No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Writ Of Certiorari
To The Texas Court Of Criminal Appeals

BRIEF FOR *AMICUS CURIAE* THE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. One of the Project's key areas of focus is the constitutional imperative of procedural fairness and due process in the criminal justice system, and particularly in the administration of capital punishment. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files *amicus* briefs in this Court and other courts in cases, like this one, that implicate its bipartisan positions on constitutional issues, in order to better apprise courts of the importance and broad consequences of those issues.

The Project takes no position on the abolition or maintenance of the death penalty. Rather, it focuses on forging consensus-based recommendations aimed at achieving the common objectives of justice for both victims of crimes and for those accused of committing crimes. In May 2001, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Dem-

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Counsel for both parties have filed with the Clerk their blanket consent to the filing of *amicus curiae* briefs.

ocrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others, to examine issues related to the administration of the death penalty. A complete list of the members of the Project's Death Penalty Committee, which includes a former Governor of Texas, is reproduced in the appendix to this brief.

Consistent with these stated goals, the committee has released three reports in which it has identified areas where the administration of the death penalty fails to protect adequately defendants' Constitutional rights, and provided recommendations to correct these deficiencies. Its most recent report makes 39 such recommendations that the committee believes are essential to reducing the risk of wrongful capital convictions and executions. See The Constitution Project, IRREVERSIBLE ERROR (2014).

As this Court recognized in *Atkins v. Virginia*, 536 U.S. 304 (2002), and recently reaffirmed in *Hall v. Florida*, 134 S. Ct. 1986 (2014), the Eighth Amendment of the Constitution prohibits the execution of the intellectually disabled. While the task of determining who is intellectually disabled is left to the states, both *Atkins* and *Hall* make clear that this determination cannot be made without reference to current medical standards. Given "the stakes in a death penalty case," it is essential, in the committee's view, to "ensure that all defendants with intellectual disability are identified and afforded the constitutional protections associated with that diagnosis." IRREVERSIBLE ERROR 75.

SUMMARY OF ARGUMENT

When it comes to diagnosing intellectual disability in death penalty cases, Texas is an outlier—and not by accident. After this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), Texas responded with *Ex Parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004). *Briseno* restricted *Atkins*' holding to those individuals with intellectual disabilities that "a consensus *of Texas citizens* would agree" ought to be "exempted from the death penalty." *Id.* (emphasis added). The CCA did this by creating a set of non-clinical "factors" (such as whether those "who knew the person best" during childhood thought "he was mentally retarded at that time," and if so, whether they said so to anyone), which factors were designed deliberately to be different from the "definition of mental retardation that is used for providing psychological assistance, social services, and financial aid." *Id.*, at 8. This idiosyncratic approach was unique to the Texas death penalty system the day it was created, and has remained so ever since. The decision below further deepens the idiosyncrasy by requiring that the *Briseno* factors be used *to the exclusion* of modern clinical criteria. The result is that Texas is an outlier in two crucial respects.

First, Texas is alone among States in forbidding the use of modern diagnostic criteria for intellectual disability and requiring, instead, the use of its outdated and non-clinical *Briseno* factors in *Atkins* cases. No other State forbids the use of modern diagnostic criteria, as Texas does, and many States affirmatively require the use of the most up-to-date standards. Nor has any other State mandated the use of the *Briseno* factors, and only one State has even ap-

proved their use permissively. As in *Atkins*, this "consensus" among States other than Texas "unquestionably reflects widespread judgment" that it is inappropriate to use outdated, non-clinical standards, and to forbid consideration of more modern ones. 536 U.S., at 317.

Second, Texas' *Atkins* procedures are an outlier *within* Texas, which does not use the non-clinical *Briseno* factors when diagnosing intellectual disability in any context *other* than determining eligibility for the death penalty. When Texas must assess whether a public-school student or juvenile offender is intellectually disabled, it uses modern clinical definitions. Perversely, it is *only* when making decisions about the death penalty that Texas requires the use of the non-clinical and outdated *Briseno* factors, and forbids the use of modern standards. But as this Court has often held, the "qualitative difference between death and other penalties" requires a "*greater* degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added).

The judgment below should therefore be reversed.

ARGUMENT

The court below acknowledged that society's "conceptions of intellectual disability and its diagnosis have changed since *Atkins* and *Briseno* were decided," but held that Texas courts are forbidden to use "the most current position … espoused" by leading medical organizations, and instead must use "the test … established in *Briseno*." Pet. App. 6a. As the petitioner correctly argues, that rule cannot be squared with this Court's decision in *Hall v. Florida*, which recog-

nized that society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue," such that in "determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 134 S. Ct. 1986, 1993 (2014). This Court, in *Hall*, thought it relevant whether the State of Florida's *Atkins* regime was "consistent with the views of the medical community." *Id.* at 1994. Texas requires the opposite, and this Court need go no further than that to reverse the judgment below. *Amicus* will not restate that argument here.

