No. 13-8004

IN THE

Supreme Court of the United States

RAMIRO HERNANDEZ, AKA RAMIRO HERNANDEZ-LLANAS,

Petitioner,

v.

WILLIAM T. STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PUBLIC LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth and Fourteenth Amendments prohibit a court deciding whether a defendant is mentally retarded and exempt from the death penalty under *Atkins v. Virginia* from considering the defendant's race or ethnicity.

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INTEREST OF AMICI[1]

Amici are scholars who teach and write about constitutional law, civil rights, criminal law, and science law and policy. Nita Farahany is Professor of Law, Genome Sciences & Policy, and Philosophy at Duke Law School, where she teaches criminal law and science law and policy. Gail Heriot is Professor of Law at University of San Diego School of Law, where she teaches civil rights; she is also a member of the U.S. Commission on Civil Rights. Ilya Somin is Professor of Law at George Mason University School of Law, where he teaches constitutional law. Ernest Young is Alston & Bird Professor of Law at Duke Law School, where he teaches constitutional law and federal courts. We file this brief in our personal capacities as scholars and not on behalf of our institutions.

SUMMARY OF ARGUMENT

Mr. Hernandez's petition for certiorari raises an issue of national importance to the credibility of the judicial system: can courts consider a defendant's race when deciding whether he is mentally retarded and therefore ineligible for the death penalty under

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[1] Counsel of record for all parties received timely notice that *amici* intended to file this brief, and all parties consented. No counsel for a party has written this brief in whole or in part, and no counsel or party contributed money intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae* or their counsel, has contributed money to this brief's preparation or submission.

Atkins v. Virginia, 536 U.S. 304 (2002)? This Court's precedents—and basic equality principles—say no. We therefore urge this Court to grant certiorari on Mr. Hernandez's second question presented to make that clear.

Atkins held that executing mentally retarded[2] defendants violates the Eighth Amendment. Courts implementing *Atkins* therefore must measure defendants' mental abilities.

That opens the door to measuring minority defendants differently. Many critics, including psychologists, believe that standard methods of assessing mental retardation include potential racial bias. To correct for that bias, common tests for mental retardation urge measuring subjects against their "cultural group."

Prosecutors and courts nationally have seized that opening to justify applying different standards to minority defendants who claim, under *Atkins*, that they cannot be sentenced to death. That is what happened here. The government's star witness argued that Mr. Hernandez's poor functioning was consistent with his "cultural group," defined as people with poor achievement, drug use, poverty,

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[2] After *Atkins*, psychologists changed the name of this diagnosis to "intellectual disability." Am. Psychiatric Ass'n, *Intellectual Disability Fact Sheet* 1 (2013), *available at* http://www.dsm5.org/Documents/Intellectual%20Disability%20Fact%20Sheet.pdf. We follow this Court's terminology in *Atkins* and use "mentally retarded."

and criminal behavior. The U.S. Court of Appeals for the Fifth Circuit concluded that Hernandez's intelligence quotient (IQ) was better measured against other "Mexicans." Prosecutors are making, and courts are accepting, similar arguments across the country.

This Court's equal-protection jurisprudence demands that such arguments satisfy strict scrutiny. Those arguments are classic racial classifications: prosecutors contend that minority defendants, as a group, test differently and therefore should be treated differently. When a criminal defendant is on trial for his life, using race to decide his fate is unacceptable unless justified under the most-rigorous scrutiny. The state has not even tried to make that showing here.

Such an argument also shows *why* this Court applies strict scrutiny to all racial classifications, whatever the rationale. Under the guise of racial sensitivity, that argument justifies making it easier to execute minority defendants. Strict scrutiny was designed to test such suspect arguments.

To be clear, our argument here is narrow. Mr. Hernandez has not claimed to be innocent of the awful crimes that he was convicted of, and we take no position on what his ultimate fate should be. We also express no view whether Mr. Hernandez actually is mentally retarded; on remand, a properly race-neutral evaluation might find him ineligible for exemption from the death penalty under *Atkins*. Nor

do we even take a position on whether *Atkins* was correctly decided.

