S. Apr. 20, 2020). The rule of law demands far

more than that before permitting this Court's cases (and our nation's medical knowledge) to be turned on their head.

## III. Ohio's petition is not an appropriate vehicle for deciding any important Eighth Amendment question anyway

### A. Ohio seeks only factbound error correction, because this case would come out the same way even under Ohio's proposed merits approach

Despite its litany of grievances, Ohio first proposes (at 27-28) a rule little different from the Ohio Supreme Court's.

*First*, Ohio would require states to assess intellectual disability using "three core elements." Pet. 27. But that's precisely what the Ohio Supreme Court did when it stated that "a court determining whether a defendant is intellectually disabled must consider 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 or lower when adjusted for the standard error of measurement, (2) significant adaptive deficits in any of the three adaptive-skill sets (conceptual, social, and practical), and (3) the onset of these deficits while the defendant was a minor." App. 33a; *accord Moore*, 137 S. Ct. at 1045.

*Second*, Ohio would bar states from using IQ-score cutoffs to automatically deny relief to those with standard-error-of-measurement ranges dipping below 70. Pet. 27. The Ohio Supreme Court here took just that approach. *See* Pet. 25a-27a, 33a.

*Third*, Ohio would require states to "consider[] only factors with *some* basis in *some* clinical guidelines." Pet. 28. The Ohio court did just that, refining its approach to more closely track current standards by requiring a finding of "significant deficits

in *any* of the three adaptive-skill sets (conceptual, social, and practical)," rather than "significant limitations in two or more adaptive skills," which had been the standards-based rule at the time of *Lott*. App. 30a-31a. And Ohio *waived* any challenge to that ruling when it *agreed* with Chief Justice O'Connor at oral argument that "the test initially was two [adaptive] deficits, *and it should be one*." *See* https://ohiochannel.org/video/case-no-2015-1309-state-v-ford, at 34:54 – 35:05 (emphasis added). Even Justice DeWine agreed in dissent that "[a] better rule would tie the assessment to contemporary standards." App. 160a. He simply concluded that "there is no suggestion that Ford would be found intellectually disabled were the new standards used." App. 159a.

In sum, the Ohio Supreme Court's rule and reasoning comport with the very framework Ohio urges this Court to grant review to apply. Such a request for factbound error correction does not merit further review.

### B. Ohio complains about issues that are not suitable for review

Ohio also claims that the Ohio Supreme Court's "analysis went wrong in quite a few ways." But in addition to misreading the state court's opinion, Ohio complains about issues that are neither outcome-determinative nor worthy of this Court's time.

Take Ohio's complaint that the Ohio Supreme Court "held that sentencing courts violate the Eighth Amendment unless they expressly discuss in their opinions evidence regarding the Flynn Effect." Pet. 34. That's sophistry about an issue this Court shouldn't stoop to address. For starters, the Ohio high court did not issue any such holding. Instead, it recognized that neither this Court nor any legal or scientific

consensus requires application of the Flynn Effect across the board. App. 28a. The court thus merely instructed lower courts to "discuss[] evidence presented on the Flynn Effect" even though they have "discretion whether to include it as a factor." App. 30a. Even the dissenting Justices didn't disagree with the majority's *instruction*; they simply concluded that "applying the Flynn Effect doesn't change the analysis." App. 161a. Intervening in such a matter of state-court opinion drafting would demean this Court and state courts alike. *See supra* p. 23-24.

Ohio also protests the Ohio Supreme Court's statements about Ford's IQ test on the ground that "the trial court *did* account for the entire range." Pet. 34 (emphasis added). Ohio again seeks factbound (and non-outcome-determinative) error correction. There is no reason for this Court to intervene to determine which court was right about what the trial court did—especially when the trial court went on to consider adaptive functioning *anyway*, just as *Hall* requires. Ohio does not claim that the trial court should not have considered adaptive functioning, so, even on Ohio's own argument, its factbound and case-specific arguments about the standard error of measurement cannot possibly be outcome-determinative.

### C. This case is also a poor vehicle for considering Ohio's proposal to overrule *Atkins*, *Hall*, and *Moore* because Ohio accepted those precedents below

This case is also a poor vehicle for considering Ohio's radical proposal to ditch this Court's precedent. As noted above, Ohio expressly accepted below that the updated standard was the correct standard to apply, and the state has not sought to develop the record so as to provide a meaningful backdrop for the novel approach it

urges this Court to adopt. And to the extent Ohio expects to achieve the same result on remand anyway (*see* App. 154a-62a (DeWine, J., dissenting)), that is just proof that the problems it decries are illusory. This Court should wait for a case in which the state even bothers to claim that the standard would make a difference. *Cf., e.g.*, *Carr*, 283 So. 3d at 22 ("*Moore I* reiterated *Atkins* and did not alter the *Atkins* landscape. Carr has failed to demonstrate prejudice under *Moore I*."); *Blackwell*, 801 S.E.2d at 721 n.11 ("Although the trial court did not have the benefit of … *Moore*, … we find that the court's analysis comports with this decision."); *Wright*, 256 So. 3d at 768 (Fla. 2018) ("*Moore* does not require a different result in this case.").

### D. This case comes to the Court in a messy interlocutory posture at best and with no jurisdictional hook at worst

The Ohio Supreme Court below remanded to the trial court to reassess Ford's claim of intellectual disability under the proper standards. Ohio nonetheless seeks review *now*, even though the state trial court has not had an opportunity to perform that analysis, and despite its confidence (like the dissent's) that it should prevail even under the new standards. At best, the interlocutory posture makes this case a bad vehicle, review of which would require this Court's trenching on the state courts' internal allocation of responsibility. At worst, this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the decision below is not a final judgment.

