No. 21-782
CAPITAL CASE

IN THE
Supreme Court of the United States

RODNEY RENIA YOUNG,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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

BRIEF OF THE RUTHERFORD INSTITUTE, CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY, AND BRETT HARRELL AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

Conservatives Concerned About the Death Penalty is a network of political and social conservatives who believe that the death penalty contradicts conservative values because it is an inefficient, arbitrary, and wasteful system that devalues human life.

Brett Harrell is an American politician from Georgia who served as a Republican member of the Georgia House of Representatives from the 106th District from 2011 to 2021. Before that, Harrell served as mayor of Snellville, Georgia, from 2000 to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, notice was given to all parties, and all parties have consented to the filing of this brief.

2003. Harrell introduced House Bill 702 to repeal the death penalty in Georgia in 2019 and is an active member of Georgia Conservatives Concerned About the Death Penalty.

Amici have an interest in this matter because it deals with fundamental questions about governmental infringement on individual rights guaranteed by the Constitution, and in particular presents an opportunity to correct Georgia's outlier approach to the Eighth Amendment and the Due Process Clause.

SUMMARY OF ARGUMENT

The sanctity of individual liberty and the protection of individual rights against government overreach lie at the heart of this country's founding. *See, e.g.*, THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (Coventry House Publishing ed., 2015) ("I propose, in a series of papers, to discuss … [t]he additional security which … adoption [of the proposed Constitution] will afford to the preservation of that species of government, to liberty, and to property.").

One way in which our legal system protects individual rights and liberties, including those guaranteed by the Eighth and Fourteenth Amendments, is through the imposition of standards of proof. Standards of proof serve to allocate the risk of error between the parties involved, and reflect a societal judgement about which party should bear that risk. Cases involving more serious consequences, such as the potential loss of liberty, demand a higher standard of proof. Thus, in the criminal context, the government typically bears the risk of error: it must prove its case beyond a reasonable doubt in order to decrease the

likelihood of punishing an innocent person. Preponderance of the evidence, in contrast, more evenly balances the risk of error between the parties. When an individual alleges that the government has violated his constitutional right, he must generally do so by a preponderance of the evidence. This standard reflects a societal consensus that, when constitutional rights are at stake, the individual and the government should typically share the risk of error.

Georgia has departed from this allocation of risk. It requires intellectually disabled individuals facing the death penalty to prove their disability beyond a reasonable doubt—despite this Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits the execution of intellectually disabled individuals. No other state imposes such a high burden. This unanimity underscores "the consistency of the direction of change," *id.* at 315, as to the acceptable burden of proof.

The single case in which this Court has sanctioned the imposition of a heightened burden for the vindication of a constitutional right underscores the need for a compelling reason to do so. Georgia lacks any such compelling reason. Although states may regulate procedural burdens, those burdens violate the Due Process Clause if they are not sufficiently protective of fundamental constitutional rights. Post-*Atkins* capital cases in Georgia demonstrate that Georgia's onerous burden effectively vitiates that right. Georgia's interest in efficient operation of its criminal justice system can be achieved through the imposition of a lesser burden, but a wrongful execution is irreversible. This Court should welcome the opportunity to correct Georgia's deeply consequential overreach.

ARGUMENT

I. Burdens Of Proof Reflect Societal Judgments About The Proper Allocation Of Risk

Litigation always involves "a margin of error," *Speiser v. Randall*, 357 U.S. 513, 525 (1958), and "the function of legal process is to minimize the risk of erroneous decisions," *Addington v. Texas*, 441 U.S. 418, 425 (1979). Burdens of proof "serve[] to allocate the risk of error," *id.* at 423, and represent a "profound judgment about the way in which law should be enforced and justice administered," *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (quoting *In re Winship*, 397 U.S. 358, 361–62 (1970)). One such profound judgment is that, "when a fundamental right, such as individual liberty, is at stake, the government must bear the lion's share of the burden." *Tijani v. Willis*, 430 F.3d 1241, 1245 (9th Cir. 2005) (Tashima, J., concurring) (collecting cases).

