No. 20-6500

IN THE
Supreme Court of the United States

ALFRED BOURGEOIS,

Petitioner,

v.

T.J. WATSON, WARDEN, AND
UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–3598, provides that "[a] sentence of death shall not be carried out upon a person who is mentally retarded," *id.* § 3596(c). That language appears in a provision entitled "Implementation of a sentence of death," alongside parallel provisions prohibiting execution of pregnant women and prisoners who are mentally incompetent, *id.* § 3596(b), (c), and following provisions triggered "[w]hen the sentence is to be implemented," *id.* § 3596(a). The Act elsewhere contains separate provisions for "Imposition of a sentence of death," *id.* § 3594, following a "Special hearing to determine whether a sentence of death is justified," *id.* § 3593, based on "Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified," *id.* § 3592, all to be followed by "Review of a sentence of death," *id.* § 3595.

The question presented is: Whether the Federal Death Penalty Act prohibits the government from executing a federal prisoner who is intellectually disabled under legal and diagnostic standards applicable when the sentence is to be carried out.

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INTEREST OF AMICUS CURIAE

The Constitution Project at the Project On Government Oversight (TCP) seeks consensus-based solutions to contemporary constitutional issues, including by working to ensure due process in the criminal justice system. TCP 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, particularly when the government seeks to impose an irrevocable punishment like the death penalty. Accordingly, TCP regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its nonpartisan positions on constitutional or statutory issues, *see, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam), in order to better apprise courts of the importance and broad consequences of those issues. TCP takes no position on the abolition or maintenance of the death penalty. Rather, it focuses on forging solutions aimed at achieving the common objectives of justice for victims of crimes and protecting the constitutional rights of the accused.[1]

[1] Pursuant to Rule 37.2(a), counsel of record received timely notice of intent to file this brief, and consented in writing. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Federal Death Penalty Act of 1994 (FDPA) commands that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c). That present-tense language—focusing on the time of execution rather than the time the sentence is imposed—means what it says: The federal government may not execute a prisoner if he is intellectually disabled when the sentence will be "carried out." That determination requires assessing the prisoner under current legal and diagnostic standards. *Id.*[2]

The Seventh Circuit here disagreed, stating that the question "is not whether [Petitioner] is intellectually disabled," because he "was able to litigate his intellectual-disability claim" in 2011. Pet. App. PA015. The court of appeals is mistaken. The court's reading not only is contrary to § 3596(c)'s plain language, but disregards familiar interpretive principles, statutory structure and context, and legislative history that fortify the statute's plain meaning. It also creates serious constitutional concerns.

Start with the text. The very first provision of the U.S. Code, like this Court's decisions, "ascribes significance to verb tense." *Carr v. United States*, 560 U.S. 438, 448 (2010) (discussing the Dictionary Act, 1 U.S.C. § 1). That is especially true where, as here, Congress put other provisions of the statute in the past tense. *See id.* at 450. Here, although Congress

[2] Except when quoting, this brief uses the term "intellectually disabled" rather than the term "mentally retarded," consistent with the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM-5).*

used past-tense constructions to refer to numerous *past* determinations, *see, e.g.*, 18 U.S.C. § 3592(a)(2) ("defendant *was* under unusual and substantial duress" (emphasis added)); *id.* § 3592(b)(3) ("defendant knowingly *created* a grave risk of death to another person" (emphasis added)), it prohibited "*carry[ing] out*" the execution of "a person who *is* mentally retarded," *id.* § 3596(c) (emphases added). That plain language prohibits executing a person who is—at the time the execution is carried out—intellectually disabled.

Consider too the other prohibitions on execution that accompany the intellectual-disability prohibition. Section 3596 also provides that "[a] sentence of death shall not be carried out upon a woman while she is pregnant," *id.* § 3596(b), or "upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it *was imposed* on that person," *id.* § 3596(c) (emphasis added). Pregnancy can be evaluated *only* in the present; likewise, mental competence *must* be assessed in the present under both this Court's decisions and the common law, even if the prisoner was competent when the death sentence was imposed. *Ford v. Wainwright*, 477 U.S. 399, 406–08 (1986). By placing those similarly worded provisions side-by-side, Congress indicated that it expected present-tense assessments at the time of execution for all three conditions.

