No. 24-872

# In the Supreme Court of the United States

JOHN Q. HAMM, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, PETITIONER

*v.*

JOSEPH CLIFTON SMITH

(CAPITAL CASE)

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING PETITIONER**

D. JOHN SAUER
*Solicitor General*
*Counsel of Record*
MATTHEW R. GALEOTTI
*Acting Assistant*
*Attorney General*
HASHIM M. MOOPPAN
*Deputy Solicitor General*
HARRY S. GRAVER
*Assistant to the*
*Solicitor General*
ANN O'CONNELL ADAMS
*Attorney*

*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

**CAPITAL CASE**

## QUESTION PRESENTED

Whether and how courts may consider the cumulative effect of multiple intelligence quotient (IQ) scores in assessing a claim under *Atkins* v. *Virginia*, 536 U.S. 304 (2002).

**TABLE OF CONTENTS**

Page

**TABLE OF AUTHORITIES**

Cases—Continued: Page



Constitution, statutes, and regulation:

# In the Supreme Court of the United States

No. 24-872

JOHN Q. HAMM, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, PETITIONER

*v.*

JOSEPH CLIFTON SMITH

(CAPITAL CASE)

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING PETITIONER**

## INTEREST OF THE UNITED STATES

The federal government has a direct interest in the proper methodology for determining whether capital defendants are intellectually disabled, because this Court's precedents and 18 U.S.C. 3596(c) both prohibit the execution of that class of federal defendants. The United States also has a broader interest in ensuring that States are not unduly restricted from pursuing and carrying out the death penalty as "an essential tool for deterring and punishing those who would commit the most heinous crimes." Exec. Order No. 14,164, 90 Fed. Reg. 8463, 8463 (Jan. 30, 2025).

## INTRODUCTION

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of individuals who are intellectually disabled. But *Atkins* expressly reserved to governments "the task of developing appropriate ways to enforce" that prohibition. *Id.* at 317. Like almost every death-penalty jurisdiction, Alabama has exercised that discretion to define intellectual disability as involving three distinct elements—the first of which is significantly subaverage intellectual functioning, generally meaning an IQ of 70 or below. And like the overwhelming majority of death-penalty jurisdictions, Alabama places the burden of proof on prisoners, requiring an *Atkins* claimant to show each element by a preponderance of the evidence.

Convicted of a brutal murder and sentenced to death, Joseph Clifton Smith sought to escape that sentence by raising an *Atkins* claim. To satisfy its first element, he put forward five IQ tests, with scores of 75, 74, 72, 78, and 74. That should have been the end of this case. In proffering five IQ scores all above 70—including one well above—respondent did not carry his burden under Alabama law to show his actual IQ is likely 70 or below.

Alabama's evidentiary framework fits comfortably within this Court's precedents. Under *Atkins*, a government may place the burden of proof on the prisoner. And where multiple IQ tests are at issue, the question becomes whether those scores—viewed collectively—establish that the prisoner has discharged his burden under state or federal law. That natural application of a burden of proof tracks sound practice and common sense. Similar to polling in an election, multiple IQ test scores often produce a more accurate image than any single test score does in isolation. And nothing in this

Court's Eighth Amendment jurisprudence compels that courts blind themselves from looking at that complete picture, or forbids governments from setting up frameworks that require courts to perform such an analysis.

A number of circuits and States, however, have read *Atkins*'s progeny—*Hall* v. *Florida*, 572 U.S. 701 (2014), and *Moore* v. *Texas*, 581 U.S. 1 (2017)—as foreclosing this approach, and stripping from governments the discretion *Atkins* promised. These courts have taken *Hall* and *Moore* as mandating some form of a one-low-score rule, where so long as a prisoner obtains one IQ test at the margins, he proves deficient intellectual functioning for purposes of *Atkins*. That badly misreads this Court's cases. Neither *Hall* nor *Moore* jettisoned common state or federal frameworks for proving intellectual disability. Nor did either decision preclude courts from considering multiple IQ test scores collectively. To the contrary, both *Hall* and *Moore* affirm that States and the federal government play a "critical role" in defining the scope of intellectual disability, *Hall*, 572 U.S. at 719, and retain "flexibility" in setting the substance and procedures for *Atkins* claims, *Moore*, 581 U.S. at 20.

Best read, *Hall* and *Moore* do not impose a single approach for using IQ tests to determine intellectual disability. Each simply corrected specific instances of States misusing IQ tests on their own terms, by ignoring or improperly altering their margins of error. By contrast, a framework that evaluates multiple IQ scores collectively suffers neither of those infirmities: In fact, its leading virtue is how it refines possible error ranges.

The decision below misapplied *Hall* and *Moore*. Despite respondent's five IQ scores above 70, the court of appeals nonetheless let his *Atkins* claim continue—and in fact, succeed. It did so on the view that all a prisoner

must do to establish deficient intellectual functioning is show that his true IQ "could" be 70 or below, regardless of what state law provides. Pet. App. 6a. And because respondent had at least one IQ test within this range, the court proceeded to shift the burden to Alabama to perform the Sisyphean task of "rul[ing] out the possibility" that respondent's intellectual functioning is deficient. *Ibid.* While the court purported to disclaim the one-low-score rule, its variant is no better: Rather than improperly treating one low score as dispositive, it uses such a score to improperly flip the burden to the government in a way that cannot meaningfully be satisfied.

To the extent *Hall* and *Moore* require any variant of a one-low-score rule, those cases should be reconsidered. They bear no resemblance to how this Court now approaches the Eighth Amendment. They ground their constitutional holdings in the views of select classes of supposed experts, without any attempt to adhere to the Amendment's original meaning. And from those fraught beginnings, *Hall* and *Moore* have only sown confusion. If those cases validate patently defective *Atkins* claims like respondent's, they should be overruled.