A. Beyond A Reasonable Doubt Is A Burden Intended To Safeguard Individual Liberty From Governmental Overreach

In criminal cases, the government must prove its case beyond a reasonable doubt. "This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *In re Winship*, 387 U.S. at 362 (quoting *Leland v. Oregon*, 343 U.S. 790, 802–03 (1952) (Frankfurter and Black, JJ., dissenting)). This Court has

repeatedly affirmed that view. *See, e.g.*, *Speiser*, 357 U.S. at 526 ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."); *Addington*, 441 U.S. at 423–24 ("In a criminal case, … the interests of the defendant are of such magnitude that historically …. [society requires] that the state prove the guilt of an accused beyond a reasonable doubt."). Imposing this burden on the government reflects society's determination that "it is far worse to convict an innocent man than to let a guilty man go free." *Patterson v. New York*, 432 U.S. 197, 208 (1977) (quoting *In re Winship*, 397 U.S. at 372 (Harlan, J., concurring)).

Such risk to the individual is at its highest in a capital case because the "consequences of an erroneous determination … are dire." *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996). In capital proceedings, this Court has generally demanded that "factfinding procedures aspire to a heightened standard of reliability," because "execution is the most irremediable and unfathomable penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). As this Court has repeatedly admonished, "death is different." *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion)).

B. Preponderance Of The Evidence Is Intended To Balance The Risk Of Error Where An Individual Seeks To Assert A Constitutional Right

A preponderance-of-the-evidence standard, in contrast to a beyond-a-reasonable-doubt standard,

"allows both parties to 'share the risk of error in roughly equal fashion.' Any other standard expresses a preference for one side's interests." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983) (quoting *Addington*, 421 U.S. at 423). Preponderance is therefore the default standard of proof in civil litigation, *Grogan v. Garner*, 498 U.S. 279, 286 (1991), and the overwhelming body of caselaw demonstrates that preponderance is the burden placed on an individual seeking to assert his constitutional right, including under the Eighth Amendment and Due Process Clause of the Fourteenth Amendment. *See* Petition for Writ of Certiorari at 27–29 & nn.6–14.

In the Eighth Amendment context, for example, courts have affirmed that a plaintiff asserting a claim must do so by a preponderance of the evidence. *See, e.g.*, *Baskerville v. Mulvaney*, 411 F.3d 45, 48 (2d Cir. 2005) (affirming jury instruction requiring plaintiff to prove Eighth Amendment excessive-force claim by a preponderance of the evidence); *cf. Bearchild v. Cobban*, 947 F.3d 1130, 1136–37 (9th Cir. 2020) (remanding jury instruction that improperly explained the substantive elements of an Eighth Amendment claim, but impliedly approving instruction that the claim should be demonstrated by a preponderance of the evidence).

Courts likewise have held that preponderance is the proper standard for claims under the Due Process Clause. *See, e.g.*, *Castro v. County of Los Angeles*, 833 F.3d 1060, 1072–73 (9th Cir. 2016) (affirming jury instruction requiring pretrial detainee to prove failure-to-protect claim, under the Due Process Clause, by a preponderance of the evidence). Plaintiffs seeking to

establish a due-process claim under *Brady v. Maryland*, 373 U.S. 83 (1963), must similarly do so by a preponderance of the evidence. *See, e.g.*, *United States v. Garcia,* 793 F.3d 1194, 1205 (10th Cir. 2015); *Drumgold v. Callahan*, 707 F.3d 28, 48 (1st Cir. 2013).