Rather, the purpose of this filing is to illustrate the extent to which Texas is an outlier, and the legal consequences of that outlier status. In the wake of *Atkins*, Texas chose to deliberately set its death penalty system apart—both from other death penalty States, and from the way intellectual disability is ordinarily treated under Texas law. The consequence is that Texas is out of step both with the "widespread judgment" about intellectual disability made by other States, *Atkins*, 536 U.S., at 317, as well as the requirement that States ensure a "*greater* degree of reliability when the death sentence is imposed," *Lockett*, 438 U.S. at 604 (emphasis added).

I. TEXAS HAS CREATED A DELIBERATELY IDIOSYNCRATIC DEFINITION OF INTELLECTUAL DISABILITY FOR *ATKINS* CASES

As this Court is well aware, Texas is an extraordinarily important death penalty jurisdiction: over one-third of executions since 1976 have taken place in that State, and a tenth of the nation's death row pop-

ulation is housed there. See Peggy Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 1 (2011). But "the 'Texas approach' regarding these offenders has not always been well-received" by this Court. *Id.*, at 2–3. In particular, Texas' approach to the execution of intellectually disabled offenders has required frequent correction.

Until this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), Texas juries were not even "provided with a vehicle" to consider evidence of intellectual disability in the penalty phase—that is, juries were not instructed to take it into account even in mitigation. But this Court concluded in *Penry* that this unconstitutionally limited the jury's discretion, which "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime." *Ibid.* At the same time, this Court rejected the argument that there was then a national consensus categorically forbidding the execution of the intellectually disabled. *Ibid.*

Texas, however, interpreted this Court's decision in *Penry* narrowly, and took a very limited view of what evidence it required be admitted for the jury's deliberation. See Tobolowsky, *supra*, at 18–21. Following *Penry*, there was a "dramatic increase in the number of states that had enacted bans on the execution of [intellectually disabled] offenders," but Texas was not among them—indeed, the governor of Texas vetoed legislation in 2001 that would have done so. *Id.*, at 24–26. Explaining his veto, which "bucked a nationwide trend," Governor Perry stated that the proposed law had "basically [told] the citizens of this state, 'We

don't trust you.'" Paul Duggan, *Texas Ban on Executing Retarded is Rejected*, Wash. Post, June 18, 2001, at A02.

Thirteen years after *Penry*, this Court concluded in *Atkins* that a national consensus had developed against the execution of the intellectually disabled. 536 U.S. 304 (2002). After this Court decided *Atkins*, the Texas Court of Criminal Appeals received "a significant number" of "habeas corpus applications" by death row inmates, arguing that they were exempt from execution under *Atkins*. *Ex Parte Briseno*, 135 S.W. 3d at 5. The CCA therefore developed what it styled "temporary judicial guidelines in addressing *Atkins* claims," under the assumption that the Texas legislature would eventually provide more detailed guidance. *Ibid.*

The *Briseno* court did not understand its objective to be, as *Atkins* put it, simply developing procedures aimed at "determining which offenders are in fact" intellectually disabled. 536 U.S., at 317. It was that essentially procedural "task" that this Court left "to the States," having already determined that a substantive national consensus existed against the execution of the intellectually disabled. *Ibid.* (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)). Instead, the *Briseno* court undertook to define "that level and degree of [intellectual disability] at which a *consensus of Texas citizens* would agree that a person should be exempted from the death penalty." *Briseno*, 135 S.W. 3d, at 6 (emphasis added).

Briseno, in other words, embraced a sort of "Texan exceptionalism" approach to the Eighth Amendment. "Most Texas citizens might agree that Steinbeck's

Lennie" ought not be executed, *Briseno* reasoned. *Ibid.* But would a "consensus of Texas citizens agree that all persons who might legitimately qualify … under the social services definition of [intellectual disability] be exempt?" *Ibid.* Is there, *Briseno* wondered, a "Texas consensus" that "all of those persons whom the mental health profession might diagnose as meeting the criteria for [intellectual disability]" are exempt from the death penalty? *Ibid.* Did Texans believe in a "bright-line exemption from our state's maximum statutory punishment?" *Ibid.* These were the questions that *Briseno* asked—despite there being little room in the logic of *Atkins*, which discerned a (necessarily substantive) *national* consensus, for any of them.

