No. 21-466

IN THE

Supreme Court of the United States

ERIC DEWAYNE CATHEY,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

BRIEF OF THE CONSTITUTION PROJECT AND NATIONAL ASSOCIATION OF SOCIAL WORKERS INCLUDING ITS TEXAS CHAPTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The Constitution Project at the Project On Government Oversight ("the Project") advocates for due process and fairness in the criminal legal system as a key part of its mission to protect constitutional rights when threatened by the government's exercise of its national security or domestic policing powers. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files *amicus* briefs in this Court and other courts in cases, like this one, that implicate its nonpartisan positions on constitutional issues to better apprise courts of the importance and broad consequences of those issues. In May 2001, the Project's Death Penalty Initiative convened a blue-ribbon committee—including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others—to examine issues related to the administration of the death penalty. The committee issued reports in 2001, 2005, and 2014, the most recent of which makes 39 recommendations that the committee believes are essential to reducing the risk of wrongful capital convictions and executions.

The National Association of Social Workers ("NASW") is a professional membership organization with 110,000 social workers in chapters in every state, the District of Columbia, and internationally. The NASW Texas Chapter

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Both parties have given written consent to the filing of this brief.

has approximately 5,300 members. Social workers help people solve and cope with problems in their everyday lives. Clinical social workers also diagnose and treat mental, behavioral, and emotional issues. Social workers advocate and raise awareness with and on behalf of their clients and the social work profession.

Since 1955, NASW has worked to develop high standards of social work practice while unifying the social work profession. NASW promulgates professional policies, conducts research, publishes professional studies and books, provides continuing education, and enforces the *NASW Code of Ethics*. NASW also develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW with its Texas Chapter supports a system that ensures that criminal defendants, especially in death penalty cases, receive thorough mental health, psychosocial, and trauma assessments. See *NASW Policy Statements: Capital Punishment and the Death Penalty*, SOCIAL WORK SPEAKS 29, 32 (11th ed. 2018). NASW believes that equal application of the law and protection of the dignity of every human being are fundamental to a legal system that upholds social justice.

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals ("TCCA") has continued to defy this Court's directive to apply current medical standards rather than lay analysis when evaluating claims under *Atkins* v. *Virginia*, 536 U.S. 304 (2002). See *Moore* v. *Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*"). As this Court recognized in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), and reaffirmed in *Hall* v. *Florida*, 572 U.S. 701 (2014), the Eighth Amendment of the U.S. Constitution prohibits the execution of intellectually disabled persons. While the states are tasked with determining who is

intellectually disabled, this determination "must be 'informed by the medical community's diagnostic framework.'" *Moore* v. *Texas*, 139 S. Ct. 666, 670 (2019) ("*Moore II*") (quoting *Moore I*, 137 S. Ct. at 1048). The TCCA's analysis does not satisfy this requirement. *Ibid.*

The TCCA has retained "the wholly nonclinical *Briseno* factors" in all but name. *Moore I*, 137 S. Ct. at 1053 (referring to *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)). The TCCA's approach to determining intellectual disability in death penalty cases is thereby inconsistent with other legal contexts in Texas, which rely on modern clinical standards for intellectual disability determinations. The death penalty is the gravest punishment that may be imposed by our justice system; it makes little sense that Texas can rely on lay conceptions about intellectual disability in capital cases, while clinical standards and professional expertise must be used to make the same determinations in matters that carry far lighter consequences.

Texas also remains an outlier among U.S. states in allowing lay opinion evidence to support an intellectual disability finding, to the exclusion of clinical factors. After *Moore I* and *Moore II*, state legislative efforts have continued to progress toward greater reliance on modern clinical standards for purposes of intellectual disability determinations in capital cases.

The TCCA's indifference for this Court's precedent—specifically its disregard for the *Atkins* line of case law and, consequently, the Eighth Amendment's prohibition against cruel and unusual punishment—cannot stand. The petition for certiorari should be granted and the judgment below reversed.