But taking *Atkins* as settled, this case illustrates the urgency of the elder Justice Harlan's insistence that "[o]ur constitution is color-blind." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). When the government is deciding who lives and dies, it cannot use different scales for different races. This Court should grant certiorari on the petitioner's second issue to make that point plain.

ARGUMENT

I. As This Case Illustrates, *Atkins* Opened the Door for Prosecutors to Use Race to Measure Defendants' Intellect.

Atkins gives prosecutors the opportunity to argue that courts should change their standards for minorities when deciding whether defendants are mentally retarded. *Atkins* and courts implementing it rely on clinical and legal standards that encourage considering "sociocultural background" when interpreting mental assessments. Because many believe bias causes minorities to perform worse on those assessments, prosecutors argue that courts can presume that minority defendants actually are abler than their assessment results suggest.

Here, the government's expert testified that Mr. Hernandez functioned normally given his "cultural group." Lower courts accepted that

testimony, and the Fifth Circuit added that "Mexican" norms should be applied to score Hernandez's IQ. Such arguments are common in state and federal courts across the country. The time is ripe for this Court to close the door on those arguments.

A. *Atkins* Requires Comparing Defendants to a Population, Which Opens the Door to Racial Comparisons.

Rather than crafting a legal definition of mental retardation to guide states, the *Atkins* Court left to the states the responsibility for deciding who qualifies as mentally retarded. It cited approvingly two clinical definitions, 536 U.S. at 308 n.3, 317-18, which many states have incorporated. But there are substantial differences in how states decide who qualifies as mentally retarded and who does not, leading to impermissible disparate treatment of like individuals. *See* Nita Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 879 (2009).

Both clinical standards *Atkins* approved require "[1] not only subaverage intellectual functioning, [2] but also significant limitations in adaptive skills such as communication, self-care, and self-direction [3] that became manifest before age 18." *Atkins*, 536 U.S. at 318.

The first two criteria require measuring the defendant against some population. Psychologists

typically use IQ tests to assess intellectual functioning. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 42 (4th ed. 2000) [hereinafter DSM-IV-TR]. IQ scores are generated by locating the individual's performance on the population's distribution. Similarly, whether someone has adapted normally to his environment depends on the environment. A fifteen-year-old might not know how to use a fork because he is mentally retarded or because he grew up in a culture that does not use forks.

The question becomes, what is the relevant population courts should compare the defendant to? Legal and clinical standards that *Atkins* relied on open the door to impermissibly using race to define that population.

Some critics contend that clinical assessments are racially biased and therefore underestimate minorities' abilities. Many have charged that implicit biases in IQ tests disadvantage minorities. Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. MEM. L. REV. 855, 890-93 (2012) (collecting authorities). In other contexts—especially education—critics have urged assuming that minorities' test scores are artificially low.[3] Similar

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[3] *E.g.*, *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1089 (9th Cir. 2002); Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1258-59 (1995); Daniel J. Losen & Kevin G. Weiner, *Disabling Discrimination in Our Public Schools:*

logic supports adjusting expectations for adaptive functioning to compensate for racial bias.

Consequently, the clinical standards *Atkins* relied on encourage compensating for potential cultural bias. The DSM-IV-TR instructs clinicians interpreting IQ-test results to "take into account factors that may limit test performance" such as "sociocultural background." DSM-IV-TR at 42. It defines adaptive functioning as "how well" the person "meet[s] the standard of personal independence expected of someone in their . . . sociocultural background." *Id.* The American Association of Mental Retardation[4] agrees that assessments must consider "cultural . . . diversity." Am. Ass'n of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 8 (10th ed. 2002). Recently revised clinical standards, such as the DSM-V, similarly require norming IQ scores "for the individual's sociocultural background" and assessing adaptive functioning "in comparison to others of similar . . . sociocultural background." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013).

Comprehensive Legal Challenges to Inappropriate Placements, 36 HARV. C.R.-C.L. L. REV. 407, 440-41 (2001).

[4] Now called the American Association on Intellectual and Developmental Disabilities.

