No. 12-10882

IN THE

Supreme Court of the United States

FREDDIE LEE HALL,

Petitioner,

v.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF FORMER JUDGES AND LAW ENFORCEMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

Amici curiae consist of over forty individuals who previously served as federal district court judges, federal appeals court judges, state trial and appellate court judges, United States Attorneys, and state attorneys general. They represent nearly two dozen States from across the country, and include both supporters and opponents of capital punishment, Democrats and Republicans, conservatives and liberals. What unites *Amici* is their fervent dedication to and interest in maintaining the fair administration and public legitimacy of the criminal justice system. The names, former titles, and years of service of these individuals are listed in Appendix A.

As individuals who have dedicated much of their lives to pursuing justice, *Amici* submit this brief in order to address several aspects of Florida's approach to mental retardation that, in addition to running afoul of this Court's precedents, threaten to undermine public confidence in the fair and equal administration of the criminal justice system.

First, although *Amici* believe strongly that the State and local jurisdictions must be given deference in the administration of the criminal justice system, they believe just as strongly that no one State should

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

be permitted to enforce the federal constitutional rights of criminal defendants in a manner that undercuts those constitutional protections. Florida's outlier approach to defining the class of persons with mental retardation protected by this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), is inconsistent with that of most other jurisdictions, and raises the prospect that criminal defendants in that State are entitled to lesser Eighth Amendment protections than elsewhere.

Second, although *Amici* are not experts in mental retardation and therefore do not advance any particular definition of mental retardation as the clinical standard, they are keenly interested in ensuring that issues affecting the core Eighth Amendment rights of criminal defendants are litigated and adjudicated in a manner that accounts for all relevant facts. In other Eighth Amendment contexts involving capital punishment, this Court has rejected procedural rules that unduly restrict courts from considering, and advocates from presenting, all relevant evidence bearing on the constitutional prohibition at issue. By making a defendant's intelligence quotient (IQ) test score a strict cutoff in a sentencing court's ability to determine mental retardation, Florida's system runs afoul of these precedents and threatens to undermine the reliability of fact-finding in cases where such reliability is needed most.

SUMMARY OF ARGUMENT

In *Atkins*, this Court invited the States to develop "'appropriate ways to enforce the constitutional restriction'" on executing persons with mental retardation. 536 U.S. at 317. Florida is one of a very few States that requires an IQ test score of 70 or below and otherwise precludes further consideration of evidence of mental retardation under *Atkins*. As a result, a criminal defendant's ability to assert his Eighth Amendment rights as a member of the class protected in *Atkins* is restricted, and the Eighth Amendment prohibition on executing persons with mental retardation applies more narrowly in Florida than it does elsewhere. Florida's approach should be invalidated for the following reasons.

First, Florida's outlier approach to defining mental retardation undercuts the Eighth Amendment right recognized in *Atkins*. This Court has never permitted a State to enforce a constitutional right in a manner that poses a substantial risk of undercutting that right, and it should not allow that to occur here. This is especially true in cases involving matters of life and death, where the need for public respect for and confidence in the criminal justice system is highest.

Second, Florida's approach to *Atkins* claims is procedurally flawed. By requiring an IQ test score of 70 or below and precluding other evidence of mental retardation if that rigid cutoff is not met, Florida's approach unduly restricts the consideration and introduction of other relevant evidence of mental

retardation. In other Eighth Amendment contexts involving capital punishment, including those in which difficult expert- and fact-intensive findings must be made, this Court has rejected procedural rules that unduly restrict courts from considering, and advocates from presenting, relevant evidence bearing on the constitutional prohibition at issue. These precedents recognize the paramount need for reliability in cases involving life and death. The Florida system ignores the teachings of these precedents and creates a risk that individuals protected by the Eighth Amendment will nevertheless be executed.

Finally, Florida's outlier approach undermines public confidence in the criminal justice system. That public confidence depends on the belief that core constitutional rights under the Eighth Amendment mean the same thing in different jurisdictions. Florida's approach here undercuts that public confidence by redefining the Eighth Amendment right recognized in *Atkins*, and arbitrarily precluding individuals who may have mental retardation from being able to present relevant evidence in support of their claims.