**STATEMENT**

1. a. In November 1997, respondent heard that Durk Van Dam was carrying $1500 in cash, and decided to murder him for it. 795 So. 2d 788, 796. Police found Van Dam's body in his pickup truck in a wooded area in Mobile County, Alabama. *Ibid.* Van Dam died as a result of "35 different blunt-force injuries to his body." *Ibid.* He had been mutilated by a power saw, and died with a "large hemorrhage beneath his scalp," brain swelling, rib fractures, and a collapsed lung. *Ibid.* Respondent robbed Van Dam of what he had: About $140, plus the boots and work tools he left in his truck. *Ibid.*

Respondent had been out of prison for only two days when he murdered Van Dam. 795 So. 2d at 796-797 & n.1. At first, respondent denied having any part in the murder; but he later confessed to participating in the killing, and indeed bragged about it to others. *Id.* at 796-797. A jury found him guilty of capital murder. *Ibid.*

b. During the penalty phase, respondent called several witnesses. 620 Fed. Appx. 734, 737-739. Dr. James Chudy, a clinical psychologist who evaluated respondent and reviewed his school and jail records, testified that he had administered a Wechsler Adult Intelligence Scale – Revised (WAIS-R) test, which showed that respondent had a full-scale IQ of 72. *Id.* at 738. Based on its standard error of measurement (SEM), Dr. Chudy explained that respondent's IQ could be as high as 75 or as low as 69. *Ibid.* Respondent also introduced school records showing that at age 12, he obtained IQ scores of 75 and 74 on Wechsler Intelligence Scale for Children (WISC-R) tests. *Ibid.* Along with five other independent diagnoses, Dr. Chudy diagnosed respondent as having "borderline intellectual functioning." *Id.* at 738-739.

The jury recommended a sentence of death. 620 Fed. Appx. at 739. The sentencing court accepted that advisory verdict and ordered that sentence. *Id.* at 740-742.

c. On direct appeal, the Alabama Court of Criminal Appeals affirmed in full. 795 So. 2d at 842. The Alabama Supreme Court denied his petition for a writ of certiorari. *Ibid.* This Court did so too. 534 U.S. 872.

2. Following *Atkins*, respondent sought state collateral relief. 71 So. 3d 12, 17. The trial court summarily dismissed his claim. *Ibid.* The Alabama Court of Criminal Appeals affirmed. *Id.* at 35. It explained that Alabama requires *Atkins* claimants to make three show-

ings: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)"; (2) "significant deficits in adaptive behavior"; and (3) that these deficits "manifested themselves" before the age of 18. *Id.* at 17 (citing *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), cert. denied, 540 U.S. 830 (2003)). Alabama also requires *Atkins* claimants to prove each prong by a preponderance of the evidence. *Byrd* v. *State*, 78 So. 3d 445, 450-452 (Ala. Crim. App. 2009), cert. denied, 565 U.S. 1205 (2012). The court held that respondent did not carry his burden as to the first two prongs. 71 So. 3d at 19-21.

3. a. In 2011, respondent filed an amended petition for post-conviction relief under 28 U.S.C. 2254 in the United States District Court for the Southern District of Alabama. 2013 WL 5446032, at *1. The court determined that the state court did not unreasonably apply federal law in finding that respondent failed to carry his burden on the first prong. *Id.* at *28-*29 & n.25. It did not address any other part of *Atkins*. See *id.* at *29 n.26.

b. The court of appeals granted a certificate of appealability and reversed. 620 Fed. Appx. at 745, 751-752. The court held that the Alabama Court of Criminal Appeals' intellectual-functioning finding was an "unreasonable determination of the facts." *Id.* at 750. In the Eleventh Circuit's view, "the problem for the State here is that the trial evidence showed that [respondent's] IQ score could be as low as 69 given a standard error of measurement of plus-or-minus three points." *Id.* at 749-750. The court of appeals then remanded to the district court for further evidentiary proceedings. *Id.* at 751.

4. a. On remand, the district court held an evidentiary hearing. Pet. App. 65a. One of respondent's witnesses, Dr. John Fabian, testified that he had assessed respondent's IQ, and respondent had obtained a score

of 78 on the Stanford-Binet Intelligence Scale, Fifth Edition test. *Id.* at 26a. The State's witness, Dr. Glen King, testified that his assessment of respondent yielded a score of 74 on the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) test. *Id.* at 26a-27a. At this point, respondent had taken five IQ tests over the course of his life, and had received full-scale scores of 75, 74, 72, 78, and 74 (in that order). *Id.* at 27a. The State's expert, Dr. King, testified that having "five IQ scores" obtained "over a lengthy period of time by different examiners under different conditions" was compelling evidence that respondent's "true IQ" was above that of someone who is intellectually disabled. *Id.* at 70a.

Following the hearing, the district court determined that respondent is intellectually disabled, granted respondent's Section 2254 petition, and vacated his death sentence. Pet. App. 63a-97a. Accounting for "the standard error inherent in IQ tests," the court found that respondent's lowest test score "could mean his IQ is actually as low as 69." *Id.* at 68a. It thus determined that "additional evidence must be considered," including evidence of respondent's adaptive deficits. *Id.* at 70a. The court further found that respondent had deficits in his adaptive behavior, and that respondent's deficits manifested before he turned 18. *Id.* at 92a; see *id.* at 75a-96a.

b. The court of appeals affirmed. Pet. App. 18a-57a. The court rejected petitioner's argument that the district court had failed to hold respondent to his burden of proof under Alabama law. *Id.* at 43a. The court maintained that, under *Hall* and *Moore*, respondent "needed to prove only that the lower end of his standard-error range is equal to or less than 70." *Id.* at 44a; see, *e.g.*, *id.* at 43a-45a. Because respondent had obtained one IQ

test score meeting that standard (the 72), the court concluded that "the district court had to move on to assess [respondent's] adaptive deficits." *Id.* at 45a.

5. This Court granted the State's petition for a writ of certiorari, vacated the judgment below, and remanded. Pet. App. 10a-13a. The Court explained that the court of appeals' decision could be read in one of two ways. On the one hand, it could be read "to afford conclusive weight to the fact that the lower end of the standard-error range for [respondent's] lowest IQ score is 69." *Id.* at 12a. On the other, it could "suggest a more holistic approach to multiple IQ scores that considers the relevant evidence, including as appropriate any relevant expert testimony." *Id.* at 13a. This Court remanded to the court of appeals to clarify the basis of its decision, with Justices Thomas and Gorsuch noting that they would have set the case for argument. *Ibid.*

6. Ten days later, the court of appeals issued a new opinion. Pet. App. 1a-9a. The court insisted that it had applied a "'holistic approach,'" and "reject[ed] any suggestion" the first prong of the test for intellectual disability is automatically satisfied whenever "the lower end of the standard-error range for [the] lowest of multiple IQ scores is 69." *Id.* at 2a. Nevertheless, where at least one IQ test score does fall within that range, the court read *Hall* and *Moore* to effectively shift the burden to the State to "foreclose" any chance the prisoner has deficient intellectual functioning. *Id.* at 5a. And because respondent's other "IQ scores could not rule out [that] possibility," the court held that respondent satisfied his burden under *Atkins*, and it was proper to move to "additional evidence of [his] intellectual disability, including evidence" of his "adaptive deficiencies." *Id.* at 6a.

