No. 21-782

IN THE

Supreme Court of the United States

RODNEY RENIA YOUNG,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF OF CHARLES FRIED AND SETH P. WAXMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are former Solicitors General of the United States. They have litigated and written on questions of constitutional adjudication, the institutional role of the Supreme Court, and adherence to the rule of law. They file this brief in support of Petitioner Rodney Young to highlight the ways in which Georgia's extraordinary and exceptional rule requiring defendants to prove intellectual disability beyond a reasonable doubt to avoid an unconstitutional death sentence flouts this Court's precedents and threatens vital rule-of-law values.

Charles Fried served as Solicitor General of the United States under President Ronald Reagan.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Individuals seeking to establish violations of their constitutional rights do not have to prove the facts entitling them to the Constitution's protection beyond a reasonable doubt—except, that is, in Georgia, if they are intellectually disabled and are seeking to be

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici*'s intent to submit this brief at least 10 days before it was due, and all parties have consented to the filing of this brief.

spared an unconstitutional death sentence. It is hard to think of a less defensible departure from the ordinary standards of constitutional adjudication. And indeed, Georgia's rule is irreconcilable with this Court's precedents.

This brief focuses on two lines of this Court's precedent. First, a principle of ancient origin that has taken on special salience in modern death-penalty jurisprudence: When the state is pitted against the individual, and the individual's life is at stake, the consequences are too serious to put almost all the risk of an erroneous determination on the individual. And second, a corollary more recently announced but no less important: States may not through their procedures "create[] an unacceptable risk that persons with intellectual disability will be executed." *Hall v. Florida*, 572 U.S. 701, 704 (2014).

By using a standard of proof that shifts almost all the risk of a wrongful execution to the defendant, Georgia has done just that, in violation of both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment. In fact, Georgia's rule is even more egregious than the procedures this Court held unconstitutional in *Hall* and *Moore v. Texas*, 137 S. Ct. 1039 (2017) (*Moore I*).

This Court in the past has not hesitated to stop states from using procedural rules to subvert the Constitution's prohibition on executing the intellectually disabled. It should not hesitate now to halt the most egregious state effort so far. Invalidating Georgia's rule would not only eliminate an extreme and unconstitutional outlier but would also reaffirm several

principles vital to the rule of law, including that lower courts are obligated to follow this Court's precedents irrespective of whether they think those precedents are correct or might be reconsidered and that procedural rules may not subvert substantive protections.

The Court should grant the petition, vacate the judgment below, and remand for a retrial under a less stringent standard of proof, either after plenary review or in summary fashion.

ARGUMENT

The beyond-a-reasonable-doubt standard should not obstruct the enforcement of the Constitution's commands. In every other context, Georgia (like other jurisdictions in the United States) recognizes as much. *See* Pet. §§ I & III. Yet Georgia has carved out what may be the most perverse exception imaginable: When the consequences of an erroneous determination for the individual are the gravest—death—and when an individual, because of intellectual disability, faces a "special risk of wrongful execution," *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), Georgia requires defendants to prove beyond a reasonable doubt that they are intellectually disabled, such that executing them would be unconstitutional. Georgia's approach facilitates unconstitutional executions and is contrary to this Court's precedents.

I. Georgia's Beyond-A-Reasonable-Doubt Standard Violates The Fundamental Principle That The Risk Of A Wrongful Execution Cannot Fall Entirely On The Individual.

Georgia's rule flouts a long-standing principle, enshrined in precedent, that the consequences of a wrongful death sentence are too grave to shift almost the entire risk of error to the defendant.

As a general matter, standards of proof "allocate the risk of error between the litigants." *Addington v. Texas*, 441 U.S. 418, 423 (1979). The beyond-a-reasonable-doubt standard is the most stringent in our legal system and places "almost the entire risk of error upon" the party bearing the burden of proof. *Id.* at 424.