ARGUMENT

I. FLORIDA'S OUTLIER APPROACH TO DEFINING MENTAL RETARDATION IS INCONSISTENT WITH THIS COURT'S PRECEDENTS, INCLUDING *ATKINS*, AND UNDERMINES RESPECT FOR THE CRIMINAL JUSTICE SYSTEM

Since *Atkins* was decided, the States have developed different ways to "enforce the constitutional restriction" on executing persons with mental retardation. Florida is one of very few states that has required an IQ test score of 70 or below and treated such a score as a strict cutoff, absent which introduction of other evidence of mental retardation is precluded. This outlier approach has restricted the ability of criminal defendants in Florida to assert *Atkins* claims, with the result that the Eighth Amendment prohibition against executing persons with mental retardation applies more narrowly there than in other jurisdictions. Such disparity is not only inconsistent with this Court's Eighth Amendment jurisprudence, including *Atkins*, but also threatens to undermine public respect for the criminal justice system.

A. Among the States, Florida Has Taken an Unduly Restrictive Approach to Defining Mental Retardation Under *Atkins*

In recognizing an Eighth Amendment prohibition on executing persons with mental retardation, this Court cited clinical definitions of mental retardation that "requir[ed] not only

subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 U.S. at 318. Those definitions each recognized that an IQ test score of 70 or below is not necessary for a diagnosis of mental retardation. *Atkins* indicated that "'[m]ild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70," *id.* at 308 n.3, and that "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition," *id.* at 309 n.5.

Since *Atkins* was decided, the States have developed varying "ways to enforce the constitutional restriction" on executing persons with mental retardation. *Id.* at 317. While this variation has included different procedural means of "enforc[ing]" the Eighth Amendment prohibition,[2] a

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[2] *See* Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia: *Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DePaul L. Rev. 721, 724-25 (2008) (describing variation that "exists in the procedures used to determine whether a defendant is mentally retarded, including whether the ultimate decisionmaker should be judge or jury, whether the state or the defendant should bear the burden of proof, and whether the determination should be made pretrial or post-trial."); John H. Blume et al., *Of* Atkins *and* Men: *Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 691, 693-94 (2009) (describing *Atkins* as giving states authority over the procedures used to implement the

number of States have also – statutorily or by case law – expressly incorporated IQ test scores into the definition of mental retardation for purposes of their capital sentencing schemes. *See* Petitioner's Brief, Appendix B (describing approaches taken by the States to defining mental retardation).

Of these approaches, Florida stands with only a few other States in both (1) defining mental retardation in terms of an IQ test score no higher than 70 and (2) using this IQ test score as a strict cutoff precluding the consideration of other evidence of mental retardation. Thus, in Florida, if a defendant cannot demonstrate an IQ test score of 70 or below (*i.e.*, without accounting for any standard error of measurement), he may not present any other evidence of mental retardation for purposes of advancing an *Atkins* claim.[3] By failing to account for the standard error of measurement in measuring IQ, and then using an IQ test score of 70 as a rigid (and arbitrary) cutoff, Florida departs not only from the clinical definition of mental retardation set forth

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categorical exemption, "such as whether determinations of mental retardation should be made by a judge or by a jury, whether determinations should occur before or after guilt-innocence trials, which party bears the burden of proof, and what entitles a mental retardation claim to an evidentiary hearing or bars it by procedural default.") (footnotes omitted).

[3] *See* Fla. Stat. Ann. § 921.137(1) (2012); *Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007) (per curiam).

in *Atkins*, but from the approach taken by the vast majority of other jurisdictions.

The result is that the Eighth Amendment protection applies more narrowly to a criminal defendant simply by virtue of being prosecuted in Florida as opposed to another less restrictive jurisdiction. A defendant with an IQ test score of 71 might qualify as having mental retardation in California (a state with no bright-line IQ test score cutoff that instead takes into account the standard error of measurement inherent in the test), but not in Florida. *See Cherry v. State*, 959 So. 2d 702, 712-14 (Fla. 2007) (per curiam).

B. While States Can Develop Differing Procedural Mechanisms to Enforce a Constitutional Right, They May Not Redefine the Right Itself

Empowering the States to develop their own approaches to enforcing constitutional rights can be advantageous, as the States play an important role "as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *see generally* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1261 (2009) ("State autonomy helps create laboratories of democracy, diffuse power, foster choice, safeguard individual rights, and promote vibrant participatory opportunities for citizens." (footnotes omitted)). Yet, to be workable, such delegation requires the articulation of at least some constitutional "minimum," whether expressed in substantive or procedural terms. *See Panetti v.*

Quarterman, 551 U.S. 930, 950 (2007) ("the state court failed to provide petitioner with the minimum process required by *Ford*"); *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (stating that federal constitutional law "'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" (internal citation omitted)). Without some constitutional minimum, the States could adopt such divergent approaches to enforcing the constitutional right at issue that that right would lose coherent meaning or force. *Cf. id.* at 280 ("There is, of course, a federal interest in reducing . . . disuniformity in the application of federal law." (internal quotations omitted)); *Thompson v. Keohane*, 516 U.S. 99, 113, n.13 (1995) (describing benefit of "advancing uniform outcomes" and reducing "the area of uncertainty" regarding cherished constitutional rights).