## SUMMARY OF ARGUMENT

I. In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), this Court held that the Eighth Amendment prohibits the execution of individuals who are intellectually disabled. But it charged the federal and state governments with providing content to that command, reserving to them "the task of developing appropriate ways to enforce [its] constitutional restriction." *Id.* at 317. And this Court has since reaffirmed that under *Atkins*, governments play a "critical role" in defining intellectual disability, *Hall* v. *Florida*, 572 U.S. 701, 719 (2014), and retain "flexibility" in crafting the procedures for evaluating *Atkins* claims, *Moore* v. *Texas*, 581 U.S. 1, 20 (2017).

*Atkins*'s conferral of significant discretion to governments in determining the standards for intellectual disability is essential to that decision. It preserves the traditional role of legislatures in setting the bounds of criminal sanction. It is consistent with how the Constitution otherwise cabins judicial power, assigning matters of moral culpability to the people and their representatives, not courts. And it limits the extent to which this Court's cases go beyond the Eighth Amendment's original meaning. *Hall* and *Moore* are best read as respecting this conferral of discretion, not eviscerating it.

II. Exercising that discretion, governments may fashion evidentiary frameworks that allow courts to assess multiple IQ test scores collectively, when deciding if a party has discharged its burden of proof under state or federal law. That approach tracks sound practice and common sense: Multiple IQ scores often say more about a person collectively than any one does alone. Requiring a prisoner to prove his *Atkins* claim in light of all his IQ scores is the precise sort of policy judgment *Atkins* permits the federal and state governments to adopt.

Some courts, however, have read *Hall* and *Moore* as foreclosing this approach. On their view, this Court has established a constitutional rule where a prisoner shows deficient intellectual functioning whenever he submits a single IQ score whose error range includes any scores of 70 or below. Or as the court below framed it, the government bears the burden of definitively ruling out deficient intellectual functioning whenever a prisoner marshals such a score. Either way, that is wrong. *Hall* and *Moore* did not impose any specific rule of proof as a matter of constitutional law. They did not implicitly blue-pencil the predominant evidentiary frameworks governing death-penalty jurisdictions. And they did not compel courts to ignore what a prisoner's full set of IQ scores reveal collectively, and instead attach conclusive significance to just the lowest range of the lowest score.

Under this Court's precedent, respondent is eligible for death. In obtaining five IQ scores all above 70, respondent did not meet his burden of proving his IQ was likely 70 or below. With no refuge in science or statistics, the court of appeals based its ruling entirely on its misreading of *Hall* and *Moore*. This Court should correct that misimpression, and hold that Alabama may carry out respondent's long-delayed capital sentence.

III. To the extent *Hall* and *Moore* mandate any variant of a one-low-test rule, they should be overruled. Neither *Hall* nor *Moore* made any effort to justify its constitutional holding by the text or history of the Eighth Amendment. Both simply gave constitutional force to the views of professed experts. And from those improvident origins, *Hall* and *Moore* have proven exceedingly difficult to implement. If *Hall* and *Moore* indeed cut so broadly, and undermine the very discretion that *Atkins* promised, those cases should be repudiated.

## ARGUMENT

### I. THE EIGHTH AMENDMENT AFFORDS GOVERNMENTS SIGNIFICANT DISCRETION IN DETERMINING INTELLECTUAL DISABILITY

#### A. This Court's Current Approach To The Eighth Amendment Prioritizes Its Original Meaning

The Eighth Amendment provides that "cruel and unusual punishments" shall not be "inflicted." U.S. Const. Amend. VIII. As originally understood, the Amendment was trained on outmoded punishments that deliberately superadded pain. *Bucklew* v. *Precythe*, 587 U.S. 119, 130 (2019). It was a prophylactic measure to guard against the evils of old; not a device to transform society based on evolving norms not yet enacted into law. See *City of Grants Pass* v. *Johnson*, 603 U.S. 520, 542 (2024).

This Court followed that traditional understanding of the Eighth Amendment for the first 150-plus years of the Republic. See, *e.g.*, *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 463-464 (1947) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson* v. *Utah*, 99 U.S. 130, 135-136 (1879). But starting in the mid-twentieth century, this Court charted a new path. In *Trop* v. *Dulles*, 356 U.S. 86 (1958), a plurality asserted that the Eighth Amendment draws its content not from text or history, but instead from "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. And over time, that "evolving standards of decency" test became the rule of decision for a host of Eighth Amendment challenges. See, *e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97, 102-103 (1976).

*Trop*'s "evolving standards of decency" test has been long (and harshly) criticized as malleable, results-oriented, and divorced from concrete legal authority. See, *e.g.*, *Miller* v. *Alabama*, 567 U.S. 460, 510-511 (2012)

(Alito, J., dissenting). Efforts to anchor this approach in more objective indicia—such as state law—have proven illusory in practice, and all too often descended into the majority's "subjective views" of "our Nation's moral standards." *Roper* v. *Simmons*, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting). As Justice Scalia later put it: "[*Trop*] has caused more mischief to our jurisprudence, to our federal system, and to our society than any other [precedent] that comes to mind." *Glossip* v. *Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring).

This Court has thus unsurprisingly moved away from *Trop* in recent years, and has returned to an approach "confine[d]" by the "text [and] history" of the Eighth Amendment. *Grants Pass*, 603 U.S. at 551; see *id.* at 542-543. That development is well taken. It treats the Eighth Amendment on par with other constitutional rights. See, *e.g.*, *New York State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 17 (2022). It restores this Court's function to its proper role in our system of government. See *Grants Pass*, 603 U.S. at 552, 557. And it likewise returns the primary authority over criminal sanction to those who are politically accountable. See *Kansas* v. *Hendricks*, 521 U.S. 346, 359 (1997).

### B. *Atkins* Broke From The Eighth Amendment's Original Meaning, But Preserved Governments' Significant Discretion In Determining Intellectual Disability

*Atkins* derives from *Trop*'s moribund framework. There, this Court held that the Eighth Amendment categorically bars the execution of any individual who is intellectually disabled. *Atkins* v. *Virginia*, 536 U.S. 304, 321 (2002). The Court did not purport to ground that ruling in the text or history of the Eighth Amendment. Instead, the Court justified its decision wholly as the product of society's "evolving standards of decency"—

which the Court discerned from a supposed "national consensus" of state legislative practice as well as the Court's "own judgment" on this important moral question. See *id.* at 311-313. In so doing, the Court overruled *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), which had held just 13 years earlier that the Eighth Amendment did *not* categorically bar such executions. *Id.* at 335.