In seeking to answer this question, the court in *Briseno* first quoted a 1992 set of clinical guidelines, which defined intellectual disability as being characterized by "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." *Id.*, at 7–8. Channeling an imagined "consensus of Texas citizens," however, the *Briseno* court criticized the clinical "adaptive behavior" criterion as "exceedingly subjective," and thus significantly altered the clinical definition by adding "other evidentiary factors" that the court said factfinders should "focus upon." *Id.*, at 8.

These factors, which would come to be known as the "*Briseno* factors," require consideration of (for example) whether the defendant's "family" or "friends" thought he was intellectually disabled during childhood, and if they did, whether they "act[ed] in accordance" with that determination; whether the de-

fendant has "formulated plans" and is able to "hide facts or lie"; and whether the crime for which he was convicted required "forethought." *Id.*, at 8–9. These factors are all entirely *ad hoc* and non-clinical, and in announcing them, the court did not identify or rely on a single authority: they simply appear as a bulleted list, unadorned by citation. *Ibid.*

Though ostensibly designed to be temporary guidelines, the *Briseno* factors have remained the operative standard in Texas ever since. The Texas legislature made several unsuccessful attempts to enact a statutory standard and procedures to govern *Atkins* claims. See Tobolowsky, *supra*, at 33–35. In 2003, the Texas House of Representatives passed a bill that would have similarly created a more restrictive definition of intellectual disability in death penalty cases than used for other State purposes. See H.R. 614, 78th Leg., Reg. Sess. (Tex. 2003). Instead of simply requiring "deficits in adaptive behavior," for example, the 2003 legislation would have required that those deficits be "significant" when "normed" against the defendant's "cultural group." *Ibid.*; see Tobolowsky, *supra*, at 33 n.177. But the Texas Senate did not consider the 2003 legislation. Tobolowsky, *supra*, at 34. Further attempts to respond to *Atkins* legislatively have generally not made it past committee review in the legislature. *Id.* at 34-35; see also generally Brief of Texas State Senator Rodney Ellis et al., as Amici Curiae in Support of Petitioner at 5–10, *Hall v. Thaler*, 562 U.S. 981 (2010) (No. 10-37) (describing unsuccessful attempts to enact *Atkins* legislation).

As the decision below illustrates, the *Briseno* framework is therefore the *exclusive* mechanism by which *Atkins* claims are evaluated in Texas—trial-

court judges are forbidden to rely on more up-to-date medical standards. As discussed below, that has made Texas an outlier, in more ways than one.

II. TEXAS IS THE ONLY STATE TO REQUIRE THE USE OF THE *BRISENO* FACTORS AND FORBID THE USE OF MODERN CLINICAL STANDARDS

Given that the *Briseno* court thought its task was to craft a Texas-specific definition of intellectual disability, it is no surprise that the decision has left Texas isolated. The decision below deepens that isolation: No other death penalty State forbids, as the court below did here, the use of modern medical standards in *Atkins* cases. The States to consider the question explicitly often *require* the use of the most modern standards; at minimum, however, they permit it, or simply assume the relevance of the most up-to-date standards. *Amicus* is aware of no other death penalty jurisdiction, however, that *forbids* the use of current medical standards for diagnosing intellectual disability.

In Oregon, for example, the State's highest court recently reversed a trial-court ruling that "comported with the published [medical] standards existing at the time," but that had not had the benefit of the revised standards in the subsequently-published DSM-5. *State v. Agee*, 364 P.3d 971, 989 (Or. 2015), adhered to as amended, 370 P.3d 476 (Or. 2016). To do otherwise, the Oregon court reasoned, would "create an unacceptable risk that a person with intellectual disability will be executed." *Id.*, at 990 (quoting *Hall*, 134 S. Ct., at 1990).

Similarly, Mississippi's highest court has concluded that "legal determinations of intellectual disability" must be "informed by established clinical standards," and has expressly adopted the latest "2010 AAIDD and 2013 APA definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of this state." *Chase v. State*, 171 So. 3d 463, 470-71 (Miss. 2015). The *Chase* court understood that to be the consequence of "the reality of evolving standards for determining intellectual disability in the medical community." *Ibid.* And the Mississippi court recognized that *Hall* requires a State to keep up with those standards, by recognizing the "significant role of the medical community in informing legal determinations of intellectual disability." *Ibid.* Thus, the court concluded that "judicial recognition of the new terminology conforms with the directives of *Atkins* and *Hall* and will facilitate legal determinations of intellectual disability by allowing our courts to rely on the newer, generally-accepted definitions most frequently used by modern clinicians." *Ibid.*