Many states, relying on those clinical definitions, permit or even require considering the defendant's "culture" when assessing his IQ or adaption.[5] As a result, prosecutors and courts facing *Atkins* claims are encouraged to assess the defendant in light of his "culture."

But a vague standard like "sociocultural group" often is in the eye of the beholder. As the record in this case illustrates, "culture" can become a proxy for race, and racial stereotypes easily can influence how a cultural group is defined. Thus efforts to compensate for racial bias in mental-retardation assessments may be well intentioned, but they risk the opposite effect.

It is not inevitable that courts will misapply *Atkins* and use racial decisionmaking. Courts can—and we expect most courts do—decide *Atkins* claims without referring to race. But by requiring courts to

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[5] *E.g.*, *Keen v. State*, 398 S.W.3d 594, 609 (Tenn. 2012) (courts may consider "cultural differences" when reviewing IQ scores); *People v. Superior Court*, 21 Cal. Rptr. 3d 542, 571 (Cal. Ct. App. 2004) (during assessment an individual's culture or ethnicity must be considered), *vacated on other grounds*, 109 P.3d 68 (2005); Ariz. Rev. Stat. Ann. § 13-753(K)(1) (defining "[a]daptive behavior" as "personal independence and social responsibility expected of the defendant's age and cultural group"); Conn. Gen. Stat. § 1-1g(c) (requiring using IQ tests that are "culturally appropriate" and defining "adaptive behavior" as "personal independence and social responsibility expected for the individual's age and cultural group as measured by tests that are . . . culturally appropriate to the individual"); Tex. Health & Safety Code Ann. § 591.003 (defining "[a]daptive behavior" similarly).

compare defendants' mental functioning to the population, *Atkins* opens the door to courts improperly letting race define that population.

Thus prosecutors can argue that because of assessment bias, minority defendants' IQ scores and adaptive functioning are greater than tests would suggest, so minorities who appear to meet the standard for mental retardation actually can be put to death. In short, prosecutors can argue that when compared to people of the same race rather than the American population, minority defendants are able enough to be executed.

B. Prosecutors and the Lower Courts Measured Hernandez's Mental Abilities against His Ethnicity.

That happened here. Indisputably, Mr. Hernandez sat on the border of a mental-retardation diagnosis. Most of his IQ scores were within the mental-retardation range, defined as 70 or below. Pet'r. Br. 6; DSM-IV-TR at 41-42.[6] Some factual testimony suggested that Hernandez's adaptive functioning was poor.[7] Pet'r. Br. 7. Two psychologists who examined him, including the only one who

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[6] IQ tests have a five-point measurement error, so scores as high as 75 can qualify. DSM-IV-TR at 41-42.

[7] Other testimony undermined that conclusion. *See Hernandez v. Stephens*, --- F. App'x ---, 2013 WL 3957796, at *4-5 (5th Cir. Aug. 2, 2013). We take no position on whether Mr. Hernandez's adaptive functioning actually is impaired; we simply urge that race should not influence that determination.

administered a full-scale IQ test to Hernandez, diagnosed him as mentally retarded. *Id.* at 6-7.

The prosecution's expert (who did not examine Hernandez), Dr. Richard Coons, testified that Hernandez was not mentally retarded. Relevant here, Dr. Coons relied on Texas law that defines "adaptive behavior" as "the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group." Tex. Health & Safety Code Ann. § 591.003; *Ex parte Briseno*, 135 S.W.3d 1, 7 n.25 (Tex. Crim. App. 2004).

Dr. Coons concluded, "Mr. Hernandez's adaptive behavior is in keeping with his cultural group." Coons Aff. 9.[8] In his affidavit, Dr. Coons explained that conclusion using numerous racially tinged comments:

- "Mr. Hernandez was raised under rather primitive circumstances. The family home was a lower class dwelling in a lower socioeconomic neighborhood adjacent to a landfill. His family sifted through the refuse in the landfill for marketable items. Mr. Hernandez had little effective parental attention. Such was his developmental culture." Coons Aff. 8.

[8] "Coons Aff." refers to Affidavit of Richard Coons, J.D., M.D., *Ex parte Hernandez*, No. A 97-364, Jun. 1, 2005. "Coons Tr." refers to a portion of testimony presented during the state trial court's habeas corpus proceedings.

