No. 21-1173

IN THE

Supreme Court of the United States

JOE ELTON NIXON,

Petitioner,

v.

FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* THE NATIONAL DISABILITY RIGHTS NETWORK AND DISABILITY RIGHTS FLORIDA

EMILY C. PAAVOLA
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044

JOHN H. BLUME
Counsel of Record
CORNELL LAW SCHOOL
159 Hughes Hall
Ithaca, NY 14853
(607) 255-1030
Jb94@cornell.edu

Counsel for Amici Curiae The National Disability Rights Network and Disability Rights Florida

311729

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF AMICI[1]

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

Disability Rights Florida is a not-for-profit corporation serving as Florida's federally-funded protection and advocacy system for individuals with disabilities. Disability Rights Florida's mission is to advance the quality of life, dignity, equality, self-determination, and freedom of choice of people with disabilities through collaboration, education, and advocacy, as well as legal and legislative strategies. Specifically, on behalf of persons

1. No counsel for a party authored this brief in whole or in part, and no entity or person, other than the *amici*, their members and counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties consented to *amici*'s intent to file this brief at least 10 days prior to its due date.

with intellectual and other developmental disabilities, Disability Rights Florida is authorized by federal law to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State …." 42 U.S.C. § 15043(a)(2)(A) (2011). Disability Rights Florida has represented and continues to represent persons with disabilities in individual actions, class actions, and systemic relief initiatives affecting all such individuals. The protection and advocacy system is unique in its authority to protect and advocate for the legal and human rights of persons with disabilities and its presence will provide a necessary perspective to assist the Court in this matter.

SUMMARY OF ARGUMENT

The Eighth Amendment prohibits the execution of any individual with intellectual disability. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The phenomenon of intellectual disability has been recognized throughout history,[2] and the clinical consensus has, for decades, dictated a three-pronged definition: (1) significant impairments in intellectual functioning, as measured by IQ testing; (2) deficits in real-world skills and abilities resulting from the disability (adaptive behavior deficits); and (3) onset of the disability before the individual became an adult. The first prong, "significantly subaverage intellectual functioning," *Id.* at 308 n.3, is an essential component of the clinical definition, and thus the diagnosis, of intellectual disability.

In *Hall v. Florida*, this Court held that Florida law violated the substantive holding of *Atkins* by "defin[ing]

2. *See, e.g.,* Nigel Walker, 1 Crime and Insanity in England 35-37 (1968).

intellectual disability to require an IQ test score of 70 or less." 572 U.S. 701, 704 (2014). Florida's strict IQ cut-off ran contrary to the medical community's unanimous consensus that a standard error of measurement ("SEM") of plus or minus five points must be applied to IQ test results. Florida treated "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." *Id.* at 712. This not only flouted established medical practice, but also "*Atkins* itself." *Id.* at 718; *see also*, *id.* at 712 ("'[T]he relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist'") (quoting APA Brief 15-16).

This case is about whether Florida may, despite *Hall*'s clear instructions, continue to apply a strict IQ cut-off to dispose of ID claims brought by individuals who, like petitioner, raised their claims before *Hall* was decided. The dispute in Nixon's case turns solely on the issue of whether he has significantly subaverage intellectual functioning.[3] Although Nixon offered four individually administered full-scale IQ scores under 75 (and therefore within the SEM), the Florida Supreme Court affirmed the denial of his claim because "[w]e have consistently interpreted [prong one] to require a defendant seeking exemption from

3. The State did not contest the second and third prongs at Nixon's initial hearing, and its own expert agreed that Nixon suffers from significant deficits in adaptive behavior. As petitioner's petition explains, Nixon offered extensive and uncontested evidence documenting his lifelong deficits in adaptive behavior, but the state courts never discussed this evidence, finding instead that Nixon's claim was foreclosed by Florida's strict 70 IQ cut-off, both before and after *Hall*.

execution to establish he has an IQ of 70 or below." *Nixon v. State*, 2 So.3d 137, 142 (Fla. 2009). Following a remand from the federal court for reconsideration in light of *Hall*, the Florida Supreme Court concluded that "Nixon is not entitled to reconsideration of whether he is intellectually disabled" because, in the state court's view, "*Hall* does not apply retroactively." *Nixon v. State*, 327 So.3d 780, 783 (Fla. 2021).[4]

Application of the SEM was well-established long before *Atkins* and it plays an important role in the proper diagnosis of intellectual disability. It is therefore an issue of significant importance to amici because a proper understanding of intellectual disability impacts our work in ensuring that private and public institutions provide appropriate services and support to our clients and their family members. We care deeply about promoting a medically accurate understanding of intellectual disability in all contexts.