The Supreme Court of California has similarly required adherence to the most up-to-date clinical standards. That Court (many years before this Court did the same in *Hall*) rejected a strict IQ cutoff in *Atkins* cases, because "a fixed cutoff is inconsistent with established clinical definitions" and "fails to recognize that significantly subaverage intellectual functioning may be established by means other than IQ testing"—citing the then-current APA and AAMR definitions in support. *In re Hawthorne*, 105 P.3d 552, 557 (Cal. 2005). That was, in turn, in accord with the California legislature's decision to derive its statutory

standard for intellectual disability from the "clinical definitions referenced by the high court" in *Atkins*. *Id.*, at 556.

Indiana has also recognized that, at minimum, because "*Atkins* explains that state statutes that provided the 'national consensus' against the execution of the mentally retarded 'generally conform'" to the then-operative clinical definitions, the decision in turn requires State definitions to continue to be at least in "general conformity with those clinical definitions," even if there is some "latitude" within that range. *Pruitt v. State*, 834 N.E. 2d 90, 108 (Ind. 2005). The *Pruitt* court observed that the AAMR definition had recently been "amended," and approved of Indiana's statute because it was "very similar to the revised AAMR definition, *and therefore* within the range of permissible standards under the Eighth Amendment." *Ibid.* (emphasis added).

Not every State, of course, has had this question squarely presented, especially following this Court's decision in *Hall*. But crucially, *amicus* is aware of no State that requires, as Texas does, the use of the nonclinical *Briseno* factors, or that forbids the use of modern medical definitions. In that respect, Texas "has clearly taken a path that differs from the other states" on this issue. Tobolowsky, *supra*, at 142. The closest that any other State's highest court has come to approving the *Briseno* factors is Pennsylvania, but even there the court "adopted the clinical definitions" of intellectual disability, while permitting—but not requiring—the use of the *Briseno* standards as evidentiary factors at the factfinder's discretion. *Commonwealth v. DeJesus*, 58 A.3d 62, 102, 109–10 (Pa. 2012). But unlike in Texas, Pennsylvania does not

regard the *Briseno* factors as "elevated to any particular favored or presumptive status." *Commonwealth v. Williams*, 61 A.3d 979, 982 n.9 (Pa. 2013). That is a stark difference, as this case illustrates. And Texas' outlier insistence on forbidding the use of modern medical standards therefore essentially guarantees disparate outcomes across States.

Texas' outlier status has serious implications for the legality of its system under the Eighth Amendment, which "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958). In assessing those standards, this Court seeks to be informed by "objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). And the "clearest and most reliable objective evidence" available is the actions of the several States. *Penry*, 492 U.S. at 331. As in *Atkins*, the "large number of States prohibiting the execution" of people who satisfy modern clinical definitions of intellectual disability "provides powerful evidence that today our society views" such offenders as "categorically less culpable than the average criminal." 536 U.S., at 315-16.

In the end, that is the heart of the matter. *Atkins* discerned a national consensus against the execution of the intellectually disabled. Texas permits the execution of offenders who would be deemed ineligible in these other States, therefore greatly increasing the risk that a person with intellectual disability will be executed, and is therefore out of step with the consensus this Court identified in *Atkins*.

III. THE TEXAS DEATH PENALTY SYSTEM IS AN OUTLIER EVEN WITHIN TEXAS

Texas is not just an outlier when compared to other death penalty States, none of which mirror its approach to implementing *Atkins*. Texas' death penalty system is even an outlier within Texas itself: In the other areas in which the State must make determinations about intellectual disability, Texas uses current medical standards and does not rely on the *Briseno* factors.

As this Court has recognized, "the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty," because "it is relevant to education, access to social programs, and medical treatment plans." *Hall*, 134 S. Ct., at 1993. In those contexts, society "relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." *Ibid.* Texas, like other States, assesses individuals' intellectual disabilities for these purposes, and in doing so, "relies upon medical and professional expertise" in a way that the decision below does not. *Ibid.*

In the Texas school system, for example, it is often necessary to identify children with special needs who may require individualized assistance. This is common: in fact, the rise of universal public education is what prompted the development of the earliest intelligence tests, including the now well-known "intelligence quotient." See THE OXFORD COMPANION TO THE MIND 88 (O.L. Zangwill & Richard L. Gregory eds., 1987); William Stern, THE PYSCHOLOGICAL METHODS

OF TESTING INTELLIGENCE (1914) (Guy Montrose Whipple, trans.).