Georgia does not impose that high burden or place that risk on individuals seeking to vindicate other constitutional rights; indeed, no one does. *See* Pet. 25-30. Nor does Georgia saddle individuals with that stringent standard when they seek to establish intellectual disability for other purposes. For instance, individuals need not demonstrate their intellectual disability beyond a reasonable doubt to be eligible for services from the state's Department of Behavioral Health and Developmental Disabilities or to secure special education.[2] *See Moore I*, 137 S. Ct. at 1052

[2] *See Application for Intellectual/Developmental Disabilities Services*, Ga. Dep't of Behav. Health & Dev. Disabilities, https://tinyurl.com/54a43tvf (last visited Dec. 21, 2021); Ga. Comp. R. & Regs. 160-4-7-.05 app. (e) (child eligible so long as a

(finding infirmity in the state's handling of intellectual disability determinations in part because they were inconsistent with "*Texas' own practices in other contexts*" (emphasis added)). Rather, Georgia reserves the riskiest of standards for cases in which the stakes are the highest for intellectually disabled persons—when they are seeking the Constitution's protection from "the gravest sentence our society may impose." *Hall*, 572 U.S. at 724.

Georgia's approach runs counter to the principle, espoused by authorities ranging from the Old Testament to Aristotle to Blackstone, that the consequences of some determinations are too grave to place almost the entire risk of error on the individual. *See* Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065, 1077-81 (2015). This Court has reaffirmed the principle many times over and recognized its special salience when a person's life is at stake. In *Santosky v. Kramer*, for instance, this Court confirmed that "[w]hen the State brings a criminal action to deny a defendant liberty or life, … 'the interests of the defendant are of such magnitude that … they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" 455 U.S. 745, 755 (1982) (quoting *Addington*, 441 U.S. at 423). Thus, "[w]hen the choice is between life and death," a heightened risk of wrongful execution created by a state procedure "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. 586, 605

"comprehensive evaluation indicates deficits in both intellectual functioning and adaptive behavior.").

(1978) (plurality op.); *see Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("Such a risk [of an unwarranted conviction] cannot be tolerated in a case in which the defendant's life is at stake.").

The Court's concern with erroneous determinations in high-stakes proceedings runs so deep that this Court has held unconstitutional the use of stringent standards of proof even when a life does not hang in the balance and even if the defendant bears the burden of proof. As Petitioner details, the Court in *Cooper v. Oklahoma*, 517 U.S. 348, 363-64 (1996), invalidated Oklahoma's rule requiring the defendant to prove incompetence to stand trial by clear and convincing evidence because it "imposes a significant risk of an erroneous determination that the defendant is competent" where the "consequences of an erroneous determination"—an incompetent person is made to stand trial—"are dire."

The concern is heightened here. The consequence of a wrongful execution for the individual is as grave and irreversible as can be. By comparison, "the injury to the State of the opposite error"—that a person who might constitutionally be sentenced to death is permitted to live—"is modest." *Id.* at 365. Indeed, it is far more modest than the costs of an erroneous acquittal—a risk this Court has recognized society appropriately bears. *See In re Winship*, 397 U.S. 358, 361-64 (1970). A false negative in a guilt determination means a guilty person escapes punishment and remains free to reoffend. A false negative in a death-penalty determination, by contrast, means that an offender who could have been executed is instead sentenced to life in prison. *See* Ga. Code Ann. § 17-7-

131(j). That offender is still "punished" just "not, however, [with] the law's most severe sentence." *Hall*, 572 U.S. at 709.

II. Georgia's Beyond-A-Reasonable-Doubt Standard Is Irreconcilable With *Atkins* And Its Progeny.

Unjustified in *any* capital proceeding, *see supra* § I, Georgia's extraordinary and exceptional standard of proof is particularly perverse in the *Atkins* context, where "[t]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty is *enhanced*" for persons with intellectual disability, due to risk factors stemming from that disability, including how they are likely to present to a jury. *Atkins*, 536 U.S. at 320-21 (emphasis added) (citation omitted).

It was that concern (among others) that led the Court to conclude in *Atkins* that imposing the death penalty on persons with intellectual disability violates the Constitution. And it was the Court's commitment to its *Atkins* precedent that drove the Court in *Hall* and *Moore I* to invalidate state rules that "create[d] an unacceptable risk that persons with intellectual disability will be executed." *Hall*, 572 U.S. at 704. Those cases, in turn, compel the conclusion that Georgia's stringent standard of proof is unconstitutional. It has the same flaws as the rules in those cases and, indeed, is in certain respects more egregious and more requiring of correction by this Court.