This Court has also held that, when an accused defendant seeks to suppress evidence, he needs to prove only by a preponderance of the evidence that the police abused their investigative discretion in violation of the Fourth Amendment. *See Franks v. Delaware*, 438 U.S. 154, 156 (1978) ("In the event … the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence … the search warrant must be voided and the fruits of the search excluded …."). Federal circuit courts have likewise applied preponderance to claims arising under the Fourth Amendment. *See, e.g.*, *Tatro v. Kervin*, 41 F.3d 9, 14 (1st Cir. 1994) ("[Plaintiff] had to prove by a preponderance of the evidence that police officers violated his Fourth Amendment rights by arresting him without probable cause … and by using excessive force in their … arrest ….").

The preponderance standard is similarly imposed on plaintiffs seeking to establish a *Batson* violation. *See Johnson v. California*, 545 U.S. 162, 170 (2005) (explaining that, at final step of *Batson* inquiry, the judge must decide "whether it was more likely than not that the challenge was improperly motivated"); *Madison v. Comm'r, Ala. Dep't of Corr.*, 761 F.3d 1240, 1250–51 (11th Cir. 2014) ("[T]he burden on [plaintiff] at *Batson*'s third step is to prove purposeful discrimination by a preponderance of the evidence.").

Appellate courts have also applied the preponderance standard to, among other things, ineffective-assistance-of-counsel claims. *See Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).[2]

Likewise, this Court consistently applies the preponderance standard to equal protection claims, ranging from redistricting, *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 259 (2016) (using "more probable than not"), to disenfranchisement, *Hunter v. Underwood*, 471 U.S. 222, 225 (1985) (citing with approval the Eleventh Circuit's application of a preponderance standard). Federal circuit courts have also applied preponderance to equal-protection claims. *See, e.g.*, *Conley v. United States*, 5 F.4th 781, 789 (7th Cir. 2021) (observing that "[e]qual protection claims generally must be proven by a preponderance of the evidence," and applying that standard to racially selective-enforcement claims); *McCarty v. Henson*, 749

[2] To determine prejudice under *Brady* and *Strickland*, the burden imposed is even lower: a petitioner must show only a "reasonable probability" of a different result. *See Kyles v. Whitley*, 514 U.S. 419, 434 ("[The] touchstone of materiality [for *Brady*] is a 'reasonable probability' of a different result, and the adjective is important."); *Strickland*, 466 U.S. at 694 (holding that a new trial must be granted if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). A "reasonable probability" is less than a preponderance, and is defined as "a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland*, 466 U.S. at 694).

F.2d 1134, 1136 (5th Cir. 1984) (affirming application of preponderance standard to plaintiffs' allegations of vote dilution in violation of the Fourteenth and Fifteenth Amendments).

This Court has also concluded that, in the First Amendment retaliation context, there is "no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation," and has rejected the argument that a plaintiff must demonstrate improper motive by clear and convincing evidence. *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998). Appellate courts have repeatedly affirmed that a preponderance standard applies generally to the assertion of constitutional rights under 42 U.S.C. § 1983. *See Campbell v. Pa. Sch. Bd. Ass'n*, 972 F.3d 213, 224 (3d Cir. 2020) ("[W]e have repeatedly held preponderance of the evidence to be the proper standard for § 1983 claims."), *cert. denied*, 141 S. Ct. 2854 (2021).

This consistent use of the preponderance standard in cases involving the assertion of constitutional rights, including those under the Eighth and Fourteenth Amendments, reflects a societal consensus regarding the appropriate allocation of risk between the individual and government when constitutional rights are at stake. *Cf. Atkins*, 536 U.S. at 313 ("[I]n cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977))). Mr. Young's case involves constitutional rights under the Eighth and Fourteenth Amendments, and the interest at stake is not only one of liberty, but

of life itself. The margin of error—where error is irreversible—cannot be placed on the individual asserting his constitutional right not to be executed.