Even so, while *Atkins* announced a general "constitutional restriction" on executing the intellectually disabled, it left "to the State[s]" the task of "determining which offenders are in fact [disabled]." 536 U.S. at 317. This "approach" mirrors the Court's approach to its decision to bar executing the insane, where its precedent sets a general prohibition, but States—and, for federal capital crimes, the federal government—are mainly tasked with defining who falls within that category, and the procedures for identifying such persons. *Ibid.*

That conferral of discretion should be understood broadly. Indeed, *Atkins* itself said so, deliberately declining to "provide definitive procedural or substantive guides for determining" intellectual disability, and instead charging the States with that core "task." *Bobby* v. *Bies*, 556 U.S. 825, 831 (2009). This Court's disavowal of a rigid mandate also reflects the background constitutional principle that doctrines of "criminal responsibility" are foremost the "province of the States." *Powell* v. *Texas*, 392 U.S. 514, 536 (1968) (plurality opinion).

Preserving significant discretion for governments is also necessary to minimize the distance between *Atkins* and the Eighth Amendment's original meaning. Again, *Atkins* did not even attempt to ground its holding in that Amendment's text or history. Nor could it. At common law, "[o]nly the *severely* or *profoundly*" intellectually disabled were immune from criminal liability.

536 U.S. at 340 (Scalia, J., dissenting). In broadening that class to those with far less severe intellectual disability, *Atkins* not only broke from this history, but also created a novel category of defendants with little parallel elsewhere in law—those competent enough to be punished for their actions (even severely so), yet nonetheless shielded from capital punishment alone. *Id.* at 350-351.

The force of that constitutional error is partly mitigated when governments retain the leading role in determining intellectual disability, with respect to both its substantive definition and the procedures for identifying it. By contrast, reading *Atkins* broadly—where the federal courts gradually decide for themselves the meaning of intellectual disability, and how to prove it—would wrongly cabin the "test" for intellectual disability in "constitutional terms," and pretermit the otherwise "productive dialogue between law and psychiatry" that would take place across legislatures. *Powell*, 392 U.S. at 536-537 (plurality opinion). It also would conflict with how this Court has recently handled other precedents that are out of step with its current approach to the Eighth Amendment. Even if it is deemed unnecessary to "reconsider" a past precedent, this Court has at minimum declined to extend an erroneous decision by construing it broadly, thereby departing even further from the Constitution's original meaning. *Grants Pass*, 603 U.S. at 546; cf. *Jones* v. *Mississippi*, 593 U.S. 98, 110-112 & n.4 (2021). The same course is warranted in this case. While Alabama has not asked this Court to overrule *Atkins*, there is still every reason to read its core prohibition narrowly, and its reservation of discretion broadly.

### C. *Hall* And *Moore* Impose Narrow Limits On Governments' Otherwise Significant Discretion Under *Atkins*

This Court expounded the meaning of *Atkins* in *Hall* v. *Florida*, 572 U.S. 701 (2014), and *Moore* v. *Texas*, 581 U.S. 1 (2017). Those cases, much like *Atkins* itself, are best understood narrowly—conditioning, but otherwise preserving, the significant discretion reserved for governments in determining intellectual disability.

In *Hall*, this Court rejected a "rigid rule" employed by Florida that "foreclosed" all "further exploration of intellectual disability" unless the prisoner obtained an IQ score of 70 or below. 572 U.S. at 704, 724. The Court held that this approach was unconstitutional, because it restricted courts from considering the test's SEM and accompanying range of scores, contrary to a professional medical consensus. *Id.* at 722-724. But the Court did not question that governments could place the burden of proof on prisoners to show intellectual disability or define deficient intellectual functioning as an IQ of 70 or below. See *id.* at 711. Nor did it bar governments from ever treating an IQ score as dispositive—so long as it was high enough to clear 70 with its SEM. *Id.* at 715; see Oral Arg. Tr. at 9, *Hall*, *supra* (No. 12-10882) (Hall conceding a State could use cutoff of 76). *Hall* instead stands for the limited proposition that, under *Atkins*, a government cannot rely on IQ scores without accounting for their SEM. See *Hall*, 572 U.S. at 724. So there, analyzing only one of Hall's tests, this Court held that Florida could not treat his score of 71 as foreclosing his claim. *Ibid.*; see *id.* at 734 (Alito, J., dissenting).

*Moore* is similar to *Hall*. There, the Court rejected the Texas Court of Criminal Appeals' (CCA) reliance on a series of evidentiary factors (the "*Briseno* factors") that the Court perceived as outdated, impermissibly

based on lay perceptions of intellectual disability, and likewise out of step with medical consensus. 581 U.S. at 6. Although these factors (and indeed, *Moore* itself) principally concerned the adaptive-functioning prong of intellectual disability, the Court concluded that they "pervasively infected" every part of the "CCA's analysis." *Id.* at 21. Of relevance here, while the CCA recognized IQ as a range (consistent with *Hall*), it wrongly used the *Briseno* factors to discount the lower end of that range. *Id.* at 14-15. *Moore* thus held that a court cannot use such "wholly nonclinical" factors—what it branded "sources of imprecision"—to "*narrow* the test-specific standard-error range." *Id.* at 14, 20. And it set aside the CCA's intellectual-functioning finding, which discounted Moore's score of 74 on that basis. *Id.* at 14.

The common—but thin—thread across these two cases is that a State cannot adopt a rule that "misuses [an] IQ score on its own terms." *Hall*, 572 U.S. at 723. A State cannot insist on using IQ as a fixed number, when the test's "own design" treats it as a range. *Id.* at 724. Nor can it alter that range based on "wholly nonclinical" factors untied to any source. *Moore*, 581 U.S. at 20. True, once correcting these discrete defects, the Court said it was proper to "move on" to consider the other elements of intellectual disability, given the claimants' IQ scores were at the borderline. *Id.* at 14; see *Hall*, 572 U.S. at 723 (similar). But courts (including the court below) have mistakenly seized on that language as holding that a single low IQ score is constitutionally sufficient at prong one. That is wrong. See Pt. II.B, *infra*. *Hall* and *Moore* did not displace common evidentiary frameworks for evaluating intellectual disability, which place the burden of proof on prisoners. Nor did they analyze, let alone answer, how courts should apply those

frameworks when multiple IQ test scores are at issue. *Moore*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting).