- "Mr. Hernandez has held numerous low level jobs and has lived under circumstances which were in keeping with his cultural group." *Id.*

- "For his cultural group, Mr. Hernandez has seemed to adapt in terms of personal independence and has lived independently for years in circumstances comparable to those in which he was raised." *Id.*

- "Mr. Hernandez has exhibited the level of social responsibility of the criminal element of his cultural group." *Id.*

- "Mr. Hernandez's cultural group tends to have low socioeconomic status, low achievement, decreased social skills, increased substance abuse, and increased level of criminal behavior." *Id.* at 8-9.

Dr. Coons followed that affidavit with live testimony. Asked to describe Mr. Hernandez's cultural group, Dr. Coons testified that he could not give a precise definition. Coons Tr. 73:9-16. But his testimony strongly suggested that Mexican stereotypes colored his conception:

- Hernandez used drugs and put his safety in danger because "that's a common thing in that cultural group." *Id.* at 86:12-21.

- "Well, he's hanging out with these—you know, he's using and selling drugs and so forth, that's in keeping with his cultural group. He talked about his—you know, his hobby was using drugs." *Id.* at 88:3-7.

- "From the age of—I don't know, 10 or 12, up until the time he was incarcerated, he was using a huge amount of drugs. So, you know, I—and the people he was hanging around with, and selling drugs, and all this, I mean, he fit in with that group. That was his social group and so forth. And drugs were his hobbies he told Dr. Puente. So during this period of time, you know, that is a way to adapt in the culture that he's in. That's a part of his culture." *Id.* at 204:18 to 205:2.

- "But it's a drug related, culturally related issue." *Id.* at 205:10-11.

- Hernandez's drug use "was a significant part of his cultural group at that time." *Id.* at 205:15-17.

Over repeated arguments by Hernandez's counsel that this testimony violated the Equal Protection Clause,[9] the state and federal lower

[9] In the state trial court Hernandez moved to strike this testimony because, among other reasons, Dr. Coons's racial profiling violated the Fourteenth Amendment. Hernandez's counsel raised the same argument on appeal in state and federal courts.

courts consistently credited Dr. Coons. Relying on Dr. Coons, lower courts rejected testimony from two physicians who (unlike Dr. Coons) examined Hernandez and diagnosed him mentally retarded.

The Fifth Circuit added another race-based reason to conclude Hernandez was not mentally retarded. On his one full-scale IQ test, Hernandez scored 62 using American norms and 70 (the highest score in the mental-retardation range) using Mexican norms. Pet'r. Br. 6.

The Fifth Circuit discounted Hernandez's 62 score and other scores well under 70 based on Hernandez's ethnicity. "When scaled to Mexican norms, Hernandez scored exactly 70 on the *one* full-scale WAIS-III test." *Hernandez*, 2013 WL 3957796, at *6.

Together, Dr. Coons and the Fifth Circuit transformed *Atkins* into an opportunity for racial decisionmaking. Facing a borderline defendant, Dr. Coons and the Fifth Circuit used Hernandez's ethnicity to lower their expectations for his performance—and sentence him to death.

C. Courts and Prosecutors Nationally Are Using Race to Assess Mental Abilities.

Remarkably, Mr. Hernandez's case is far from isolated. Across the country, prosecutors and courts are seizing *Atkins*'s opening and arguing that

minority defendants claiming mental retardation should be held to lower standards. In these fact-intensive inquiries, courts disagree wildly how seriously to take such arguments.

Across the country, prosecution experts are testifying that minority defendants' IQ scores should be increased or that defendants' impaired adaptive functioning is normal given the defendant's "culture." Prosecution experts have testified to the following:

- "Cultural" factors could have "artificially suppressed" the defendant's IQ scores, so his scores had to be adjusted upward. *Maldonado v. Thaler*, 625 F.3d 229, 238-39 (5th Cir. 2010) (holding that even excluding this testimony, the defendant could not show he was mentally retarded and could be executed).