C. Only Georgia Requires Proof Beyond A Reasonable Doubt For Intellectually Disabled Individuals To Invoke Their Right Not To Be Executed

Georgia Code § 17-7-131(c)(3) provides: "The defendant may be found 'guilty but with intellectual disability' if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is with intellectual disability." If "the jury or court find[s] in its verdict that the defendant is guilty of the crime charged but with intellectual disability, the death penalty shall not be imposed and the court shall sentence the defendant to imprisonment for life." *Id.* § 17-7-131(j)(2). The Georgia Supreme Court has interpreted § 17-7-131 to require a defendant to prove that he "is with intellectual disability" beyond a reasonable doubt. *See Young v. State*, 860 S.E.2d 746, 769 & n.9 (Ga. 2021).

Georgia's requirement that an intellectually disabled individual must bear the risk of error makes it an outlier among the states. *See* Pet. at 11–17. Of the jurisdictions that retain the death penalty, the majority impose a preponderance standard—and no other state requires proof beyond a reasonable doubt. *See* Lauren Sudeall Lucas, *An Empirical Assessment of Georgia's Beyond a Reasonable Doubt Standard to Determine Intellectual Disability in Capital Cases*, 33 GA. ST. U. L. REV. 553, 560-61 & nn.22–25 (2017)

(collecting statutes and cases). Likewise, state supreme courts that have considered the question have overwhelmingly held that only the preponderance standard satisfies the Due Process Clause—and no other state supreme court has affirmed the constitutionality of beyond a reasonable doubt. *See* Pet. at 11–17 & nn.2–3.[3]

This outlier status is particularly meaningful in light of this Court's ruling in *Atkins*. In assessing the "evolving standards of decency" regarding execution of intellectually disabled individuals, the Court relied on the significance of "the consistency of the direction of change" in state legislatures prohibiting such executions to determine that the practice violated the Eighth Amendment. *See Atkins*, 536 U.S. at 315. Here, too, the states have spoken with a unified voice, requiring a lesser burden of proof to assert an *Atkins* claim. *Cf. Cooper*, 517 U.S. at 362 ("The near-uniform application of a standard that is more protective of the defendant's rights than Oklahoma's clear and convincing evidence rule supports our conclusion that the heightened standard offends a principle of justice that is deeply 'rooted in the traditions and conscience of our

[3] Colorado's high court previously upheld a clear-and-convincing standard, *see People v. Vasquez*, 84 P.3d 1019, 1022–23 (Colo. 2004) (en banc), but Colorado has since abolished the death penalty. *See* Pet. at 17 n.4. One other state supreme court—Arizona—has upheld a clear-and-convincing standard. *See State v. Grell*, 135 P.3d 696, 705 (Ariz. 2006) (en banc). Neither of these decisions suggested that beyond a reasonable doubt would be constitutional. *See* Pet. at 17 n.4. Florida's high court has never squarely addressed the constitutionality of its clear-and-convincing standard. *See id.*

people.'" (quoting *Medina v. California*, 505 U.S. 437, 445 (1992))); *see also Moore v. Texas*, 137 S. Ct. 1039, 1057 (2017) (Roberts, C.J., dissenting) ("Our decisions addressing capital punishment for the intellectually disabled recognize the central significance of state consensus."); *Hall v. Florida*, 572 U.S. 701, 718 (2014) ("The rejection of [Florida's rule] in the vast majority of States and the consistency in the trend, toward recognizing [another approach] provide strong evidence of consensus that our society does not regard [Florida's rule] as proper or humane." (internal quotation marks and citation omitted)). This Court need not resolve whether any lesser evidentiary burden satisfies due process and the Eighth Amendment in order to hold that Georgia's use of the beyond-a-reasonable-doubt standard does not. Georgia's burden forces the individual seeking to vindicate his constitutional right to disproportionately bear the risk of error, running afoul of the consensus of the other states, *Atkins*, and the Due Process Clause.

II. Beyond a Reasonable Doubt Cannot Be The Standard For Vindicating Constitutional Rights

Counsel for amici is not aware of any situation in which this Court has sanctioned a state's imposition of the beyond-a-reasonable-doubt standard on an individual seeking to vindicate a constitutional right. In the single instance in which this Court has permitted a more demanding standard, it has authorized only the imposition of the clear-and-convincing-evidence standard, and has required compelling reasons justifying the heightened standard.