ARGUMENT

I. THE TCCA'S LEGAL APPROACH IN THIS CASE REMAINS AN OUTLIER.

Despite this Court's clear mandate in *Moore* v. *Texas*, 137 S. Ct. 1039 (2017) ("*Moore I*") that the TCCA abandon its unconstitutional use of lay analysis in assessing claims of intellectual disability in capital cases, the TCCA persists in relying on lay analysis to the exclusion of current clinical standards. In fact, while the TCCA purported to "disregard" the *Briseno* factors in the decision below, it continued to apply them in all but name. The TCCA adopted the determinations of its *Briseno*-reliant 2014 decision in two conclusory paragraphs without providing any additional analysis or a true alternate basis for its reasoning. The TCCA relied, just as it did in its prior decision in Mr. Cathey's case, on its own lay perceptions of Mr. Cathey's IQ test results, his school records, and trial testimony about his adaptive strengths to conclude that Mr. Cathey is not intellectually disabled. Compare *Ex parte Eric DeWayne Cathey*, 2021 WL 1653233, at *1 (Tex. Crim. App. Apr. 28, 2021) with *Ex parte Eric DeWayne Cathey*, 451 S.W.3d 1, 19-23 (2014) (analyzing IQ test results, school records, and trial testimony to support decision). Reliance on this type of lay perception is precisely why this Court held that the *Briseno* factors are unconstitutional. See *Moore I*, 137 S. Ct. at 1044. But rather than explain why its decision complies with this Court's precedent in *Moore I and II*, the TCCA instead simply cited its 2014 *Briseno*-reliant analysis of Mr. Cathey's *Atkins* claim as support for its determination that Mr. Cathey is not intellectually disabled. See *Ex parte Cathey*, 2021 WL 1653233, at *1.

The TCCA's approach is not only unconstitutional; it also is inconsistent with the approach used to determine

intellectual disability in other legal contexts in Texas. In evaluating death penalty eligibility, the TCCA elevates lay perceptions above clinical standards and professional expertise to make determinations of intellectual disability. In contrast, in non-death-penalty contexts (such as evaluating students for intellectual disability), Texas relies on prevailing clinical standards and professional expertise.

The TCCA's approach also is an outlier vis-à-vis other states. Even at the time the Court issued its decision in *Moore I*, no other state legislature had approved the use of the *Briseno* factors or anything similar. See *Moore I*, 137 S. Ct. at 1052. Since this Court's decision in *Moore II*, states have continued to move even further away from the TCCA's approach.

A. The TCCA's Approach Remains Inconsistent with How Texas Diagnoses Intellectual Disability in Other Contexts.

Texas continues to use nonclinical analysis when diagnosing intellectual disability in capital cases, but not in other contexts. When making determinations of intellectual disability for other purposes, Texas instead relies on prevailing clinical standards and professional expertise. This discrepancy is both internally inconsistent and cruelly irrational because the consequence of a negative finding of intellectual disability in a death penalty case is the gravest outcome possible in our justice system. As this Court has held, the "qualitative difference between death and other penalties" requires a "greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). It cannot follow that the standard for determining intellectual disability is untethered from reliable, professionally accepted clinical standards in capital cases, but not in other situations with less-severe consequences.

In *Moore I*, this Court observed that "Texas itself does not follow *Briseno* in contexts other than the death penalty." *Moore I*, 137 S. Ct. at 1052. The Court noted two scenarios in which Texas regulations address the diagnosis of intellectual disability: (1) the procedures for diagnosing intellectual disability in individuals committed to the Texas Juvenile Justice Department, see 37 Tex. Admin. Code § 380.8751(e)(3); and (2) the standards used to assess students for intellectual disability, see 19 Tex. Admin. Code § 89.1040(c)(5). See *Moore I*, 137 S. Ct. at 1052. Texas continues to require reliance on clinical standards and experts when diagnosing intellectual disability in the juvenile justice system, and to use procedures consistent with clinical standards in the education system, while the TCCA fails to do the same for capital cases.