A. Georgia's rule is at least as unconstitutional as the rules in *Hall* and *Moore I*.

In both *Hall* and *Moore I*, this Court held unconstitutional state rules that meant that individuals who met the clinical definition of intellectual disability would still be eligible for the death penalty. In *Hall*, that was the case if defendants fell just above Florida's IQ cut-off. 572 U.S. at 704, 711-12. In *Moore I*, that was true if defendants failed to show their adaptive deficits did not accord with certain lay perceptions of intellectual disability or outweigh their adaptive strengths. 137 S. Ct. at 1050-51. Georgia's rule has the same unconstitutional effect. It means that defendants who are more likely than not intellectually disabled can still be sentenced to death just because they haven't satisfied the jury of that fact beyond a reasonable doubt.

More specifically, Georgia's standard reproduces the very flaws this Court called out in *Hall* and *Moore*, if not "in *haec verba*, certainly in substance." *Moore v. Texas*, 139 S. Ct. 666, 672 (2019) (*Moore II*) (Roberts, C.J., concurring).

The problem with *Hall*'s strict IQ cut-off was that it "ignore[d] the inherent imprecision of these tests," which rendered it inappropriate to treat an IQ score "as final and conclusive" of other evidence of intellectual disability. *Hall*, 572 U.S. at 723, 712. Not only does Georgia's beyond-a-reasonable-doubt standard ignore that imprecision by requiring a degree of certainty those tests cannot provide, *see* Brief of Disability Rights Organizations, Georgia's standard also

exploits that imprecision by providing a reason for jurors to disregard even undisputed scores within the unconstitutional range. After all, the presence of a doubt about evidence that "leaves [the jury's] mind wavering, unsettled or unsatisfied" means the defendant has not carried his burden. Tr. 3273-74. In the case of Alphonso Stripling, for instance, a Georgia jury rejected his claim of intellectual disability, even though two mental health experts for the defense agreed that Stripling, who had IQ scores of 64 and 68, was intellectually disabled. The prosecution's expert, who conducted no testing of his own and conceded that the defense expert's testing was valid, nevertheless offered his "guestimate" that Stripling's intellectual function was instead average—likely providing enough doubt to sway the jury. Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 Ga. St. U. L. Rev. 553, 585-86 (2017).

Georgia's standard also encourages the jury to make the same errors that this Court unanimously concluded in *Moore I* rendered Texas's use of the so-called *Briseno* factors unconstitutional. *See* 137 S. Ct. at 1053 (Roberts, C.J., dissenting) ("I agree with the Court today that those factors are an unacceptable method of enforcing the guarantee of *Atkins*[.]"); *Moore II*, 139 S. Ct. at 669 ("[A]ll [Members of the Court] agreed about the impropriety of the *Briseno* factors."). One problem with the *Briseno* factors was that they "invited 'lay perceptions of intellectual disability' and 'lay stereotypes' to guide assessment of intellectual disability," including, for instance, the stereotypical judgments that people with intellectual

disability can't hold down jobs or maintain intimate relationships. *Moore II*, 139 S. Ct. at 669 (quoting *Moore I*, 137 S. Ct. at 1051); *see id.* at 672 (citing as examples of reliance on lay stereotypes state court's assessment of defendant "'ha[ving] a girlfriend' and a job as tending to show he lacks intellectual disability"). The beyond-a-reasonable-doubt standard likewise calls for jurors to seize on any shred of evidence that gives them pause—including anything that goes against their (mis)perceptions about the capabilities of people with intellectual disability. Here, for instance, the prosecution repeatedly invoked Petitioner's ability to keep his job labeling cans and have relationships with women, thus playing to stereotypes to sow doubt about whether Petitioner had an intellectual disability. *See, e.g.*, Tr. 3268-69 ("[Y]ou get this picture from what the defense is arguing that he[] sits there all day long with drool coming down his face sticking labels on a can.... Isn't it odd that if the defendant really is as mentally retarded as they claim he is, that these men [his co-workers] can do this same job[?]"); Tr. 3289-90 ("[T]he fact, again, that he's able to have this other relationship with another woman shows that he is multi-faceted[.]"); Tr. 3275 ("He's able to have a relationship[]" with his girlfriend); Tr. 3287 ("[H]e argued over his finances with his [girlfriend], which means he's not a doormat.").