Georgia has no compelling reason for imposing a heightened burden on intellectually disabled individuals asserting their right not to be executed. The state's interest in efficient operation of its criminal justice system can be achieved through the imposition of a lesser burden, and the heightened burden creates an increased risk of execution in violation of the Eighth Amendment—which is irreversible.

A. A Compelling Reason Must Exist To Impose A Heightened Burden

The only instance in which this Court has sanctioned the imposition of a heightened burden for the vindication of a constitutional right underscores its singularity, and the concomitant need for a compelling reason to do so. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 280–83 (1990).

Cruzan applied the clear-and-convincing burden because the case involved the interest in life, and the right asserted (to withdraw life support) was being maintained by a surrogate, rather than the individual herself. *Id.* at 280. This Court explained that a state is entitled to impose a heightened burden on a surrogate seeking to demonstrate someone else's wishes, particularly where "[a]n erroneous decision … is not susceptible of correction." *Id.* at 283.

This limited exception underscores that the default standard of proof to prove facts underlying the assertion of a constitutional right is preponderance. Only when that standard may compromise other constitutional rights or imperatives has this Court permitted deviation from the preponderance standard.

B. Georgia Has No Compelling Reason For Imposing A Heightened Burden

Georgia lacks any comparable compelling reason for imposing a greater burden on an intellectually disabled individual invoking his right not to be executed. The risk involved—that of wrongful, irreversible execution—supports imposing a higher burden on the state, not the individual. *Cf. Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) ("[W]e have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case.").

That risk is not merely hypothetical: since 1973, more than 185 people have been released from death row with evidence of their innocence. *See* Facts About the Death Penalty, DEATH PENALTY INFO. CTR., https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf (last updated Dec. 9, 2021). Put another way, an average of 3.94 wrongly convicted death-row prisoners have been exonerated each year since 1973. *Id.*

The risk of error is compounded in cases involving defendants with intellectual disabilities. This Court recognized in *Atkins* that defendants with intellectual disabilities "may be less able to give meaningful assistance to their counsel and are typically poor witnesses." 536 U.S. at 320–21. In much the same way that intellectually disabled individuals are less able to help their defense, they are less able to help prove their intellectual disability. Raising the burden of proof to achieve that end is counterintuitive and cruel, in contravention of the Eighth Amendment.

The record of Georgia's post-*Atkins* cases suggests a risk that individuals with intellectual disability might have been, or might be, sentenced to death in violation of their Eighth Amendment right not to be executed. *See* Pet. at 18 (explaining that only one out of eighteen asserted *Atkins* claims in Georgia has succeeded through 2014, whereas *Atkins* claims outside of Georgia have succeeded at a rate of approximately one in three (citing John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins, 23 WM. & MARY BILL RTS. J. 393, 412–13 (2014))).[4]

States can regulate procedural burdens, *see Bobby v. Bies*, 556 U.S. 825, 831 (2009), but that power is "subject to proscription under the Due Process Clause if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Cooper*, 517 U.S. at 367 (quoting *Patterson*, 432 U.S. at 201–02). *Atkins* definitively established that "death is not a suitable punishment for a[n intellectually disabled] criminal," 536 U.S. at 321, and the Due Process Clause demands that this Court examine "whether a State's procedures for

[4] Georgia's provision of additional procedures for establishing an *Atkins* claim does not mitigate the impact of its heightened burden. The Georgia Supreme Court noted in its decision that, although this Court has never deemed due process to require a full trial on the issue of intellectual disability, Georgia nevertheless provides that full panoply of protections to individuals charged with capital crimes who seek to assert their Eighth Amendment right under *Atkins*. Pet. App. at 48a. A trial serves no practical protective purpose, however, where the burden of proof imposed on an individual is so high that he has no reasonable chance of vindicating his constitutional right.

guaranteeing a fundamental constitutional right are sufficiently protective of that right," *Cooper*, 517 U.S. at 367–68. Georgia's heightened burden has effectively, and impermissibly, nullified the constitutional right guaranteed by the Eighth Amendment. *Cf. Bailey v. Alabama*, 219 U.S. 219, 244 (1911) ("What the state may not do directly it may not do indirectly.").