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4. In *Walls v. State*, the Florida Supreme Court held that *Hall* does apply retroactively as a matter of state law. 213 So.3d 340 (Fla. 2016). However, in a dramatic change of course just four years later, the Florida Supreme Court *sua sponte* overruled its own decision in *Walls*. *Phillips v. State*, 299 So.3d 1013 (Fla. 2020). Thus, when Nixon's case came before the Florida Supreme Court, it stated:

> It is true that – when *Walls* was still good law – this Court instructed the trial court to determine whether an evidentiary hearing was necessary to evaluate Nixon's successive intellectual disability claim in light of *Hall*. But under *Phillips*, the controlling law in our Court *now* is that *Hall* does not apply retroactively.

Nixon, 327 So.3d at 783 (emphasis in original).

ARGUMENT

The Standard Error of Measurement is a Well-Established Foundational Element of An Accurate Intellectual Disability Assessment.

The procedures which *Hall* found necessary for a constitutional evaluation of intellectual disability[5] under *Atkins* were standard operating procedure for diagnosticians long before *Hall*[6] and even before *Atkins*.[7]

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5. In *Hall*, this Court recognized the pejorative connotations of the term "mental retardation," and instead "us[ed] the term 'intellectual disability' to describe the identical phenomenon." 572 U.S. at 704. In keeping with this Court's decision, this brief also uses "intellectual disability" in place of "mental retardation" except where naming or directly quoting sources.

6. *American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports* 36 (11th ed. 2010) ("Understanding and addressing the test's standard error of measurement is a critical consideration that must be part of any decision concerning a diagnosis of ID that is based, in part, on significant limitations in intellectual functioning."); *American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* 58 (10th ed. 2002) ("In the 2002 AAMR system, the 'intellectual functioning criterion for diagnosis of mental retardation is approximately two standard deviations below the mean, considering the *SEM* for the specific assessment instruments used and the instruments' strengths and limitations."); John Matthew Fabian, William W. Thompson, IV & Jeffrey B. Lazarus, *Life, Death, and IQ: It's Much More than Just a Score: Understanding and Utilizing Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability/Mental Retardation Cases*, 59 Cleveland State L. Rev. 399, 412–13 (2011).

7. *See Hall*, 572 U.S. at 719: "The *Atkins* Court twice cited definitions of intellectual disability which, by their express

terms, rejected a strict IQ test score cutoff at 70." *E.g.*, *Atkins*, 536 U.S. at 509 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition. 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds. 7th ed.2000).)." *See also American Association on Mental Retardation, Mental Retardation: Definition, Classification and Systems of Supports* 37 (9th ed. 1992) ("This [assessment] process is facilitated by considering the concept of standard error of measurement, which has been estimated to be three to five points for well-standardized measures of general intellectual functioning. . . . This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation."); Edward J. Slawski, *Error of Measurement*, in 1 Encyclopedia of Human Intelligence 394, 398 (Robert J. Sternberg, editor in chief, 1994) ("The standard error of measurement described earlier can be used to estimate how good a measure of true score an observed score provides. If certain assumptions are met, psychologists can construct confidence intervals around true score estimates by adding to and subtracting from the observed score the appropriate multiple of the standard error of measurement."); *American Association on Mental Retardation, Classification in Mental Retardation* 56 (1983) ("*Error of measurement of IQ.* In addition to the possibility of temporal change, an obtained IQ must also be considered in terms of its fallibility as a measurement. . . . This is interpreted to mean that if a retest is promptly given with the same instrument, discounting any practice effect, the second IQ would be within 1 standard error of measurement of the first IQ about two thirds of the time."); David Wechsler, *The Measurement of Adult Intelligence* 135 (1939) ("As criteria of a scale's reliability, statisticians generally use one or several of the following measures: (1) the standard error of the scale's central tendency, (2) the degree of correlation between the various portions of the scale, (3) the correlation between alternate forms of the same scale, (4) correlations between repeated administrations of the tests to the same individuals." *And see id.*, Table 26: "*Measures of standard error*".)