- A Hispanic defendant's poor adaptation should be discounted because he was a member of "the criminal socio-culture." *Commonwealth v. DeJesus*, 58 A.3d 62, 72-73 (Pa. 2012) (reopening *Atkins* proceedings to consider the government's new evidence and declining to decide the defendant's cross-appeal).

- A defendant's low IQ scores could be discounted because "IQ tests tend to underestimate particularly the intelligence of African-Americans." *Hodges v. State*, 55 So.3d

515, 525 (Fla. 2010) (affirming finding that the defendant was not mentally retarded).

- "[A]ll" the defendant's "IQ scores that I know in the school records that indicate school scores measured by IQ that would be indicative of mild mental retardation, if they were not spuriously lowered by things such as exposure to domestic violence, poverty, cultural deprivation, *ethnicity*, perhaps intoxication." *Ex parte Smith*, No. 1080973, 2010 WL 4148528, at *3, 7 (Ala. Oct. 22, 2010) (emphasis added) (affirming finding that the defendant was not mentally retarded).

- "My opinion would be that his intellectual function may be slightly higher than that. Sometimes individuals of African-American background don't score quite as high on formal testing." *Brown v. State*, 982 So.2d 565, 604 (Ala. Crim. App. 2006).

- "I.Q. tests have historically been biased against minorities. . . . [I]f you have an African-American who tests in the seventies, the clinician must be very cautious . . . ." *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577, at *7-8, 14 (Tenn. Crim. App. Oct. 19, 2005) (affirming finding that the defendant was not mentally retarded).

- The defendant's scores did not necessarily show mental retardation because the verbal

IQ test "is really culturally based." *Ex parte Rodriguez*, 164 S.W.3d 400, 404 (Tex. Crim. App. 2005) (Cochran, J., concurring) (affirming finding that the defendant was not mentally retarded).

- The defendant's IQ score should be raised 3 to 6 points because the test is "culturally prejudiced against him." *Johnson v. State*, 102 S.W.3d 535, 539 n.10 (Mo. 2003) (en banc) (remanding for further consideration of the defendant's *Atkins* claim).

Prosecutors nationally similarly are urging courts to disregard, discount, or even adjust minority defendants' IQ scores. *E.g.*, *Commonwealth v. Williams*, 61 A.3d 979, 989 (Pa. 2013) (prosecution unsuccessfully tried to dismiss childhood IQ tests because those tests "were culturally and racially biased"); *Lizcano v. State*, No. AP-75879, 2010 WL 1817772, at *11-12 (Tex. Crim. App. 2010) (prosecution unsuccessfully argued that the courts should have added 7.5 points to the defendant's IQ because "Hispanic test subjects historically score 7.5 points lower on IQ tests than Caucasian subjects").

Some courts have criticized such arguments. One prosecution expert, in two different cases, intentionally normed the black defendants' IQ scores on a special, race-based standard and concluded that the defendants were not mentally retarded. *United States v. Smith*, 790 F. Supp. 2d 482, 500 (E.D. La. 2011); *United States v. Hardy*, 762 F. Supp. 2d 849,

912-13 (E.D. La. 2010). The expert further classified one of the defendants as "an African-American from the South." *Hardy*, 762 F. Supp. 2d at 912. The district court emphatically rejected that expert's testimony, pointing out that some black defendants could not possibly score in the mental-retardation range using her equation. *Id.* at 912-13; *Smith*, 790 F. Supp. 2d at 500.

In another case, courts rejected the prosecution's argument that a defendant's verbal IQ score of 66 was unreliable because the defendant spoke Spanish and English, even though he was educated in English. *Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007); *Rivera v. Dretke*, No. Civ. B-03-139, 2006 WL 870927, at *15 (S.D. Tex. Mar. 31, 2007), *rev'd on other grounds sub nom. Rivera v. Quarterman*, 505 F.3d 349. The district court found "very troubling"—and possibly unconstitutional—the argument that Americans whose first language is not English essentially cannot prove mental retardation because their scores should be discounted. *Rivera*, 2006 WL 870927, at *18-19.