The Court's summary reversal in *Moore II* illustrated how easily factfinders can slip into stereotypes. 139 S. Ct. at 672 (language from the decision below "suggest[ed] reliance upon ... 'lay stereotypes of the intellectually disabled'"). If expert judges who had been expressly instructed by this Court on remand to do better could make that mistake, *see id.*, so can lay

jurors who are coaxed (inadvertently or otherwise) into it by "impassioned" (Pet. App. 69a) prosecutors emphasizing the beyond-a-reasonable-doubt standard.

B. Georgia's rule is worse than the rules in *Hall* and *Moore I*.

In at least one key respect, Georgia's rule is even more troubling than the rules this Court invalidated in *Hall* and *Moore I* (and again in *Moore II*).

The rules in *Hall* and *Moore* were most likely to wrongfully exclude individuals at the edges of the constitutionally protected class. The rule in *Hall*, after all, set a standard for the outer limits of subaverage intellectual functioning. And *Moore*'s *Briseno* factors tended to exclude individuals with "'mild' intellectual disability." 137 S. Ct. at 1051. The Court held those rules unconstitutional because "States may not execute *anyone* in the entire category of [intellectually disabled] offenders." *Id.* (emphasis altered) (citation omitted). The beyond-a-reasonable-doubt standard is likely to wrongfully exclude *everyone* from the category of intellectually disabled offenders. Not one capital defendant in Georgia tried for intentional murder has ever succeeded in proving intellectual disability beyond a reasonable doubt. *See* Lucas, *supra*, at 582.

That is not because all those individuals presented only borderline cases of intellectual disability. The group includes individuals who squarely fell within the category of individuals the Constitution protects. For instance, uncontradicted trial evidence showed (among other things) that Willie Palmer had

an IQ of 61 and was deficient in 8 of 11 categories of adaptive functioning. He couldn't tie his shoes at age 11. Yet despite the lack of any expert rebuttal testimony by the state, Palmer was sentenced to death by a jury who was told that "the most important thing that you must understand is that what we do in psychology … is not necessarily what we do in a courtroom." *See* Lucas, *supra*, at 590-91. If Palmer's sentence had not been overturned after he spent almost 23 years on death row,[3] he would have been unconstitutionally executed. Warren Lee Hill was not so fortunate: Georgia executed him, even though the state post-conviction court determined he was intellectually disabled by a preponderance of the evidence—a determination that would have spared his life in nearly every other state. *See* Pet. 17 & n.4; *Hill v. Humphrey*, 662 F.3d 1335, 1364 (11th Cir. 2011) (en banc) (Tjoflat, J., specially concurring); Alan Binder, *Georgia Executes Warren Lee Hill for Murder*, N.Y. Times (Jan. 27, 2015), https://tinyurl.com/ycxw53ms.

[3] *See* Sandy Hodson, *After Two Decades on Death Row, Burke County Man Will Face Life in Prison*, The Augusta Chronicle (Aug. 25, 2020), https://tinyurl.com/yckrfxb3. The prosecution took death off the table as part of a consent decree that followed revelations of prosecutorial misconduct. That it took such an extraordinary development to prevent Palmer's unconstitutional execution only underscores the risk Georgia's standard creates of wrongful executions.

C. Georgia's rule is more amenable to correction than the rules in *Hall* and *Moore I*.

This Court is on even stronger institutional footing to resolve the questions presented in this case than it was in *Hall* and *Moore I*.

For one thing, rejecting Georgia's uniquely high standard of proof does not require the Court to assess or endorse any clinical judgment or medical consensus about intellectual disability. *See Moore I*, 137 S. Ct. at 1054 (Roberts, C.J., dissenting) ("But clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment."). To answer the question presented under the Eighth Amendment, the Court need only apply the ordinary constitutional analysis, for here consensus in the states provides the "objective indicia of society's standards" that show Georgia's rule is unconstitutional. *Hall*, 572 U.S. at 714 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). Georgia's legislature is the only one in the nation to have adopted the beyond-a-reasonable-doubt standard in this context. And so in this case, as in *Atkins*, the Court need "swe[ep] only as far as [the national] consensus," as established by state legislatures. *Moore I*, 137 S. Ct. at 1057 (Roberts, C.J., dissenting) (citing *Atkins*, 536 U.S. at 321). That is, on this issue, there is no "serious disagreement." *Id.* (quoting *Atkins*, 536 U.S. at 317); *compare Hall*, 572 U.S. at 730 (Alito, J., dissenting) (citing the lack of a "methodological consensus" as a reason to reject the Eighth Amendment claim). There is only Georgia, standing alone and without justification. *See* Pet. 23; *Raulerson*

v. Warden, 928 F.3d 987, 1014 n.3 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part) ("The Georgia Supreme Court's reasoning—that the standard of proof is high because the General Assembly defined intellectual disability to require a high standard of proof—is tautological and fails to identify a state interest that the burden of proof actually serves.").[4]