Most fundamental, neither *Hall* nor *Moore* upset the central premise of *Atkins*: It is politically accountable governments, not the federal courts, that are primarily responsible for determining what qualifies as intellectual disability. While governments cannot have "unfettered" discretion in this task, lest *Atkins* might be rendered a "nullity," they play a "critical role" in deciding "how intellectual disability should be measured and assessed." *Hall*, 572 U.S. at 719, 721. And in performing that task, this Court's cases afford governments "flexibility" as they devise the substance and procedures surrounding *Atkins*'s enforcement. *Moore*, 581 U.S. at 20.

## II. THE EIGHTH AMENDMENT DOES NOT PROHIBIT GOVERNMENTS FROM EVALAUTING MULTIPLE IQ TEST SCORES COLLECTIVELY IN DETERMINING INTELLECTUAL DISABILITY

### A. Governments Should Be Able To Evaluate Multiple IQ Scores Collectively For *Atkins* Claimants

"This Court has not specified how courts should evaluate multiple IQ scores." *Hamm* v. *Smith*, 604 U.S. 1, 2 (2024). The answer is that courts should follow whatever is provided for under state or federal law, so long as that law does not conflict with the narrow constraints of *Atkins*, *Hall*, and *Moore*. A government thus may place the burden of proof on the prisoner to "show" he belongs to *Atkins*'s "protected class." *Montgomery* v. *Louisiana*, 577 U.S. 190, 210 (2016). Likewise, a government may define intellectual disability by three distinct "elements"—including one for significantly subaverage intellectual functioning, as defined primarily by IQ. *Moore*, 581 U.S. at 7. And in determining whether

a prisoner has carried his burden on that first prong, a court may take stock of the full range of that prisoner's IQ scores to see whether he has adequately shown deficient intellectual functioning—*i.e.*, an IQ of 70 or below.

It is not uncommon for lower federal courts to assess IQ tests collectively in assessing whether a prisoner has satisfied his burden at prong one. See, *e.g.*, *Black* v. *Carpenter*, 866 F.3d 734, 748-749 (6th Cir. 2017), cert. denied, 584 U.S. 1015 (2018) (finding that defendant did not prove deficient intellectual functioning given full range of tests even with some at margins); *McManus* v. *Neal*, 779 F.3d 634, 652 (7th Cir. 2015) (similar); *Garcia* v. *Stephens*, 757 F.3d 220, 226 (5th Cir. 2014), cert. denied, 574 U.S. 1193 (2015) (similar). So too state courts. See, *e.g.*, *Pizzuto* v. *State*, 484 P.3d 823, 831-832 (Idaho) (endorsing case that derived range from multiple tests), cert. denied, 142 S. Ct. 601 (2021); *State* v. *Escalante-Orozco*, 386 P.3d 798, 834 (Ariz.) (looking to "median" across scores), cert. denied, 583 U.S. 871 (2017); *Ex parte Smith*, 213 So. 3d 313, 317 (Ala. 2010) ("average").

This makes good sense: Multiple IQ scores can give a better sense of a person's true IQ than a single score. "The pattern of test scores is more important than the score on any given test." Allen Frances, *Essentials of Psychiatric Diagnosis: Responding to the Challenge of DSM-5*, at 31 (2013). That is because "[u]ncertainty about the true score declines as more measurements are made," such that the "SEM for a single score is greater than the standard error of the average of several scores." David H. Kaye, *Deadly statistics: quantifying an "unacceptable risk" in capital punishment*, 16 Law, Probability & Risk 7, 29-30 (2017). Accordingly, when "multiple reliable and valid IQ test scores are available," then "[a]ssessment professionals should integrate

the multiple scores" as part of more accurately identifying that person's "general level of intellectual functioning." Kevin S. McGrew, *Intellectual Functioning,* reprinted in *The Death Penalty and Intellectual Disability* 85, 105 (Edward A. Polloway ed., 2015); see also, *e.g.*, *Hall*, 572 U.S. at 742 & n.13 (Alito, J., dissenting).

This is not to say the Eighth Amendment prescribes a specific approach to analyzing multiple IQ tests, be it averaging or a composite or taking the median. It does not. There are a number of "statistically sound" ways to evaluate "multiple scores." Kaye 30. But in the main, when a person has "multiple IQ tests over time," it is possible to "combine composite IQ test scores across batteries when the correlations between the instruments can be reasonably determined or estimated and the reliabilities for all test scores are available." Dale G. Watson, *Intelligence Testing*, reprinted in *The Death Penalty and Intellectual Disability* 113, 123-124 (Edward A. Polloway ed., 2015). Multiple IQ test scores can thus be refined into a single range that is more accurate than any one test in isolation. See W. J. Schneider, *Principles of Assessment of Aptitude and Achievement*, reprinted in *The Oxford Handbook of Child Psychological Assessment* 286, 289-291 (Donald H. Saklofske et al. eds., 2013) (cited favorably by *Hall*, 572 U.S. at 714).

Of course, it would fall to the factfinder to assess and weigh this sort of expert analysis. But the upshot for present purposes is that the Eighth Amendment allows that exercise. And in turn, a government may fashion an evidentiary framework that places the burden of proof on a prisoner, and requires him to demonstrate—one way or another—that his collective IQ test scores betray deficient intellectual functioning. Such a scheme fits comfortably within the discretion *Atkins* promised.

### B. This Court's Precedents Do Not Require Courts To Ignore A Prisoner's Complete Range Of IQ Test Scores

Some courts, however, have misread *Hall* and *Moore* as constitutionalizing a particular approach to multiple IQ scores and intellectual functioning. Under this one-low-test rule, whenever "the low end of an IQ score range falls at or below 70," courts must treat the intellectual functioning prong as satisfied—regardless of what state or federal law may otherwise provide—and "move on to consider [a prisoner's] adaptive functioning." *Jackson* v. *Payne*, 9 F.4th 646, 652 (8th Cir. 2021), cert. denied, 142 S. Ct. 2745 (2022); see, *e.g.*, *Pizzuto* v. *Yordy*, 947 F.3d 510, 520 n.8, 526-529 (9th Cir. 2019) (per curiam) (similar), cert. denied, 141 S. Ct. 661 (2020); *United States* v. *Roland*, 281 F. Supp. 3d 470, 503 (D.N.J. 2017) (prong one satisfied if "one valid IQ test score generates a range that falls to 70 or below").