See, e.g., *American Association on Intellectual & Developmental Disabilities, User's Guide: [to] Mental Retardation: Definition, Classification and Systems of Supports* 12 (10th ed. 2007) ("[T]he assessment of intellectual functioning through the reliance on intelligence tests is fraught with the potential for misuse if consideration is not given to possible errors in measurement.");[8] American Psychological Association, *APA's Guidelines for Test User Qualifications: An Executive Summary*, 56 Am. Psychologist 1099, 1101 (2001) ("[T]est users should understand the standard error of measurement, which presents a numerical estimate of the range of scores consistent with the individual's level of performance.");[9] Richard J. Bonnie &

8. *See also id.* ("[A]n IQ of 70 is most accurately understood not as a precise score, but as a range of confidence with parameters of at least one standard error of measurement . . . or parameters of two standard errors of the mean. . . . This is a critical consideration underlying the appropriate use of intelligence tests and best practices and that must be a part of any decision concerning the diagnosis of mental retardation."); Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution,* 30 J. Legis. 77, 96 (2003) ("[A]ny state's use of a fixed IQ cutoff score, without reference to standard measurement error and other factors concerning the specific instrument used, risks an inaccurate assessment of the intellectual functioning component of the mental retardation definition.").

9. *See also American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports* 57 (10th ed. 2002) ("Errors of measurement as well as true changes in performance outcome must be considered in the interpretation of test results. This process is facilitated by considering the concept of standard error of measurement (*SEM*), which has been estimated to be three to five points for well-

Katherine Gustafson, *Implementing* Atkins v. Virginia*: How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U. Richmond L. Rev. 811, 836 (2007) ("[T]he SEM must *always* be taken into account when interpreting scores on IQ tests; failing to do so would be a clear departure from accepted professional practice in scoring and interpreting any kind of psychological test, including IQ tests. The importance of the SEM is so well-established in the field that it would be superfluous to direct experts to take it into account in a statute governing *Atkins* evaluations and adjudications, and most state laws say nothing about it.").[10]

It was, indeed, Florida's deviation from the professionally recognized process for an intellectual disability diagnosis that largely underlay the holding in *Hall*:[11]

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standardized measures of general intellectual functioning. …. This is a critical consideration that must be part of any decision concerning a diagnosis of mental retardation."); *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* [DSM-IV-TR] 41–42 (4th ed. 2000); *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* [DSM-III] 36–37 (3d ed. 1980).

10. *See also* John H. Blume, Sheri Lynn Johnson & Christopher Seeds*, Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 Cornell J. L. & Pub. Pol'y 689, 697–98 (2009).

11. It was "[a]gainst the backdrop of that clear professional consensus . . . [that] the Supreme Court's decision in *Hall v. Florida* addressed the constitutionality of a Florida rule barring consideration of the SEM in making *Atkins* adjudications." James W. Ellis, Caroline Everington, and Ann M. Delpha, *Evaluating*

> Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.
>
> The professionals who design, administer, and interpret IQ tests have agreed, *for years now*, that IQ test scores should be read not as a single fixed number but as a range.

Hall, 572 U.S. at 712 (emphasis added). *Hall* stated explicitly that "The clinical definitions of intellectual disability, which take into account that IQ scores represent a range, not a fixed number, were a fundamental premise of *Atkins*. And those clinical definitions have long included the SEM."[12] Precisely because they were a fundamental

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Intellectual Disability: Clinical Assessments in Atkins *Cases*, 46 Hofstra L. Rev. 1305, 1359 (2018).

12. 572 U.S. at 720. Unlike the Florida Supreme Court, the clinical community has not reversed this longstanding premise. *See American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* 131 (12th ed. 2021) ("[I]n reference to an IQ or an adaptive behavior standard score of 70 that is obtained on an assessment instrument with a *SEM* of 4, *the score of 70 is most accurately understood not as a precise score, but as a range of scores* with parameters of at least two *SEM* units (i.e., score range of 62-78, 95% probability). Reporting the range within which the person's true score falls, rather than only

premise of *Atkins*, the command of *Hall* that they be respected in conducting *Atkins* evaluations has got to be understood as enforcing a preexisting Eighth Amendment requirement, not creating a new one.

The issue in this case is not only one whose erroneous resolution may have fatal consequences for condemned individuals in Florida; it also potentially affects death-sentenced people in as many as eleven other States.[13] It

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a score, represents both the appropriate use of intellectual and adaptive behavior assessment instruments and best diagnostic practices in the field of ID. Reporting of the 95% confidence interval (i.e., score range) must be a part of any decision concerning the diagnosis of ID.").