In the Eighth Amendment context in particular, this Court has recognized that, while States may adopt their own procedural mechanisms to enforce a constitutional right, they may not redefine the substance of the right itself. Thus, since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court has imposed various categorical restrictions under the Eighth Amendment on a State's power to impose capital punishment. Yet, in none of these cases has this Court ever held or suggested that an individual State may redefine who or what falls within the protected category.

This is true of the line of cases holding that the Eighth Amendment forbids application of the death penalty to certain crimes. *See Coker v. Georgia*, 433

U.S. 584, 592 (1977) (plurality opinion) (holding that "a sentence of death [was] grossly disproportionate and excessive punishment for the crime of rape [of an adult woman] and [was] therefore forbidden by the Eighth Amendment as cruel and unusual punishment"); *Enmund v. Florida*, 458 U.S. 782, 787 (1982) (holding death was not a "valid penalty" for a defendant "who neither took life, attempted to take life, nor intended to take life"); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, [was] unconstitutional under the Eighth and Fourteenth Amendments").

It is also true of this Court's precedents proscribing the execution of certain types of offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), for example, where this Court held that "the death penalty is a disproportionate punishment for juveniles," *id.* at 564, the Court did not leave to the States the task of defining which offenders are "juveniles." Rather, it announced a uniform rule that no offender who was under the age of 18 when he committed his crime could be subject to execution. *Id.* at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

Although certain categories of crimes or offenders protected under the Eighth Amendment may be more difficult to delineate than others, the Court has never suggested that individual States may draw those lines in ways that vitiate the force of

those constitutional protections. As this Court stated in *Kennedy*, "The National Government and, beyond it, the separate States are bound by the proscriptive mandates of the Eighth Amendment to the Constitution of the United States, and *all* persons within those respective jurisdictions may invoke its protection." 554 U.S. at at 412 (emphasis added).

Ford v. Wainwright, 477 U.S. 399 (1986) – a case cited in *Atkins* for the proposition that States should be given "'the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences,'" *Atkins*, 536 U.S. at 317 (quoting *Ford*, 477 U.S. at 416-417) – provides no exception to this rule. In *Ford*, a majority of the Court held that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane." 477 U.S. at 409-10. A four-Justice plurality then considered whether the State's procedures for determining sanity were adequate to preclude federal redetermination of the constitutional issue, ultimately determining that they were not. *Id.* at 416. The Court then stated:

> We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences. It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of insanity. *Cf. Pate v.*

> *Robinson*, 383 U.S. 375, 387 (1966) (hearing on competency to stand trial required if "sufficient doubt" of competency exists). Other legitimate pragmatic considerations may also supply the boundaries of the procedural safeguards that feasibly can be provided. [¶] Yet the lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination.

Id. at 416-17 (plurality opinion).

This passage demonstrates the *Ford* plurality's view that the States should be allowed to develop various *procedures* to enforce the constitutional right, not that they should be allowed to define the substance of the right itself. [4] While the majority in

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[4] The distinction between substance and procedure is a familiar one. When construing the Rules Enabling Act, for instance, this Court has understood procedure to be "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer*, 380 U.S. 460, 464 (1965) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). Or, in another formulation, rules of procedure govern "the manner and the means" by which the litigants' rights are "enforced," whereas substance goes to "the rules of decision by which [the] court will adjudicate [those] rights." *Id.* at 465 (quoting *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 446 (1946)). Of course, the distinction between substance and procedure has very different implications in the present case as opposed to in the context of Rules Enabling Act. An *Atkins* claim, even if initially heard pursuant to state process in state court, is both federal and

Ford did not articulate a precise definition of "insanity," the Court later clarified that a prisoner must have at least a "rational understanding of the reason for the execution" before he may be put to death. *Panetti*, 551 U.S. at 958. The principles announced in *Panetti* – while not purporting to "set down a rule governing all competency determinations," *id.* at 960-61 – nevertheless provided a sufficient constitutional minimum against which to evaluate potential violations of the core right.