That is not, and cannot be, correct. If a prisoner puts forward nine scores above 90, the Eighth Amendment does not require his *Atkins* claim to proceed if a tenth score is in the low-70s—or even in the high-60s. This Court's precedent does not require that absurd result either. In fact, in *Brumfield* v. *Cain*, 576 U.S. 305 (2015), the Court acknowledged that a "higher IQ test score" could foreclose an *Atkins* claim, even if the prisoner had another score at the margins. *Id.* at 316. The Court disagreed about whether the record included such a score; but all Justices agreed such a score could be part of a holistic analysis. *Id.* at 315-316.; *id.* at 336 (Thomas, J., dissenting). That makes good sense: High scores are often more reliable than low scores, because while there are many reasons why someone may underperform (*e.g.*, malingering), there are far fewer, if any, for materially *overperforming*. See Simon Whitaker,

*The Stability of IQ in People With Low Intellectual Ability: An Analysis of the Literature*, 46 Intellectual and Developmental Disabilities 120, 125-126 (Apr. 2008).

The courts that have adopted the one-low-score rule have misread a few lines from *Hall* and *Moore*. For instance, in *Hall*, this Court stated 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. And in *Moore*, the Court said that "[b]ecause the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning." 581 U.S. at 14. But in context, those lines cannot bear the weight put on them.

The sole "issue" in *Hall* was the use of a "strict IQ test score cutoff of 70." 572 U.S. at 712. The Court did not address, let alone condemn, Florida's evidentiary framework. Rather, it invalidated Florida's law because it failed to account for IQ tests' SEM. *Id.* at 714. But an approach that takes account of multiple IQ test scores collectively does not suffer from that vice; indeed, its *virtue* is that it better accounts for the SEM by refining any range of error so that it is more accurate than any one test in isolation. See Kaye 29 & n.142. Moreover, in concluding that a score just above 70 is not *per se* fatal to an *Atkins* claim, *Hall* did not hold that such a score is *per se* sufficient to satisfy the first prong of *Atkins*. To the contrary, *Hall* stressed that the "analysis of multiple IQ scores jointly" is a "complicated endeavor." 572 U.S. at 714. But if *Hall* mandated a categorical one-low-score rule, that would make no sense; the inquiry would be exceedingly and artificially simple.

*Moore* also did not blind courts from considering IQ scores collectively. There, the Court purported to apply *Hall*, not extend it; it thus did not transform a "complicated endeavor" into a mechanistic one. See 581 U.S. at 13. Rather, this Court reversed the Texas CCA because that court viewed the prisoner's IQ range through the same "*Briseno* factors" that "pervasively infected" the rest of its decision. *Id.* at 20-21. But in holding that a court cannot use "sources of imprecision"—such as "wholly nonclinical" factors—to "*narrow*" a prisoner's IQ test score "range," the Court never suggested it is improper to use *other IQ tests* to perform that function. *Id.* at 14, 20; see *id.* at 34 n.1 (Roberts, C.J., dissenting).

In *Hall* and *Moore*, this Court thus set aside each lower court's intellectual-functioning finding as corrupted by narrow misapplications of principles governing standard errors of measurement. In so doing, despite the broad language noted above, the Court did not silently adopt—as a matter of constitutional law—a rigid evidentiary rule at odds with the vast majority of death-penalty jurisdictions and with the discretion promised by *Atkins* itself. To be sure, the facts of *Hall* and *Moore* both involved multiple IQ test scores. But neither lower court decision was based on how those IQ scores interacted: *Hall* rested on a cut-off rule; *Moore* turned on the use of nonclinical factors (not other tests) to rule out the prisoner's lower range. And in reversing those particular errors, this Court did not further render an implicit holding about how to assess multiple IQ scores under *Atkins*. See *Hamm*, 604 U.S. at 2.

If anything, the one-low-score rule conflicts with the core reasoning of both *Hall* and *Moore*. Both cases rejected what this Court saw as arbitrary approaches, unmoored from the IQ tests themselves and surrounding

practice. But a rule that myopically focuses on the lowest end of the standard-error range of a prisoner's lowest score does just that. See pp. 18-19, *supra*. For that matter, if any single score were to have outsized significance, it should be the *highest* one, not the lowest. As noted, when there is variability among individualized tests that have a limited ability to guess at answers, "the higher scores are likely to be the more indicative, since there are many reasons why a given score might underestimate a person's intelligence, but no reason why scores should overestimate it." Frances 31.

Finally, while there is no basis to extend *Hall* or *Moore*, there is particularly no basis to extend them to preclude the consideration of multiple IQ scores collectively. Whatever constitutional significance attaches to the views of clinicians, the leading professional organizations have not addressed how to precisely assess multiple IQ scores in this context. See Kevin S. McGrew, *Is the Intellectual Functioning Component of AAIDD's 12th Manual Satisficing?*, 59 Intellectual and Developmental Disabilities 369, 369-370 (2021); see also Pet. Br. 25, 40-41. And there is no national consensus among States disapproving the consideration of multiple IQ scores together. See p. 18, *supra*; see also Pet. Br. 11-15, 27. This is the exact sort of matter the Constitution assigns to the "fruitful experimentation" of elected governments, not the "rigid" superintendence of the federal courts. *Powell*, 392 U.S. at 536-537 (plurality opinion).

**C. The Decision Below Is Wrong**

Offering scores of 75, 74, 72, 78, and 74, respondent did not show it was likely his true IQ was 70 or below. In allowing respondent's *Atkins* claim to proceed, the court of appeals misapplied this Court's precedents.

1. In its original opinion, the court of appeals expressly applied the one-low-score rule. It did so repeatedly. *E.g.*, Pet. App. 39a-40a ("*Hall* and *Moore* hold that when an offender's lowest IQ score, adjusted for the test's standard error of measurement, is equal to or less than 70, a court must move on and consider evidence of the offender's adaptive deficits."); see *id.* at 41a (making similar point in defending district court); *id.* at 43a-44a (three more times); *id.* at 17a (and again in stay denial).

On remand, the court of appeals purported to clarify its opinion as applying a more "holistic" review. Pet. App. 2a. But in substance, the court applied a close variant of the one-low-score rule. Instead of just stopping at respondent's lowest score, the court also asked whether the other IQ tests could "foreclose" or "rule out" the possibility that respondent's IQ score was 70 or below. *Id.* at 5a-6a. This tweaked approach is no better.