Determining the standard of proof required under the Due Process Clause is likewise a classic exercise of the judicial function. *See Santosky*, 455 U.S. at 755-56 ("[T]he degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to resolve.'") (quoting *Woodby v. INS*, 385 U.S. 276, 284 (1966)). Indeed, this Court has a long history of determining the minimum standards of proof in state-court proceedings required under the Due Process Clause. *E.g.*, *Winship*, 397 U.S. at 364 (Due Process Clause of the Fourteenth Amendment protects criminal defendants in state proceeding against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged); *Cooper*, 517 U.S. at 367-68 ("[W]e consider here whether a State's procedures for guaranteeing a fundamental constitutional right are sufficiently protective of that right.").

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[4] In fact, there is evidence that Georgia's legislature "inadvertently" adopted the beyond-a-reasonable-doubt standard in a bout of "careless drafting." Lucas, *supra*, at 561. That, however, has not stopped Georgia from continuing to adhere to and defend its standard. *See infra* § III.B.

What's more, in holding that the beyond-a-reasonable-doubt standard is unconstitutional in this context, the Court would be setting forth a bright-line rule that offers clear guidance to states. *Compare Moore I*, 137 S. Ct. at 1058 (Roberts, C.J., dissenting) (criticizing "the lack of guidance [the majority opinion] offers to States seeking to enforce the holding of *Atkins*").

III. Georgia's Outlier Approach Threatens The Rule Of Law In Ways Only This Court Can Remedy.

A. Georgia's rule undermines the rule of law.

Several important rule-of-law values further compel the invalidation of Georgia's rule.

1. Striking Georgia's rule would reinforce the importance of vertical stare decisis—an "absolute" principle that imposes a "constitutional obligation [on state courts] to follow a precedent of this Court." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part). As demonstrated, Georgia's distinctive and restrictive approach is irreconcilable with several decisions of this Court.

Ensuring that lower courts adhere to this Court's precedents is reason enough to grant review, but there is special need here, just as there was in *Moore II*. *See* 139 S. Ct. at 672 (summarily reversing lower court for failing to adhere to *Moore I*). The decision below reflects a cavalier attitude toward this Court and its authority. Specifically, a concurrence for three

of the justices in the majority derided several of this Court's Eighth Amendment decisions as turning on the whims of its current personnel. *See* Pet. App. 95a-97a & n.29; Pet. App. 99a (Nahmias, J., specially concurring) (describing Eighth Amendment jurisprudence as turning on "whether five Justices decide to 'evolve' the Eighth Amendment a little more"). Those justices recognized that the "reasoning" of several of this Court's decisions "casts doubt on [Georgia's] uniquely high standard of proof," yet concluded that "courts like [Georgia's] should be cautious in deciding Eighth Amendment cases based on aspects of the reasoning" because this Court "as currently comprised" was unlikely to follow *Hall* and *Moore*, "notwithstanding the reasoning of the majority opinions in those two cases." Pet. App. 98a-99a, 100a-101a.

This Court should vacate the decision below to reaffirm that lower-court judges must follow this Court's precedents—including its reasoning—as it stands, instead of assuming that a differently composed Court would abandon the logic of prior cases. *See, e.g.*, *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("a reason given for [the Court's] conclusion" is to be "regarded as authority"). "As a lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it is essential that [Georgia's Supreme Court] follow both the words and the music of Supreme Court opinions"—even when the musicians are different. *United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting).

2. Striking down Georgia's rule would also reaffirm the fundamental principle that the power to

"enforce [a] constitutional restriction," *Atkins*, 536 U.S. at 317, does not include the power to undermine it. Put differently, "a constitutional prohibition cannot be transgressed indirectly by the creation of a [procedural rule] any more than it can be violated by direct enactment." *Bailey v. Alabama*, 219 U.S. 219, 239 (1911). That is just as true when it comes to standards of proof as any other procedural mechanism. *See Cooper*, 517 U.S. at 367-68 (holding that the "[s]tate's procedure[] for guaranteeing a fundamental constitutional right"—specifically, its standard of proof—was not "sufficiently protective of that right").