But other courts have accepted and applied such arguments to sentence minority defendants to death. For example, an Ohio appellate court concluded, relying on the prosecution's expert, that the defendant's IQ score of 69 was "artificially lower" because of racial bias. *State v. Were*, 2005 Ohio 376, ¶¶ 70-81 (Ohio Ct. App. 2005). Because the defendant was black, the court concluded, his IQ did not show mental retardation. *Id.* The Ohio Supreme

Court agreed and affirmed. *State v. Were*, 890 N.E.2d 263, 293 (Ohio 2008).

One federal district court even *rejected* a mental-retardation diagnosis based on low IQ scores because the psychologist "failed to adequately account for cultural differences" given the defendant's Colombian birth. *Ortiz v. United States*, No. 04-8001-CV-W-GAF, 2007 WL 7686126, at *3 (W.D. Mo. Dec. 14, 2007), *rev'd on other grounds*, 664 F.3d 1151 (8th Cir. 2011). The psychologist testified that he normed the defendant against American standards because the defendant was in the U.S. legal system. *Id.* at *3-4. The district court disagreed and insisted that Colombian, not American, norms were appropriate. *Id.* The Eighth Circuit affirmed that aspect of the district court's decision. *Ortiz*, 664 F.3d at 1167.[10]

Thus measuring minority defendants' mental abilities differently is a national phenomenon. Certainly some kinds of arguments implicating ethnic background do not raise concerns; defendants like Mr. Hernandez who do not speak English fluently, or at all, should be tested in a language

[10] Other courts have expressly or implicitly encouraged considering whether race or ethnicity explains low IQ scores. *E.g.*, *Eldrige v. Quarterman*, No. H-05-1847, 2008 WL 700949, at *14 (S.D. Tex. Mar. 13, 2008) (pointing out that an expert conceded "evidence that minorities score artificially low" on IQ tests); *Webster v. United States*, No. 4:00-CV-1646, 2003 WL 23109787, at *12 (N.D. Tex. Sep. 30, 2003) (same); *State v. Vela*, 777 N.W.2d 266, 296 (Neb. 2010).

they understand. And knowing whether a defendant grew up in a country that does not use forks could help explain why the defendant does not know how to use one. But the statements and arguments in Mr. Hernandez's case and the cases cited here go much further, crossing the line into very suspect stereotyping.

Courts disagree wildly about how to address such arguments. True, cases do not show a clean, up-or-down split in authority. But that reflects the intensely fact-dependent nature of adjudicating whether a defendant is mentally retarded. As these cases show, and as the record here shows, courts consider testimony and arguments about minorities' mental abilities as part of a wide-ranging, holistic assessment of the defendant. The factual nature of *Atkins* claims does not immunize them from this Court's review, and lower courts need this Court's clarification on this issue.

This Court's review is also needed because arguments relying on defendants' race likely will persist. Prosecutors have incentive to make these arguments whenever minority defendants, like Mr. Hernandez, test on the border of mental retardation—and many if not all *Atkins* claims will fall into that category.[11] This Court should grant certiorari to emphatically clarify that using race to

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[11] Eighty-five percent of people whose IQ scores fall in the mental-retardation range score at the upper end of that range, from about 50 or 55 to 70. *See* DSM-IV-TR at 42; *Atkins v. Commonwealth*, 534 S.E.2d 312, 323 (Va. 2000), *rev'd on other*

assess *Atkins* claims must meet the strictest scrutiny.

II. Mental-Retardation Evaluations under *Atkins* Must Be Race Neutral or Satisfy Strict Scrutiny.

As this Court's precedents already make clear, such arguments are suspect racial classifications. The government simply cannot apply different standards for mental retardation depending on the defendant's race without triggering strict scrutiny.

Indeed the government's and the courts' reasoning here shows why strict scrutiny is necessary. The courts apparently lowered standards for Mr. Hernandez's ability because of his ethnicity. The government cannot make it easier to execute minority defendants without satisfying the most exacting scrutiny—and we are deeply skeptical that the government can.