Atkins, as properly interpreted, is entirely consistent with these precedents. Quoting from the *Ford* plurality opinion, *Atkins* invited the States to determine for themselves the best procedural mechanisms to enforce the substantive constitutional right – not to re-define the constitutional right itself. To interpret *Atkins* otherwise would cede to Florida what is the exclusive province of this Court – "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

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substantive in nature. Therefore, federal substantive law must control.

C. Florida's Outlier Approach to Mental Retardation Improperly Redefines the Constitutional Right Recognized in *Atkins* By Unduly Restricting the Consideration of Relevant Evidence

Amici are not experts in mental retardation and therefore will not repeat the discussion in the Petitioner's Brief addressing how Florida's approach departs from the established clinical definition of mental retardation. (Petitioner's Br. 25-30, 34-43). Instead, *Amici* focus on a related structural flaw in Florida's approach that is of particular concern to them.

Under Florida's approach, a defendant must show an obtained IQ test score of 70 or below as a strict threshold requirement in the court's consideration of whether a defendant falls within the class of individuals protected in *Atkins*. If that threshold requirement is not satisfied, the fact-finder may not consider any other evidence of mental retardation. The imposition of such a threshold requirement need not necessarily be problematic, if set high enough to ensure that no potential members of the protected class will be excluded. In this case, however, Florida has established a threshold requirement that defendant possess an IQ test score no higher than 70, notwithstanding the *Atkins* Court's recognition that persons with mental retardation can have IQ test scores as high as 75. Regardless of what that cutoff should be, it is undisputed that an individual who tests above that cutoff could in fact possess an IQ below the cutoff, due to the inherent error of measurement in IQ

testing. Yet in Florida, such individuals are precluded from offering, and courts are precluded from considering, any additional evidence of mental retardation as a result of their above-70 test score.

Thus, it is not simply the specific IQ test score that Florida has adopted to form the outer limits of "subaverage intellectual functioning," but the fact that that IQ score is used as a gatekeeper to preclude the introduction of any further evidence (whether relating specifically to IQ or to the other components of mental retardation discussed in *Atkins*) that is problematic. As this Court emphasized in *Atkins*, and as is consistent with the established clinical view, mental retardation cannot be reduced solely to a defendant's measurable intelligence, but also involves "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 U.S. at 318. In Florida, however, evidence with respect to those other elements of mental retardation cannot be admitted by a claimant to inform the fact-finder's analysis, even with respect to individuals possessing an IQ test score within the upper range for mental retardation (70 to 75) recognized in *Atkins*.

This Court's approach in *Ford*, 477 U.S. 399, and *Panetti*, 551 U.S. 930, helps illuminate the deficiencies in Florida's system. In those cases, this Court explained how, once a defendant has made a threshold showing of insanity, he becomes entitled under the Eighth Amendment (as incorporated by the Fourteenth Amendment) to certain basic procedural due process, including a "full hearing" at

which the defendant can submit evidence and argument, in accordance with fundamental fairness. *Ford*, 477 U.S. at 426 (plurality opinion); *Panetti*, 551 U.S. at 949. In *Panetti*, this Court found that the petitioner had been denied this due process right, when he was not given an adequate opportunity to submit expert evidence in response to a report filed by a court-appointed expert. *See id.* at 949-50.

Although the procedural defect and substantive matter (mental incompetency as opposed to mental retardation) at issue in *Panetti* differ from those here, this Court's reasoning in *Panetti* is nevertheless instructive. That decision indicated that, while it may be permissible to require a defendant to make a threshold showing of membership in a protected Eighth Amendment class, that requirement cannot be set so high as to exclude potentially meritorious claims and members. And once the threshold showing has been made, a state may not unduly restrict what evidence can be presented as to whether a defendant falls within the protected class. This seems particularly true where, as was the case in *Panetti*, a fact-finder must resolve complex and nuanced psychological issues. In part for these reasons, the *Panetti* Court, while hesitant "to set down a rule governing all competency determinations," nevertheless rejected as unduly restrictive the state's "strict test for competency." 551 U.S. at 960-61. The same is true of the strict IQ test score requirement that Florida purports to impose on *Atkins* claims.