3. Finally, doing away with Georgia's rule would restore the minimum degree of uniformity that is critical to the fair administration of the death penalty and public confidence in the criminal justice system.

It is vital that there be "consistency in the application of the death penalty and confidence that it is not being administered haphazardly." *Hall*, 572 U.S. at 738 (Alito, J., dissenting). Indeed, "[t]he Constitution … requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987). And "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt" as to whether only those deserving of death "are being condemned." *Winship*, 397 U.S. at 364; *see id.* at 370 (Harlan, J., concurring) (standards of proof reflect "the degree of confidence our society thinks [the factfinder] should have in the correctness" of decisions). Georgia's beyond-a-reasonable-doubt standard invites prejudice and passion and all but

ensures unconstitutional death sentences. In doing so, it contributes to the arbitrary application of the death penalty and dilutes the moral force of the criminal law.

The existence of even a single outlier is cause for concern. *See Moore I*, 137 S. Ct. at 1052 (noting that Texas was an "outlier" in using the *Briseno* factors). And Georgia is not just any outlier. It ranks sixth among states in the number of executions carried out, and in one recent year, executed more people than any other state in the nation.[5]

Some variation among the states is, of course, often acceptable and sometimes even desirable. *See Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."). Invalidating Georgia's extreme procedural approach would not deprive states of the leeway to "develop[] *appropriate* ways to enforce" the Constitution's prohibition on executing the intellectually disabled. *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986)) (emphasis added). After all, every other state has been able to advance its interests without imposing on the defendant the burden to prove intellectual disability beyond a reasonable doubt. And going forward, states would retain considerable discretion to set the procedures for intellectual-disability claims, including which party bears the

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[5] Death Penalty Info. Ctr., *Executions By State and Region Since 1976*, https://tinyurl.com/2p8sejvd (last visited Dec. 21, 2021).

burden of proof. *See* John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 410 (2014) (discussing various state procedures for implementing *Atkins*, including ones that exclusively entrust juries with the determination, some in which only judges make the decisions, and various hybrid options). Vacating the decision below would merely recognize that, while "procedures must be allowed to vary," they must still "meet the constitutional minimum," *Addington*, 441 U.S. at 431, and that Georgia's unique rule does not.

B. Georgia will not change course absent intervention by this Court.

The Georgia Supreme Court has made clear that it will not revisit its long-standing precedent upholding the beyond-a-reasonable-doubt standard. Pet. App. 28a ("[W]e adhere to our prior decisions upholding Georgia's standard of proof."); Pet. App. 101a (Nahmias, J., specially concurring) ("I see no compelling reason for this Court to overrule our well-established precedent on this issue."); *see also Head v. Hill*, 587 S.E.2d 613, 622 (2003) ("[W]e believe that *Cooper* should not be extended to retardation decisions unless the Supreme Court of the United States so requires at some future date."). Change will not come from the lower federal courts, either. On habeas review, the Eleventh Circuit has repeatedly—and en banc—rejected constitutional challenges to Georgia's standard. *See Hill*, 662 F.3d at 1338; *Raulerson*, 928 F.3d at 992. There is likewise little hope that Georgia's legislature will change course. It has deliberately chosen

to stick with its unique standard in the face of efforts to review and alter it.[6]

CONCLUSION

For the foregoing reasons, the Court should grant plenary review or, in the alternative, summarily reverse the denial of Petitioner's request for a retrial and remand for a retrial on intellectual disability under a less stringent standard of proof.

Respectfully submitted,

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[6] *See, e.g.*, H.B. 768, 154th Gen. Assemb., Reg. Sess. (Ga. 2018), https://tinyurl.com/yckbhrhk (last visited Dec. 21, 2021) (showing stalled progress of bill that would lower the standard to preponderance of the evidence); Veronica M. O'Grady, *Beyond a Reasonable Doubt: The Constitutionality of Georgia's Burden of Proof in Executing the Mentally Retarded*, 48 Ga. L. Rev. 1189, 1193 (2014) (describing an "informational hearing regarding the 'beyond a reasonable doubt' standard" a Georgia legislative committee held following calls for change).