A. All Race Classifications, Especially in Criminal Prosecutions, Must Meet Strict Scrutiny.

This Court has made crystal clear that *all* racial classifications—whatever the justification—must satisfy strict scrutiny. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701,

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grounds sub nom. Atkins v. Virginia, 536 U.S. 304. And few people who test much below a 50 or 55 likely have the capacity to commit crimes and stand trial.

720, 742-43 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995). That prohibition rests on vital philosophical and practical principles.

The Fourteenth Amendment's "central mandate is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). That mandate reflects the principle that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Parents Involved*, 551 U.S. at 745-46 (quoting *Adarand*, 515 U.S. at 214).

And "such classifications ultimately have a destructive impact on the individual and our society." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and concurring in the judgment). They "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," *Shaw v. Reno*, 509 U.S. 630, 657 (1993), "promote notions of racial inferiority," and "lead to a politics of racial hostility," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Those principles apply with particular force in the justice system—especially when defendants are on trial for their lives. This Court has long stressed that "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling

in the judicial system." *Powers v. Ohio*, 499 U.S. 400, 415 (1991). Even when litigants would otherwise have unfettered decisionmaking—such as when prosecutors bring charges or litigants exercise peremptory challenges—they cannot apply racial classifications. *Id.*

Flatly prohibiting race in the courtroom is essential to preserving defendants' and the community's confidence in the justice system. "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991). "Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it." *Id.*

This Court made those statements when explaining why *civil litigants* cannot use raced-based peremptory challenges. *See id.* Here, Hernandez is literally on trial for his life. If our "color-blind" Constitution means anything, it must guarantee Hernandez a death sentence free from suspicion that race affected his punishment.

B. Using Race to Measure Defendants' Mental Abilities Is an Impermissible Racial Classification.

Here, proceedings in the lower courts raise suspicion that race indeed infected Hernandez's death sentence. And as we have explained, Hernandez is not alone. Prosecutors, their experts, and some courts openly contend that minority defendants' mental abilities must be measured differently. That violates basic equal-protection principles.

This Court repeatedly has stressed that "our Constitution protects each citizen as an individual, not as a member of a group." *Parents Involved*, 551 U.S. at 743 (quoting *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)). "Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake." *Id.* at 795 (Kennedy, J., concurring in part and concurring in the judgment).

Consequently, this Court has repeatedly held that the government must satisfy strict scrutiny before using different yardsticks to measure minorities. For example, in *Regents of University of California v. Bakke*, this Court held that placing applicants on different admissions "tracks" based on race was unconstitutional. 438 U.S. 265, 315-16 (1978) (opinion of Powell, J.). *Gratz* similarly

rejected a university's admissions-scoring system that awarded minority applicants 20 extra points. 539 U.S. at 271-72. And *Parents Involved* struck down a school-assignment system because "race, for some students, [wa]s determinative standing alone." 551 U.S. at 723.

Here the government and the Fifth Circuit equally placed Hernandez in a different category because of his race. Dr. Coons repeatedly testified that Hernandez had to be evaluated within his "cultural group." The Fifth Circuit insisted that Hernandez's IQ scores were best normed against other "Mexicans."

Similar arguments are cropping up across the country. Prosecutors are urging, quite literally, that 7.5 points must be added to Hispanics' IQ scores. *Lizcano*, 2010 WL 1817772, at *11-12. State experts want to add "3 to 6 points" to minority defendants' scores. *Johnson*, 102 S.W.3d at 539 n.10.

For many defendants, those points literally mean the difference between life and death. In *Were*, the defendant's IQ was 69—within but near the top of the mental-retardation range. 890 N.E.2d at 290-91. The courts discounted that score, and sentenced him to death, because as a minority his score had to be regarded as artificially low. *Id.* at 293.

Even more than in school admissions or assignment, different yardsticks cannot be used to sentence minority defendants to death. This Court

needs to make clear that assessing minority defendants' *Atkins* claims differently is an impermissible racial classification. If prosecutors want to argue that minority defendants should be evaluated differently, prosecutors—if they can—must justify that notion under the strictest scrutiny.