First, Texas's criminal justice system requires that a diagnosis of intellectual disability in youths be made by qualified professionals and based on the latest edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"). The latest version of the DSM is the fifth edition (2013), commonly known as the DSM-5, which this Court has recognized as one of the "leading diagnostic manuals." *Moore I*, 137 S. Ct. at 1048–49. In previously noting this Texas requirement to use the latest edition of the DSM in the juvenile justice system, this Court in *Moore I* cited 37 Texas Administrative Code § 380.8751(e)(3) (2016), which establishes the process by which youths are assessed for intellectual disability and provided specialized treatment within Texas's criminal justice system. See *Moore I*, 137 S. Ct. at 1052 (explaining that the regulation "requires the intellectual-disability diagnoses of juveniles to be based on 'the latest edition of the DSM.'"). The regulatory provision further provides that "[t]he diagnosis of Intellectual

Disability is made by a psychology and psychiatry staff." 37 Tex. Admin. Code § 380.8751(e)(3).

Not only does this regulation continue to rely on the DSM and on psychological professionals (as it did at the time *Moore I* was decided), but so do additional regulations related to intellectual disability diagnoses in the Texas juvenile justice system. For example, 37 Texas Administrative Code § 380.8779(e)(2)(B), pertaining to the mandatory discharge of certain youths from the juvenile justice system, requires that an intellectual disability diagnosis be made by "a licensed psychologist based upon the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association." Further, 37 Texas Administrative Code § 343.100(26), pertaining to residents in secure juvenile detention facilities and correctional facilities, defines "Intellectual Disability" as "[a] diagnosis made by a mental health provider based on the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders."

Second, when assessing students for intellectual disability, Texas uses a formulation of "intellectual functioning" that contemplates reliance on clinicians. The assessment's consideration of adaptive deficits also is consistent with the DSM-5. See *Moore I*, 137 S. Ct. at 1052. The regulatory provision specifies:

> [A] student with an intellectual disability is one who: (A) has been determined to have significantly sub-average intellectual functioning as measured by a standardized, individually administered test of cognitive ability in which the overall test score is at least two standard deviations below the mean, when taking into consideration the standard error of measurement of the test; and (B) concurrently exhibits deficits in at least two of the following areas of adaptive behavior: communication, self-care,

> home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

19 Tex. Admin. Code § 89.1040(c)(5). This regulatory standard comports with the DSM-5, which (1) states that diagnosis of intellectual disability is to be "based on both clinical assessment and standardized testing of intellectual and adaptive functions;" and (2) focuses the adaptive behavior inquiry on "[d]eficits in adaptive functioning." DSM-5 at 37. The Texas requirement to use a "standardized, individually administered test of cognitive ability" to evaluate intellectual functioning inherently necessitates the involvement of clinicians, as explained in the DSM-5. See *Ibid.* ("[C]linical judgment is needed in interpreting the results of IQ tests."). Further, the regulation mandates consideration of adaptive *deficits* in assessing adaptive behavior and, like the DSM-5, makes no mention of adaptive *strengths*. See *Ibid.*

In contrast, the TCCA's decision below fails to comport with the clinical approaches relied on in these Texas regulations. First, the TCCA did not rely on clinical judgment to interpret the results of Mr. Cathey's IQ test. Rather, it based its intellectual functioning determination on its own lay interpretation of the IQ test by failing to adjust for the Flynn Effect. See *Ex parte Cathey*, 2021 WL 1653233, at *1. In fact, the TCCA explicitly disregarded the Flynn Effect, even though the DSM-5 recognizes that it may affect IQ test scores. Compare *Ibid.* ("Although we agree that factfinders may consider the concept of the 'Flynn Effect' in assessing the validity of a WAIS-R IQ test score, we decline to subtract points from Applicant's obtained IQ score.") with DSM-5 at 37 ("Factors that may affect test scores include * * * the 'Flynn effect' (i.e., overly high scores due to out-of-date test norms).").

Second, the TCCA's approach to adaptive functioning relies on its own interpretation of lay witness impressions about perceived adaptive strengths and notes from Mr. Cathey's childhood schoolteacher about the same. This is inconsistent with the DSM-5, which relies on an assessment of adaptive *deficits* (not adaptive *strengths*) that is "assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures," with the requirement that "[s]cores from standardized measures and interview sources must be interpreted using clinical judgment." See DSM-5 at 37. Contrary to the approach contemplated in the DSM-5, the TCCA allows its lay perception of adaptive strengths to outweigh the presence of adaptive deficits. See *Ex parte Cathey*, 2021 WL 1653233, at *1 (relying heavily on its decision in *Ex parte Cathey*, 451 S.W.3d 1, 27 (Tex. Crim. App. 2014), in which the TCCA determined that Mr. Cathey's adaptive strengths precluded a determination of intellectual disability).