To start, it still inverts the burden that Alabama has properly placed on prisoners. Again, this Court has said that governments may place the burden on prisoners of demonstrating intellectual disability. See *Montgomery*, 577 U.S. at 210. And Alabama follows a near-uniform practice of States (plus the federal government) in doing just that. See *Hall*, 572 U.S. at 741 (Alito, J., dissenting). To that end, the question under Alabama law is not whether respondent has shown his IQ "could be less than or equal to 70." Pet. App. 7a. It is whether respondent has shown it is *more likely than not* his IQ is 70 or below. *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002), cert. denied, 540 U.S. 830 (2003). The court of appeals relied solely on *Hall* and *Moore* to relieve respondent of that burden, and shift it to Alabama—for the State to disprove the "possibility" that respondent

may have deficient intellectual functioning. The court had no authority to rewrite Alabama's law in that way.

Related, the decision below mirrors the mistake corrected in *Hall*: It misunderstands the nature of IQ tests. By their "own design," *Hall*, 572 U.S. at 724, IQ tests do not definitively "rule out" anything, Pet. App. 6a. An IQ score reflects a likely range of a person's true IQ. But even a score "significantly higher than 70" harbors the "possibility" that the person has an IQ below 70. *Black*, 866 F.3d at 748. It cannot "rule out" the small chance that the high score is anomalous, or a different borderline test is closer to an individual's true IQ. There is thus no practical difference between the court of appeals' revised framing, and the one-low-test rule it first applied; both treat a single low score as conclusive.

2. The judgment below should be reversed. Neither court below disputed that respondent's IQ was likely above 70. See Pet. App. 31a. Rightly so. But that should have been the end of the analysis under Alabama law.

It is true that one of respondent's IQ test scores—the 72—had a range whose lower end fell below 70. Pet. App. 68a. But as important, respondent has not shown that the range for any of his other tests did so; and all five were above 70, including one that was well above 70. See Pet. Br. 16-18. Further, the State submitted unrebutted expert testimony that assessed the collective force of these scores, and concluded the lowest part of respondent's lowest range should not control. As that expert explained, these "multiple sources of IQ over a long period of time," taken together, underscore that respondent likely "does not have significant subaverage intellectual functioning." Pet. App. 70a; see Pet. Br. 24. On the other side of the ledger, the court of appeals pointed to nothing to prove respondent could carry his

burden as to deficient intellectual functioning. Like the district court, its analysis rose—and fell—wholly on its misreading of what *Hall* and *Moore* together compel.

Of course, Alabama is free to structure its *Atkins* inquiry differently. *Moore*, 581 U.S. at 20. It could choose to adopt a policy broader than what the Eighth Amendment demands, like the one-low-test rule. It could also adopt a higher IQ cut-off, as Oklahoma has done, Okla. Stat. Ann. tit. 21 § 701.10b(C) (West 2019) (ending *Atkins* inquiry with any valid score of 76 or higher)—and as *Hall* itself contemplates as lawful. See *Hall*, 572 U.S. at 715. But here, Alabama has followed the overwhelming practice of States in (i) placing the burden of proof on the prisoner, and (ii) requiring him to prove each element of *Atkins* by a preponderance of the evidence. And under that common framework, the only possible conclusion—given respondent's collective IQ scores—is that respondent failed his burden and may be executed.

## III. IF *HALL* AND *MOORE* PROHIBIT GOVERNMENTS FROM EVALUATING IQ TEST SCORES COLLECTIVELY, THOSE CASES SHOULD BE OVERRULED

To the extent *Hall* and *Moore* constitutionalize any form of a one-low-score rule, or otherwise interfere with the natural application of a burden of proof, those cases would vitiate the discretion *Atkins* promised. While this Court does not lightly overturn its precedents, *stare decisis* is "not an inexorable command," and is "at its weakest" in constitutional cases. *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997). If *Hall* and *Moore* stretch as far as some have read them, they should be overruled. See *Dobbs* v. *Jackson Women's Health Organization*, 597 U.S. 215, 267-268 (2022) (detailing *stare decisis* factors).

Nature of Error. Both *Hall* and *Moore* are the products of an abandoned approach to constitutional interpretation. See p. 12, *supra*. *Atkins* itself was already a departure from the Eighth Amendment's original meaning. But *Atkins* at least tried to ground its holding in a "national consensus" of state legislation. See 536 U.S. at 312. *Hall* broke from even that constraint, and relied mainly on a consensus of "professional societies" to shape its view of the Eighth Amendment. 572 U.S. at 725 (Alito, J., dissenting) (emphasis omitted). And *Moore* built on that brittle foundation. There, the Court barely looked to "state legislative judgments," and instead based its ruling entirely on "clinical practice." 581 U.S. at 27-29 (Roberts, C.J., dissenting).

That was grievous error. The Eighth Amendment does not constitutionalize the views of select clinicians. To the extent *Trop*'s "evolving standards of decency" approach retains any legitimacy, it is only to the extent it enforces a national consensus first shaped by the people—*i.e.*, one defined by independent legislative enactments that emerge from the democratic process. See *Moore*, 581 U.S. at 26-27 (Roberts, C.J., dissenting). The Constitution does not elevate certain professional medical organizations into super-legislatures able to short-circuit that process; nor does it empower this Court to set aside the will of governments based on how a subset of Americans would approach that given issue. This Court has not hesitated to "overrule[] decisions that wrongly removed an issue from the people and the democratic process." *Dobbs*, 597 U.S. at 269. In divining constitutional rules based on the shifting views of a class of purported experts, *Hall* and *Moore* do just that.

Quality of Reasoning. If *Hall* and *Moore* constitutionally mandate a one-low-score rule for purposes of

*Atkins*, they stand on exceptionally weak grounds. To start, neither decision is based on any cogent legal principle—or at least one discernible to governments tasked with compliance. Both cases instead announced competing general propositions, and faulted States for failing to divine the right side of the divide. While the "legal determination of intellectual disability is distinct from a medical diagnosis," sometimes (but not always) the latter controls the former. *Hall*, 572 U.S. at 721. And while governments retain the ability to depart from "the views of medical experts," they cannot do so in a way that "disregard[s]" those views. *Moore*, 581 U.S. at 12-13. That know-it-when-you-see-it rule of decision is not sound constitutional reasoning.