13. *See Hall*, 572 U.S. at 714–17, identifying nine States in which it appeared that the standard error of measurement (SEM) might not be taken into account in adjudicating the issue of subaverage intellectual functioning. The *Hall* opinion notes that in most of these States there were no pre-*Hall* appellate decisions authoritatively resolving the SEM question. We know of no reported data bearing directly on the number of cases in which *Atkins* claims were lost on that issue in these nine States, or on the number of cases in which Atkins claims were not raised because postconviction counsel failed to consider the SEM. But it does appear that nationwide 31% of the *Atkins* losses between mid-2002 and the end of 2013 rested solely upon adverse appellate findings on the intellectual-deficits prong of the three-pronged orthodox diagnostic formula, and that 29% of these cases in turn involved average I.Q. scores below 75. And the study which documents these figures mentions at least two such cases—*State v. Elmore*, 2005 WL 2981797 (Ohio App. 2005), and *Cribbs v. State*, 2009 WL 1905454 (Tenn. Crim. App. 2009)—in which the SEM was erroneously disregarded in a State other than the nine identified by *Hall* as treating an I.Q. above 70 as precluding *Atkins* relief. John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (and Possibly Three) Atkins: Intellectual*

is the subject of conflicting lower-court decisions.[14]

Disability and Capital Punishment Twelve Years after the Supreme Court's Creation of a Categorical Bar, 23 William & Mary Bill of Rights Journal 393, 400–04 (2014).

14. Compare *In re Henry*, 757 F.3d 1151, 1158-1159 (11th Cir. 2014) ("For the first time in *Hall,* the Supreme Court imposed a new obligation on the states not dictated by *Atkins* because *Hall* restricted the states' previously recognized power to set procedures governing the execution of the intellectually disabled. In addition, Justice Kennedy's *Hall* opinion explained that the basis for its holding stretched beyond *Atkins* alone: '[T]he precedents of this Court "give us essential instruction," . . . but the inquiry must go further. . . . In this Court's independent judgment, the Florida statute, as interpreted by its courts, is unconstitutional.' *Hall* . . . (quoting *Roper v. Simmons* . . . .). Nothing in *Atkins* dictated or compelled the Supreme Court in *Hall* to limit the states' previously recognized power to set an IQ score of 70 as a hard cutoff. This is plainly a new obligation that was never before imposed on the states, under the clear language of *Atkins,* and of *Hall* itself."), *and Kilgore v. Secretary, Florida Department of Corrections*, 805 F.3d 1301, 1313 (11th Cir. 2015) ("[I]n *In re Henry* . . . we rejected the argument that *Hall's* holding—limiting the states' previously recognized power to set an IQ score of 70 as a hard cutoff—was 'clearly established' by *Atkins* . . . . [W]e held that *Hall* necessarily established a new rule of constitutional law.") *with Smith v. Sharp*, 935 F.3d 1064, 1084–85 (10th Cir. 2019) ("As in *Strickland*, the Supreme Court in *Atkins* declared 'a rule of general application . . . designed for the specific purpose of evaluating a myriad of factual contexts.' . . . The application of this general rule to *Hall*, . . . *Moore I* . . . and *Moore II* cannot be understood to 'yield[ ] a result so novel that it forges a new rule, one not dictated by precedent' . . . in light of the Court's proclamation in *Hall* that '*Atkins* . . . provide[s] substantial guidance on the definition of intellectual disability . . .' . . . The Court's application of *Atkins* more closely resembles, for example, our conclusion that the extension of *Strickland*'s guarantee of effective counsel to the plea-bargaining context merely applied *Strickland* rather than

A scientifically sound understanding of intellectual disability, including how it is defined and what constitutes a medically proper assessment, is essential in many other contexts. As this Court has acknowledged,

> the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans.

Hall, 572 U.S. at 710. In these and other settings, "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose" intellectual disability. *Id.* Adherence to that medical consensus should be uniformly applied in all social and policy areas.

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created a new rule."); *and see Van Tran v. Colson*, 764 F.3d 594, 612 (6th Cir. 2014) (determining that *Hall* "clarified the minimum *Atkins* standard under the U.S. Constitution . . . . In [*Hall*], the Court confronted directly the question of 'how intellectual disability must be defined in order to implement[] the principles and holding of *Atkins*.'").

CONCLUSION

Florida's continued reliance on a strict IQ cut-off is not justified by scientific or medical practice and risks the misdiagnosis of persons with intellectual disability. It is inconsistent with the substantive holding of *Atkins* and decades of medical consensus before *Atkins* was decided. The proper assessment of intellectual functioning requires clinical judgment beyond a simplistic determination that IQ scores above a certain number conclusively determine the issue. Florida's insistence on ignoring the medical community's guidance on this foundational principle violates *Atkins*.

Respectfully submitted,

EMILY C. PAAVOLA
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044

JOHN H. BLUME
Counsel of Record
CORNELL LAW SCHOOL
159 Hughes Hall
Ithaca, NY 14853
(607) 255-1030
Jb94@cornell.edu

Counsel for Amici Curiae The National Disability Rights Network and Disability Rights Florida