Florida's strict IQ test score cutoff also ignores the teachings of this Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny. These cases emphasize the need in capital cases – where reliability is paramount – for sentencers to be able to evaluate all relevant evidence of a defendant's character and record. *See id.* at 602-03 ("[W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is 'highly relevant – *if not essential* – to the selection of an appropriate sentence." (quoting *Williams v. New York*, 337 U.S. 241 (1949)); *Johnson v. Texas*, 509 U.S. 350, 361 (1993) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring)). Under these precedents, States may not bar the consideration of such evidence – including specifically evidence of mental retardation – "if the sentencer could reasonably find that it warrants a sentence less than death." *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004) (quoting *McKoy*, 494 U.S. at 441) (invalidating Texas's imposition of a "constitutional relevance" screening test for the

admissibility of mitigating evidence of mental retardation).[5]

Florida, however, precludes the introduction of relevant evidence of mental retardation simply because the defendant's obtained IQ test score is above 70. Given that such a defendant could still possess "significantly subaverage intellectual functioning," as defined in *Atkins*, Florida's failure to consider additional evidence of mental retardation, however strong, undermines the reliability of *Atkins* proceedings in Florida. If this Court was correct in the line of cases beginning with *Lockett* that, given the paramount need for reliability in capital cases, the Eighth Amendment requires sentencers to have access to all available evidence in assessing a defendant's character, there is no reason not to apply this same insight and logic to the question whether that defendant falls into the category of protected individuals recognized in *Atkins*.

Florida's general sentencing procedures in capital cases also show why removing Florida's strict IQ cutoff would not overwhelm sentencing courts

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[5] Consistent with these precedents, Florida accords defendants wide latitude to raise as a mitigating factor "any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Fla. Stat. § 921.141(6)(h) (allowing consideration as mitigating factor of "any other factors in the defendant's background that would mitigate against imposition of the death penalty").

with irrelevant information, for courts in Florida (and elsewhere) already must consider all mitigating information available about a defendant's character, under *Lockett*. Nor would the removal of a strict IQ cutoff prevent courts from closely scrutinizing *Atkins* claims to determine whether the claimants really do fall within the protected class. What removing Florida's strict IQ test score cutoff would do is allow sentencing courts to consider all of the relevant evidence about a defendant that is before them in determining whether the defendant has a valid *Atkins* claim. Precluding a sentencing court from being able to consider such additional evidence simply because a defendant's obtained score is over 70 is not only arbitrary but threatens to the undermine the reliability of fact-finding in cases where such reliability is needed most. *See California v. Brown*, 479 U.S. 538, 541 (1987) ("The Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."); John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J. L. & Pub. Pol'y 691, 689 (2009) (imposing death penalty on individuals who are in fact constitutionally ineligible would be "intolerable under the Eighth Amendment, which demands consistency and non-arbitrary application of punishment").

D. Florida's Outlier Approach Threatens to Undermine Public Confidence in the Criminal Justice System

Florida's outlier approach to defining mental retardation is not only inconsistent with this Court's precedents, but also threatens to undermine public confidence in and respect for the criminal justice system. Such public confidence and respect requires that the criminal justice system – and capital punishment, which the vast majority of States authorize – be administered in a manner that is not only fair but, just as importantly, broadly perceived as such. *See Kennedy*, 554 U.S. at 436 (describing need to "ensure consistency in determining who receives a death sentence.").

Such public confidence is, particularly with respect to capital punishment, already somewhat fragile. According to a recent poll, only fifty-two percent of Americans believe the death penalty is applied fairly, while forty percent believe it is applied unfairly. *See* Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More than 40 years*, Gallup Politics (Oct. 29, 2013), http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx. These figures reflect "deep[] concern[] about the risk of executing the innocent, about the fairness of the process, and about the inability of capital punishment to accomplish its basic purposes." Death Penalty Information Center, *A Crisis of Confidence: Americans' Doubts About the Death Penalty* 1 (June

2007), http://www.deathpenaltyinfo.org/CoC.pdf. [6] The negative publicity generated when offenders diagnosed with mental retardation are executed suggests that concerns regarding the fairness of capital punishment are particularly acute whenever the defendant in question suffers from a mental impairment or defect.[7]

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[6] Concerns about wrongful executions are particularly prevalent. Eighty-seven percent of Americans, for example, believe that innocent people have been executed in recent years. *See* Death Penalty Information Center, *supra*, at 5. Even in Texas, a state where support for the death penalty is relatively strong, one in eight people believes that wrongful death penalty convictions take place "a great deal of the time." Ross Ramsey, *UT/TT Poll: Texans Distrust Big Institutions on Privacy*, The Texas Tribune (Nov. 8, 2013), http://www.texastribune.org/2013/11/08/uttt-poll-texans-dont-trust-institutions-privacy/.