Numerous judges on the Eleventh Circuit and on the Supreme Court of Georgia have, in concurrences and dissents, condemned Georgia's procedure for these reasons. *See Raulerson v. Warden*, 928 F.3d 987, 1009 (11th Cir. 2019) (Jordan, J., concurring in part and dissenting in part) ("[Georgia's] burden of proof creates an intolerable risk that intellectually disabled defendants will be put to death."), *cert. denied*, 140 S. Ct. 2568 (2020);[5] *Hill v. Humphrey*, 662 F.3d 1335, 1364 (11th Cir. 2011) (Tjoflat, J., concurring) ("By erecting this higher burden, [Georgia] effectively put its thumb on the scale against a defendant's mental-retardation defense."), *cert. denied*, 566 U.S. 1041 (2012); *id.* at 1365 (Barkett, Marcus, and Martin, JJ., dissenting) ("Although Georgia was the first state to declare that the mentally retarded should not be executed, it is the only one to guarantee precisely the opposite result by requiring offenders to prove beyond a reasonable doubt that they are mentally retarded."); *Stripling v. State*, 711 S.E.2d 665, 671 (Ga. 2011)

[5] The majority in *Raulerson* held that the lower court's determination that Georgia's burden of proof did not violate the Due Process Clause was not an unreasonable application of clearly established federal law under "the deferential framework imposed by section 2254(d)(1)," 928 F.3d at 1000, but this case presents the opportunity to review the Georgia statute on direct review.

(Benham, J., dissenting in part) ("Today Georgia stands alone in severely inhibiting Eighth Amendment protections by applying the most stringent standard available in our system of justice …. Georgia's requirement … is too rigorous a standard to sufficiently uphold th[e] constitutional protection [established by *Atkins*]."); *Head v. Hill*, 587 S.E.2d 613, 628 (Ga. 2003) (Sears, J., dissenting) ("[T]he state's power to establish the procedures necessary to enforce the federal constitutional ban on executing the mentally retarded is not left to the state's wholesale discretion, but rather must conform to the United States Constitution's guarantee of procedural due process. The majority errs by holding otherwise.").

Moreover, the risk borne by the state as a result of lessening the burden imposed on the individual is comparatively slight: an erroneous decision would mean the individual spends life in prison, rather than being executed. Such a result would continue to serve the state's interest in maintaining its criminal justice system and public safety.[6] The unanimity of the other

[6] It would also save the state—and the taxpayers—extraordinary sums of money. The financial cost of the death penalty is exorbitant: Louisiana's capital punishment system, for example, costs the state at least $15,600,000 per year. Hon. Calvin Johnson, *An Analysis of the Economic Cost of Maintaining a Capital Punishment System in the Pelican State* at 1 (2019), https://law.loyno.edu/sites/default/files/economic_cost_paper_la_5.1.2019.pdf. Capital trials cost millions of dollars to prosecute and post-conviction review costs millions of dollars to litigate—significantly more than non-capital prosecutions. *See* Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 890 (2007) (collecting studies); *see also*

states, in imposing a lesser burden than beyond a reasonable doubt in order to establish intellectual disability under *Atkins*, further underscores that states can efficiently administer their criminal justice systems with a lower standard of proof.

* * *

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari or, in the alternative, grant the writ, vacate the decision and remand for further proceedings.

Jenny-Brooke Condon, *Denialism and the Death Penalty*, 97 WASH. U. L. REV. 1397, 1424 n.172 (2020).

Dated: New York, NY
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