The TCCA's negative finding for Mr. Cathey would be impermissible in other contexts in Texas for determining intellectual disability, even though a negative finding of intellectual disability in those scenarios would have consequences far less severe than loss of life at the hands of the state. This inconsistent approach continues to defy logic. See *Moore I*, 137 S. Ct. at 1052 ("Texas cannot satisfactorily explain why it applies current medical standards for diagnosing intellectual disability in other contexts, yet clings to superseded standards when an individual's life is at stake.").

B. The TCCA's Approach Stands Apart from Courts in Other States.

By continuing to apply an unconstitutional lay analysis to *Atkins* claims, see *Ex parte Cathey*, 2021 WL 1653233, at *1, Texas remains an outlier among the states. Many

states affirmatively require the use of the most current clinical standards, including the DSM-5, when making an intellectual disability determination in death penalty cases. The remaining states at least allow or assume the relevance of the most up-to-date clinical standards. See Brief of The Constitution Project as *Amicus Curiae* in Support of Petitioner Bobby James Moore, No. 15-797, 2016 WL 4191356, at *10 (Aug. 4, 2016) (hereinafter "TCP Moore Brief"). Since the Project last briefed the "Texas outlier" issue for this Court in *Moore I*, see TCP Moore Brief at *10–*13, the Court has again made clear that state courts must be guided by current clinical standards regarding intellectual disability. See *Moore I*, 137 S. Ct. at 1039 (emphasizing that states are constrained by prevailing clinical standards in making determinations as to an individual's intellectual disability); *Moore* v. *Texas*, 139 S. Ct. 666 (2019) ("*Moore II*") (same). Consistent with this precedent, two states, California and Tennessee, have enacted changes to their laws regarding intellectual disability and the death penalty in the wake of *Moore I* and *Moore II*.

In 2020, California Governor Gavin Newsom signed into law A.B. 2512, which modernized California's statute on intellectual disabilities and the death penalty—pegging it to current clinical standards. See 2020 Cal. Legis. Serv. Ch. 331 (A.B. 2512) (West), https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201920200AB2512&showamends=false ("It is the intent of the Legislature that California adopt the professional medical community's definition and understanding of intellectual disability."). Among other changes, A.B. 2512 modified the statute's definition of "intellectual disability" by changing the age-of-onset requirement from "before 18 years of age" to "before the end of the developmental period, *as defined by clinical standards*." Compare Cal. Penal Code §

1376 (2020) with Cal. Penal Code § 1376 (2021) (emphasis added).

The amended statute also includes a reference to current clinical standards in a newly added provision addressing a "prima facie showing of intellectual disability" by a defendant. See Cal. Penal Code § 1376(a)(2) (2021) ("'Prima facie showing of intellectual disability' means that the defendant's allegation of intellectual disability is based on the type of evidence typically relied on by a qualified expert in diagnosing intellectual disability, *as defined in current clinical standards*, or when a qualified expert provides a declaration diagnosing the defendant as intellectually disabled.") (emphasis added). A prima facie showing triggers a court hearing to determine whether the individual is intellectually disabled and is therefore exempt from capital punishment. See *id.* § 1376(b)(1).

In 2021, Tennessee changed its law to redefine "'intellectually disabled' for the purpose of capital punishment," according to lawmakers, "in conformity with court decisions." Tennessee Senate Republican Caucus 2021 Report (June 2021), https://www.tngopsenate.com/?p=3429 (describing S.B. 1349). As explained by the Tennessee General Assembly's Fiscal Note accompanying the legislation, the bill changed the definition of "intellectual disability" to comport with "a disability as defined in the current edition of the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association." Tennessee General Assembly Fiscal Review Committee, Fiscal Note HB1062 – SB1349 (Feb. 23, 2021), https://www.capitol.tn.gov/Bills/112/Fiscal/HB1062.pdf. To effectuate this change, Tennessee removed the IQ cutoff of 70 from the language of its statute addressing the intellectual disability exemption from capital punishment. Compare Tenn. Code § 39-13-203 (2019) with Tenn. Code § 39-13-203 (2021); see also Tenn. Pub. Ch. No. 399, H.B. 1062