But when assessing students for intellectual disability, the Texas school system does not rely on the *Briseno* factors. Instead, it uses a clinical definition (including, for example, requiring consideration of "standard error of measurement"), and omits any requirement that the child's adaptive behavior deficits must be "related to" sub-average general intellectual functioning. See 19 Tex. Admin. Code §89.1040(c)(5). The latter omission was one specifically criticized by the court below as inconsistent with *Briseno*: the habeas judge here, the CCA ruled, had "erred by disregarding our case law and employing the definition of intellectual disability presently used by the AAIDD, a definition which notably omits the requirement that an individual's adaptive behavior deficits, if any, must be 'related to' significantly sub-average general intellectual functioning." Pet. App. 6a.

Even *within the State's criminal justice system*, Texas' death penalty system is an outlier. In Texas' juvenile justice system, the State recognizes that certain young offenders may have "specialized treatment needs." 37 Tex. Admin. Code §380.8751(a). One of those identified needs is intellectual disability: Texas operates a "residential treatment program" that "provides specialized program services for youth identified with a high need for intellectual disability services." 37 Tex. Admin. Code §380.8775(a). For *this* criminal justice purpose, Texas requires a diagnosis made by "a psychology and psychiatry staff based on the results of a culturally validated assessment of cognitive functioning, mental abilities, reasoning, problem solving, abstract thinking, and adaptive be-

havior *as defined in the latest edition of the DSM*." 37 Tex. Admin. Code §380.8751(e)(3) (emphasis added).[2] But when it comes to deciding whether a person is to be executed, the decision below mandates adherence to the outdated, non-clinical, Texas-specific *Briseno* framework.

It is difficult to imagine a rational justification for this difference in treatment. That is especially so given the similar penological objectives at work. Texas offers special treatment to juvenile offenders with intellectual disability to promote "successful … reentry" and "reduce risk to the community by addressing individual specialized treatment needs through programs that are shown to reduce risk to reoffend." 37 Tex. Admin. Code §380.8751(a). Texas recognizes, in other words, that intellectually disabled offenders may require particular attention to reduce re-offense risk, above and beyond the ordinary deterrence of the criminal law. That neatly tracks one of *Atkins*' primary justifications for excluding the intellectually disabled from the death penalty: executing such individuals "will not measurably further the goal of deterrence" because of such offenders' "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," which "make it less likely that they

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[2] This mirrors Texas' general approach to "mental health assessment" for juveniles, which is similarly required to be made "using the most current edition of the Diagnostic and Statistical Manual of Mental Disorders." 37 Tex. Admin. Code §380.8751(e)(2). Similarly, when diagnosing alcohol- and drug-treatment issues, Texas requires the use of the most up-to-date standards. 37 Tex. Admin. Code §380.8751(e)(6).

can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." 536 U.S., at 320.

Texas' decision to use the *Briseno* factors *only* in its administration of the death penalty, while reserving clinical judgment for decisions about schooling and juvenile justice, turns on its head the usual requirement of a "*greater* degree of reliability when the death sentence is imposed." *Lockett*, 438 U.S. at 604 (emphasis added). In *Lockett*, this Court observed that most States had an "established practice of individualized sentences" in non-capital cases, and that the "considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases." *Id.*, at 605.

The same logic applies here: whatever the considerations that require the use of up-to-date medical standards in schooling decisions or the juvenile justice system "surely cannot be thought less important" when a person's life is at stake. See also *Eddings v. Oklahoma*, 455 U.S. 104, 117–18 (1982) (O'Connor, J., concurring) (noting that death sentences are "qualitatively different" and therefore require "extraordinary measures" to protect the rights of defendants). But that is just what the current system in Texas suggests.

* * *

Blackstone stated that "ancient Saxon law" had provided that a child under twelve could not be "guilty in will" of a capital crime—but noted that un-

der the law "as it now stands, and has stood at least ever since the time of Edward the third," the "capacity of doing ill … is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 24 (1765). Blackstone's conception of intellectual disability (which was restricted to a group he called "idiots") was, thankfully, not the terminus of our society's understanding—but even then, it was understood that the understanding of such matters evolves over time.

Blackstone thought it inappropriate to freeze the Saxon practice in place as our law's unyielding yardstick of intellectual disability. But neither did our society's understanding of intellectual disability end in 2002, when this Court decided *Atkins*. Texas, however, requires that its courts ignore the modern professional understanding of intellectual disability in *Atkins* cases, and instead apply the wholly non-clinical *Briseno* factors; in that, it stands alone. Because the Eighth Amendment means the same thing in every State, the judgment below should undoubtedly be reversed.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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