[7] *See, e.g.*, Lindsay C. Harrison, *Although Supreme Court Ruled It Unconstitutional, Georgia Inmate Has Hours to Live,* USA Today, July 14, 2013, http://www.usatoday.com/story/opinion/2013/07/14/mentally-retarded-inmate-death-penalty-column/2512025/; Trymaine Lee, *'Mentally Retarded' Killer Denied Stay of Execution*, MSNBC, July 10, 2013, http://www.msnbc.com/news-nation/mentally-retarded-killer-denied-stay-exe; Andrew Cohen, *Executing the Mentally Handicapped Is Illegal – Except When It Isn't*, The Atlantic, Apr. 23, 2013, http://www.theatlantic.com/national/archive/2013/04/executing-the-mentally-handicapped-is-illegal-except-when-it-isnt/275219/; Jordan Smith, *Smart Enough to Die*, The Austin Chronicle, Apr. 19, 2013, http://www.austinchronicle.com/news/2013-04-19/smart-enough-to-die/; David R. Dow, *Supreme Court Outlawed Executing Mentally Retarded, But Texas Does It Anyway*, The Daily Beast, Aug. 14, 2012, http://www.thedailybeast.com/articles/2012/08/14/supreme-cou

The public's confidence in the fair nationwide administration of capital punishment, and of the criminal justice system more generally, could be further undermined were this Court to permit Florida to re-define the Eighth Amendment right recognized in *Atkins* in a manner that arbitrarily excludes members of the protected class. The public is entitled to believe that the fundamental protections of the Eighth Amendment should not waver depending on where a defendant happens to be prosecuted.

CONCLUSION

For all of the foregoing reasons, *Amici* urge the Court to reverse the decision below.

(continued…)

rt-outlawed-executing-mentally-retarded-but-texas-does-it-anyway.html; Ed Pilkington, *Texas Set To Execute Death Row Inmate Diagnosed as 'Mentally Retarded'*, The Guardian, Aug. 5, 2012, http://www.theguardian.com/world/2012/aug/05/texas-death-row-mentally-retarded; John Rudolf, *Milton Mathis, Convicted Killer, Executed in Texas Despite Evidence of Retardation*, The Huffington Post, June 21, 2011, http://www.huffingtonpost.com/2011/06/21/milton-mathis-executed-killer_n_881885.html; Raymond Bonner & Sara Rimer, *Mentally Retarded Man Facing Texas Execution, N.Y. Times*, Nov. 12, 2000, http://www.nytimes.com/2000/11/12/us/mentally-retarded-man-facing-texas-execution-draws-wide-attention.html? pagewanted=all&src=pm.

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APPENDIX

APPENDIX A

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A. Bates Butler III
United States Attorney, District of Arizona (1980-1981); First Assistant United States Attorney, District of Arizona (1977-1980).

Edward Cahn
Judge, United States District Court, Eastern District of Pennsylvania (1974-1998), Chief Judge (1993-1998).

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United States Attorney, District of New Jersey (1999-2002); United States Attorney, Southern District of Illinois (2002); First Assistant United States Attorney, District of New Jersey (1994-1996); Assistant United States Attorney, Southern District of New York (1987 to 1994).

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Chief Justice and Associate Justice, North Carolina Supreme Court (1974-94).

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Justice, Supreme Court of Georgia (1989-2006), Chief Justice (2001-2005)

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United States District Judge, District of Massachusetts (1994–2011).

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Chief Judge, United States Court of Appeals for the Third Circuit (1987-1990); Judge, United States Court of Appeals for the Third Circuit (1970-1987).

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Judge, Fourth Judicial District of Minnesota (1984-2006).

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Associate Justice, California Supreme Court (1982-1987); Chief Justice, California Court of Appeals (1981-1982); Associate Justice, California Court of Appeals (1979-1981).

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Judge, United States Court of Appeals for the Sixth Circuit, 1979-2002; Assistant United States Attorney, Northern District of Ohio (1962-67).

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Judge, Florida Supreme Court (1987-1998) (Chief Justice 1996-1998); Judge, Florida Eleventh Circuit (1980-1987); Assistant State Attorney, Dade County, Florida (1960-1967).

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Presiding Judge, Sixth Municipal District, Circuit Court of Cook County, Illinois (1992–1992); Associate Judge, Circuit Court of Cook County (1989–1992).

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