C. This Case Illustrates Why Racial Classifications Must Satisfy Strict Scrutiny.

This case beautifully demonstrates why this Court has repeatedly insisted that racial classifications must satisfy strict scrutiny, even when the justification purportedly is "benign" or benefits minorities. *E.g.*, *Parents Involved*, 551 U.S. at 741-42; *Shaw*, 509 U.S. at 653; *Adarand*, 515 U.S. at 225-27; *Bakke*, 438 U.S. at 298 (opinion of Powell, J.).

All "[r]acial classifications raise special fears that they are motivated by an invidious purpose." *Johnson v. California*, 543 U.S. 499, 505 (2005). "[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *J.A. Croson*, 488 U.S. at 493.

That is essential because "[i]t may not always be clear that a so-called preference is in fact benign." *Parents Involved*, 551 U.S. at 742 (quoting *Adarand*, 515 U.S. at 226). As this Court recognizes, our "[h]istory should teach greater humility." *Id.* (quoting *Metro Broadcasting, Inc.*, 497 U.S. at 609 (O'Connor, J., dissenting)). Our nation has a long, unfortunate history of relying on "science" or fashionable theories to "help" minorities by discriminating against them. *See Parents Involved*, 551 U.S. at 772-82 (Thomas, J., concurring) (cataloguing that history); *see generally* Kevin Brown, *The Racial Gap in Ability: from the Fifteenth Century to* Grutter *and* Gratz, 78 TUL. L. REV. 2061 (2004) (describing the history of using racial "science," including IQ tests, to justify treating minorities differently).

Indeed, a core objective of the Equal Protection Clause's framers was to change a tragic history of using race to impose criminal punishments and the death penalty. *See* Randall Kennedy, *Race, Crime, and the Law* 77 (1997). At a minimum, the Equal Protection Clause requires colorblind death-penalty sentences.

In Mr. Hernandez's case, there is good reason to suspect that the lower courts and the government relied on impermissible racial stereotypes. The Fifth Circuit insisted on applying lower, "Mexican" norms, even though Hernandez committed his crimes in the United States and was being prosecuted in an American court. And Dr. Coons apparently relied on

a grab-bag of pernicious racial stereotypes to define Mr. Hernandez's "cultural group": "low socioeconomic status, low achievement, decreased social skills, increased substance abuse, and increased level of criminal behavior." Coons Aff. 8-9.

As we have explained, Mr. Hernandez is far from alone. Mr. Smith, for example, deserved to have the government explain what on earth its expert meant when he testified that the defendant's IQ scores would have established mental retardation "if they were not spuriously lowered by things such as . . . ethnicity." *Ex parte Smith*, 2010 WL 4148528, at *3.

Indeed, *Atkins*'s implicit reliance on standards that measure ability by "culture" opens the door to all manner of racial hokum. In one case, a defense expert tried to explain why the defendant's IQ score was not artificially low because he was "Asian." *Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828, at *9 (Tenn. Crim. App. Nov. 9, 2006). She argued that "any bias in the testing scores would favor Asians over Caucasians" because "Asian Americans tend to score higher than Caucasians on tests of cognitive ability." *Id.* She even added that one study indicated that "Asian's [*sic*] in general have larger brains than Caucasians." *Id.*

"[T]he purpose of strict scrutiny is to 'smoke out'" that kind of nonsense. *J.A. Croson*, 488 U.S. at 493. And the consequences here prove why. Under the guise of cultural sensitivity, prosecutors and the

lower courts devised an argument for *executing minority defendants more easily than whites*. The lower courts' reasoning here amounts to the conclusion that Hernandez is eligible for the death penalty because he's pretty smart for a Mexican.

The Constitution demands more. Mr. Hernandez and defendants like him are being prosecuted in the United States for violating American legal norms. We cannot think of any reason why those defendants should not also be held to American norms when deciding whether they are exempt from the death penalty under *Atkins*. At a minimum, the government should justify arguments to the contrary under the strictest scrutiny.

This Court should grant certiorari to make clear that *Atkins* is not an opportunity to use race when imposing the death penalty. This Court should remand this case with instructions that lower courts reconsider Mr. Hernandez's *Atkins* claim without using impermissible race classifications. The risks of letting racial nonsense influence who lives or dies are just too great.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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