Nor do *Hall* and *Moore* engage with the fundamental contradiction underlying those cases. Namely, neither *Hall* nor *Moore* disputes that governments may place the burden of proof on prisoners to show intellectual disability. But then both cases—again, if read to impose any version of a one-low-score rule—go on to adopt a rule irreconcilable with that practice. *Hall*, 572 U.S. at 741 (Alito, J., dissenting). If a prisoner must show it is more likely than not his true IQ is 70 or below, he can virtually never do so with scores all above that threshold, even if one or more are at the border. Something has to give: Either the burden holds (and the prisoner's *Atkins* claim fails), or it has been implicitly transformed (and the court may move to prong two). *Ibid.* Both *Hall* and *Moore*, however, fail to even recognize this tension.

Last, even on its own, the one-low-score rule has little to recommend. Taken literally, if a court must "move on" to consider adaptive functioning whenever "the lower end of [a prisoner's] score range falls at or below 70," *Moore*, 581 U.S. at 14, then a prisoner with 99 scores of

100 would satisfy the first prong of *Atkins* so long as his hundredth score was 72. That makes no sense. A prisoner is generally deemed to have deficient intellectual functioning when his *true IQ* is 70 or below. Fixating on the lowest end of the lowest score's range does not serve that inquiry—especially given that error ranges are bi-directional, and it is at least as possible someone's IQ is *higher* than his measured score. See Pet. Br. 35-36. The only rationale for such an approach would be to err on the side of caution above all else, and bar the execution of anyone whose intellectual functioning *may be* deficient—in essence, a beyond-all-doubt standard that the prisoner is not intellectually disabled, rather than a more-likely-than-not standard that he is—even if that shields many deserving criminals from constitutionally permissible punishment. But that sort of prophylactic standard is a policy judgment, not a constitutional mandate. Judges "have no basis for deciding that progress toward greater decency can move only in the direction of easing sanctions on the guilty." *Miller*, 567 U.S. at 495 (Roberts, C.J., dissenting).

Workability. As predicted, *Hall* and *Moore*'s opaque lines have proven unworkable. See *Hall*, 572 U.S. at 731 (Alito, J., dissenting); *Moore*, 581 U.S. at 29-30 (Roberts, C.J., dissenting). Courts cannot tell whether *Hall* and *Moore* now mandate some variant of a one-low-score rule with respect to intellectual functioning. See Pet. 16-19 (detailing split). Moreover, across both of those camps, there is confusion about whether a court must use one or two SEMs in calculating any test's lower range. See *United States* v. *Wilson*, 170 F. Supp. 3d 347, 365 (E.D.N.Y. 2016). And that confusion is only compounded with "multiple IQ test results." *Id.* at 366.

*Wilson* illustrates the problem. That case involved a man who killed two police officers, and was sentenced to death by a federal jury. *United States* v. *Whitten*, 610 F.3d 168, 173-175 (2d Cir. 2010). Over his life, Wilson had obtained seven IQ test scores between 76 and 84 (and one score of 70 that the district court set aside as an outlier). *United States* v. *Wilson*, 922 F. Supp. 2d 334, 358 (E.D.N.Y. 2013), on reconsideration, 170 F. Supp. 3d 347 (E.D.N.Y. 2016); *Wilson*, 170 F. Supp. 3d at 364. At first, the district court held that Wilson failed to carry his "burden." *Wilson*, 922 F. Supp. 2d at 360, 368. On remand following *Hall*, however, the court reversed itself. Making its best guess at whether "courts should apply one or two test-specific SEMs" under *Hall*, the court chose the latter, which brought the lower end of the range of two tests to 70 or below. *Wilson*, 170 F. Supp. 3d at 364-365. And reading *Hall* to hold that "the presence of even one score at or below 70 is sufficient," the court found this prong satisfied—and ultimately that Wilson was intellectually disabled. *Id.* at 364, 392. At no point did the court express confidence that it was correctly reading *Hall*. See *id.* at 359-360 & n.9, 362, 364, 366, 391 (noting points of confusion). But as a result, Wilson was able to avoid being brought to justice.

Other Areas of Law. *Hall* and *Moore* are doctrinal outliers at virtually every turn. They are completely inconsistent with this Court's current approach to the Eighth Amendment. See *Grants Pass*, 603 U.S. at 551. Indeed, they are not even consistent with how this Court has otherwise applied *Trop*. See p. 27, *supra*.

More broadly, *Hall* and *Moore* are irreconcilable with this Court's approach to the rest of the Constitution. For that, this Court looks to text, history, and tradition. *E.g.*, *Bruen*, 597 U.S. at 17. And to the extent some

other source should join that class, the ever-shifting and politically charged views of professional organizations should perhaps be the last place to start. See *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1836-1837 (2025); cf. Alabama Amicus Br. at 9-27, *Skrmetti*, *supra* (No. 23-477) (describing this dynamic). "[T]he American people and their representatives are entitled to disagree with those who hold themselves out as experts." *Skrmetti*, 145 S. Ct. at 1840 (Thomas, J., concurring); see *id.* at 1855 (Barrett, J., concurring). Thus, for the Eighth Amendment too, traditional legal tools should control its meaning—not the present views of a select group of experts.

Reliance and Practical Effect. There are no reliance interests justifying a one-low-score rule from *Hall* and *Moore*. No person has committed a murder because he thought a score of 72 will shield him from death. In fact, that degree of premeditation based on judicial precedent should itself refute a claim of intellectual disability.

By contrast, the broad reading of *Hall* and *Moore* inflicts serious harm on the federal and state governments. In particular, that reading significantly weakens the most important part of the intellectual-disability inquiry that a clear majority of death-penalty jurisdictions have adopted. The intellectual-functioning prong is the only objective part of the analysis, because it turns on concrete IQ scores, rather than subjective clinical judgments. Insisting on some objective element to anchor this analysis serves key penological ends by promoting "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). And the Eighth Amendment permits governments to make that choice. *Atkins*, 536 U.S. at 317. To the extent

*Hall* and *Moore* commandeer this process and hollow out its primary prong, they should be overruled.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

D. JOHN SAUER
*Solicitor General*
MATTHEW R. GALEOTTI
*Acting Assistant Attorney General*
HASHIM M. MOOPPAN
*Deputy Solicitor General*
HARRY S. GRAVER
*Assistant to the Solicitor General*
ANN O'CONNELL ADAMS
*Attorney*

AUGUST 2025