(approved May 11, 2021), https://publications.tnsosfiles.com/acts/112/pub/pc0399.pdf. Tennessee's law now requires a defendant to display "[s]ignificantly subaverage general intellectual functioning" as one of the three requirements for a finding of intellectual disability. Tenn. Code § 39-13-203a (2021). The other two requirements in the statute already paralleled the DSM-5 prior to this amendment. They provide that the individual must have "deficits in adaptive behavior" and the "intellectual disability must have manifested during the developmental period, or by eighteen (18) years of age." *Ibid.*

In contrast, the TCCA effectively disregards modern diagnostic criteria for determining intellectual disability, instead staunchly clinging to nonclinical factors. See TCP Moore Brief at *10 ("No other death penalty State forbids * * * the use of modern medical standards in *Atkins* cases."). In the absence of legislative revisions by the Texas Legislature to address *Moore I* and *Moore II*, the TCCA appears to assume that, as long as it does not openly rely on *Briseno*, it may continue to substitute lay judgment for professional determinations based on prevailing medical standards. The TCCA is plainly mistaken, as the Court's mandate on this is clear.

The TCCA also remains out-of-step with the most recent efforts of the Texas Legislature, which has undertaken efforts to amend its statute to be consistent with *Moore I* and *Moore II*, although it has not yet adopted the proposed revisions. See Tex. H.B. No. 869 (2021), https://legiscan.com/TX/text/HB869/id/2392232 (explicitly referencing "prevailing medical standards" and defining "intellectual disability" in a manner consistent with the DSM-5). H.B. 869 was reported favorably from committee by an eight-to-zero vote on May 3, 2021, see H.B. 869 History, https://capitol.texas.gov/BillLookup/History.aspx?L

egSess=87R&Bill=HB869, though the legislative session concluded without further action on the bill.

II. The TCCA Failed to Properly Rely on Professional Expertise.

As explained above, the TCCA has effectively retained its pre-*Moore* approach of favoring lay assessments of intellectual disability over determinations based on clinical standards and professional expertise. This is inconsistent with this Court's precedent, which has held that in "determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions" and that society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Hall*, 572 U.S. at 710 (applying the DSM-5 standards to invalidate Florida's procedures for addressing *Atkins* claims); see also *Moore I*, 137 S. Ct. at 1053 (noting that current manuals offer "the best available description of how mental disorders are expressed and can be recognized by trained clinicians" and reflect "improved understanding over time"); *Atkins*, 536 U.S. at 308 n.3, 318 (relying on then-current clinical standards).

Appropriate reliance on professional expertise is of the utmost importance in making intellectual disability determinations in death penalty cases. Because more is at stake in capital cases than any other kind of case, the method of determining intellectual disability must have a great degree of reliability. See *Lockett*, 438 U.S. at 604. Professionals capable of providing reliable testimony based on current clinical standards play an important role in helping courts effectuate the Eighth Amendment's prohibition on cruel and unusual punishment—in particular, the *Atkins* mandate that imposing the death penalty on a person with an intellectual disability is unconstitutional. Testimony from expert professionals is needed to inform courts about

the application of current clinical standards to individual cases to ensure that sentencing decisions are not unconstitutional. See *Moore I*, 137 S. Ct. 1039; *Moore II*, 139 S. Ct. 666.