**1.** With the type still being set in the *U.S. Reports* for *Moore I* and *Moore II*, Ohio claims that the Court should overrule those precedents because it can already tell that they are unmanageable. As discussed, however, Ohio has not shown any real confusion or, more importantly, that any alleged confusion produces different

outcomes. *Supra* pp. 11-16. Instead, the Ohio Supreme Court here merely corrected the legal standard to bring it in line with *Moore I* and *Moore II*—well within its prerogatives under *Atkins*, *Hall*, and *Moore I* to determine how to enforce the Eighth Amendment guarantee. The court then remanded because it "decline[d] to glean [the necessary] finding [under the updated standard] from the record" "[i]n the context of a capital case." App. 31a. If this Court is to entertain overturning its existing jurisprudence, it should not do so where the courts have not had the opportunity to apply *Moore I* and *Moore II*.

**2.** Worse still, the unusual posture of this case presents serious jurisdictional concerns that the judgment below is not final under 28 U.S.C. § 1257(a). Ohio spends three full pages (at 30-33) attempting to assure the Court that it has jurisdiction under two of the four categories set forth in *Cox Broadcasting Corp.*, 420 U.S. 469 (1975). But those arguments lack merit, and there is little reason to entertain them, barely a year after *Moore II*, when this case has yet to be litigated on remand.

Ohio first asserts that because it lost below and might have difficulty appealing later, this case presents one of "those situations 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." *Id.* at 481. But Ohio crashes into the starting gate, because *the federal claim has not been finally decided*. It has been remanded back to the Ohio trial court.

*Kansas v. Marsh*, 548 U.S. 163, 167-68 (2006), does not help Ohio. There, the Kansas Supreme Court had conclusively found Kansas' capital sentencing statute facially unconstitutional; the question of the statute's constitutionality didn't remain for decision on remand. This case is instead more like *Florida v. Thomas*, 532 U.S. 774, 779 (2001), where the Court held that the state court judgment was not final because the "[t]he state court has yet to decide [on remand] whether the evidence should be suppressed" under federal law, notwithstanding the state high court's adverse ruling. As things now stand here, there is no ruling on whether Ford is intellectually disabled, so the federal claim has not been "finally decided." For that same reason, the case also does not fall into the other *Cox* category that Ohio claims applies, of cases "in which the federal issue, *finally decided* by the highest court in the State, will survive and require decision." *Cox*, 420 U.S. at 480 (emphasis added).

Ohio also has not shown that this case could not return to this Court, as required for its first *Cox* exception. To the contrary, Ohio concedes that "if [it] prevails then *Ford* will have a legitimate gripe that the state courts are misapplying *Atkins*" and that "[i]f Ford wins, and if one assumes that the State has some mechanism for appealing, then Ohio will be able to present the same question again." Pet. 32. Regardless of whether it can successfully seek review from the Ohio Supreme Court, Ohio can always seek this Court's review after "[f]inal judgment[] … rendered by the highest Court of a State *in which a decision could be had*." 28 U.S.C. § 1257(a) (emphasis added)). And Ohio *does* have a mechanism for appealing, *see, e.g., State v.*

*Deloney*, 2017-Ohio-9282, ¶ 1, even if such an effort would likely be "unsuccessful[]," *Johnson v. California*, 541 U.S. 428, 430-31 (2004).

Ohio's last-ditch attempt to establish jurisdiction is to claim that "[e]ven if none of [this Court's traditional finality] exceptions maps perfectly on to this case, that is irrelevant." Pet. 32. The breadth and standardlessness of that argument should counsel strongly against it. And *California v. Ramos*, 463 U.S. 992 (1983), can't save it. For one thing, the Court never addressed its own jurisdiction in *Ramos*, and it is well established that "this Court has never considered itself bound by prior *sub silentio* holdings when a subsequent case finally brings the jurisdictional issue before [it]." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (cleaned up). For another, the California Supreme Court in *Ramos had* definitively ruled—after imposition of a death sentence—that the sentencing-stage jury instructions were unconstitutional such that a new penalty phase was required. 463 U.S. at 995-96. The remand did not contemplate further proceedings on the federal issue. Here, in contrast, the Ohio Supreme Court remanded for redetermination of the federal issue under the standard it clarified. There might have been a final decision on the federal issue in *Ramos*, but there isn't one here.

* * *

Ohio and its amici want this Court to grant certiorari to overrule its Eighth Amendment intellectual disability precedents. Indeed, Texas is taking its third run at *Moore*. But the states have provided no good reason the Court should discard the national consensus (and the medical community's consensus) against executing even

mildly disabled individuals in favor of Ohio or Texas citizens' consensus. Even assuming the Court has jurisdiction, Ohio's and its amici's efforts at selective quotation and characterization have not shown any real confusion or conflict in the courts below. And this case is a terrible vehicle for either error correction or a project of overturning precedent. Jurisdictional problems aside, this case doesn't raise half of the supposed issues about which Ohio and its amici complain. The ink isn't dry on *Moore I* and *Moore II*—in fact, the type hasn't even been set. The Court should allow these issues to percolate and the Ohio trial court to reach a final judgment. Despite the states' desire to take a third run at *Moore* in three years, this Court has more pressing matters.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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