Accordingly, it was inappropriate for the TCCA to disregard Mr. Cathey's Vineland-II Adaptive Behavior Scales ("Vineland-II") test results. The TCCA based its dismissal on the nonclinical belief that the Vineland reporters—Mr. Cathey's sister and ex-wife—were "highly motivated to misremember [his] adaptive abilities" because they are family members and knew that a finding of intellectual disability would make him exempt from the death penalty. *Ex parte Cathey*, 2021 WL 1653233, at *1 (citing to *Ex parte Cathey*, 451 S.W.3d at 20). But the DSM-5 expressly states that standardized tests for adaptive functioning, of which the Vineland-II is one, should be "used with knowledgeable informants (e.g., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible." DSM-5 at 37. The DSM-5 thus specifically recommends using family-member reporters to inform standardized measures of assessing adaptive functioning that are then "interpreted using clinical judgment." *Ibid.* The TCCA erred in making its own lay judgments about the suitability of Mr. Cathey's Vineland reporters on the basis that family members would be inherently biased.

The TCCA also made an inappropriate lay determination in disregarding the adaptive behavior reported by Mr. Cathey's sister as part of the Vineland-II test on the grounds that it was "contradicted by her trial testimony." *Ex parte Cathey*, 2021 WL 1653233, at *1. The TCCA ignored *Moore I* in relying on Mr. Cathey's sister's perception of his intellectual abilities, employing "lay stereotypes of the intellectually disabled" in contravention of efforts by the medical profession to counter such stereotypes. See

Pet. Br. at 22 (quoting *Moore I*, 137 S. Ct. at 1052); see also DSM-5 at 37 ("Scores from standardized measures and interview sources must be interpreted using clinical judgment.").

Additionally, the TCCA did not identify which portion of Mr. Cathey's sister's trial testimony it understood to contradict her Vineland interview; Mr. Cathey is simply left in the dark about why the TCCA discredited the clinical conclusion that his Vineland-II test showed the requisite adaptive deficits. See Pet. Br. at 25–26. This is particularly troubling, given that the habeas judges who actually heard the trial testimony reached opposite conclusions from the TCCA and issued highly detailed findings of fact supporting those determinations. See Pet. Br. at 2–3. The habeas judge is "[u]niquely situated to observe the demeanor of witnesses first-hand," putting her "in the best position to assess the credibility of witnesses." *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). Yet rather than deferring to the habeas judge's credibility findings or explaining why they were plainly incorrect, the TCCA overrode them without explanation.

III. The Supreme Court Should Act to Uphold the Rule of Law.

While the TCCA's apparent reliance on the unconstitutional *Briseno* factors is clear error and warrants Supreme Court review, the need for consistency with this Court's binding authority is itself reason enough to summarily reverse the TCCA. The decision below is irreconcilable with this Court's precedent, which is to be followed as the supreme law of the land.

The Supreme Court has final authority to ensure that the Constitution is interpreted uniformly and applied consistently across the country. See *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 347–48 (1816) (explaining "the

importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution"); see also *Marbury* v. *Madison*, 5 U.S. 137, 146 (1803) ("This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals * * * ."). This authority includes oversight of the TCCA, which is bound by *Moore I* and *Moore II*. See *Aekins* v. *State*, 447 S.W.3d 270, 275 (Tex. Crim. App. 2014) ("This * * * is United States Supreme Court law, not some peculiar doctrine thought up by Texas judges. We are not permitted to ignore or denigrate it.").

It is a role that the Court has played before in reviewing death penalty appeals from the TCCA. See, *e.g.*, *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (overturning TCCA's imposition of death sentence due to the absence of instructions informing jury that it could consider mitigating evidence of defendant's intellectual disability); *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007) (granting habeas relief to petitioner where TCCA incorrectly analyzed Supreme Court precedent on jury consideration of mitigating evidence); *Brewer* v. *Quarterman*, 550 U.S. 286, 289 (2007) (same); *Smith* v. *Texas*, 550 U.S. 297, 314-15 (2007) (same). And it is the role that must be played again here. When the Supreme Court spoke in *Moore II*, it rejected the *Briseno* factors under the Constitution and reaffirmed its earlier opinion in *Moore I*.

The "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content." *DIRECTV, Inc.* v. *Imburgia*, 577 U.S. 47, 53 (2015) (quoting *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990)). Where, as here, an inferior court violates Supreme Court precedent, this Court should act to protect its constitutional appellate authority. Certiorari should be

granted to ensure that the TCCA abides by this Court's pronouncements in *Moore I* and *Moore II*.

CONCLUSION

The Petition for Certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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