The FDPA's structure confirms that Congress drafted the statute with care. The intellectual-disability prohibition appears in a section entitled "*Implementation* of a sentence of death"—a section triggered "[w]hen the sentence is to be implemented." 18 U.S.C.

§ 3596(a) (emphasis added). But "*Imposition* of a sentence of death" is the subject of another provision, *id.* § 3594 (emphasis added), to be resolved at a "Special hearing to determine whether a sentence of death is justified," *id.* § 3593, based on "Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified," *id.* § 3592.

Congress' placement of the intellectual-disability assessment at implementation was no accident. Just a few years before enactment of the FDPA, this Court held in *Penry v. Lynaugh*, 492 U.S. 302, 324–30 (1989), that the Eighth Amendment required consideration of intellectual disability as mitigating evidence weighing against *imposition* of the death penalty. But Congress charted a different course in the FDPA. First, Congress went beyond *Penry* to prohibit altogether the execution of "a person who is mentally retarded," 18 U.S.C. § 3596(c), rather than placing intellectual disability among the mitigating factors in § 3592. Second, Congress placed that prohibition at *implementation*, thus requiring the determination to be made at the time the execution is to "be carried out." *Id.* § 3596(c).

Congress' choice to require a time-of-execution assessment matters. Although the underlying impairments are permanent, the intellectual-disability inquiry is not. Beginning with *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), this Court's decisions make clear that the applicable standards continue to advance as this Court provides guidance on the law and clinical authorities continue to refine the relevant diagnostic standards. *See Moore v. Texas*, 137 S. Ct. 1039, 1049–53 (2017); *Hall v. Florida*, 572 U.S. 701, 710–14, 721–23 (2014). By amending the FDPA after *Atkins* without modifying the intellectual-disability prohibition,

Congress indicated that it incorporated this Court's understanding of intellectual disability and the FDPA's time-of-execution prohibition.

In *Atkins*, the Court held that executing persons with intellectual disability violates the Eighth Amendment. The Court noted that the FDPA "prohibited any individual with mental retardation from being sentenced to death *or executed*." *Atkins*, 536 U.S. at 314 n.10 (emphasis added). It further relied on the national consensus in the States, with definitions that "generally conform to the clinical definitions" set out by the American Association on Mental Retardation and the American Psychiatric Association. *Id.* at 308 n.3, 317 n.22. Having established the importance of focusing on standards "that currently prevail," as informed by ever-advancing clinical guidelines, the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 311, 317.

Congress amended the FDPA twice after *Atkins*. *Infra* pp. 22–23. But it never revisited its prohibition on "carr[ying] out" a death sentence on "a person who is mentally retarded." 18 U.S.C. § 3596(c). That is because Congress had already made its choice about how to enforce the constitutional restriction. As "the words on the page" provide, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020), the federal government may not execute someone who is intellectually disabled under standards prevailing at implementation, when the execution will "be carried out."

Constitutional avoidance principles dispel any lingering doubt that § 3596(c) means what it says. The Eighth Amendment prohibits the execution of "*any* intellectually disabled individual." *Moore*, 137 S. Ct. at

1048 (quoting *Atkins*, 536 U.S. at 321). And it requires attention to "[t]he medical community's current standards." *Id.* at 1053. Failing to assess a prisoner's intellectual-disability claim under standards current at the time of execution raises serious constitutional questions by "creat[ing] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1051 (quoting *Hall*, 572 U.S. at 704). That is true even if the prisoner has previously litigated an intellectual-disability claim, so long as he can show that the result may be different under current standards, informed by this Court's precedents and "the work of medical experts." *Hall*, 572 U.S. at 710. Reading § 3596(c) according to its plain language avoids those constitutional difficulties.

ARGUMENT

A. The FDPA's plain text forbids executing a person who "is" intellectually disabled under standards applicable at the time the execution will be "carried out."

Courts interpret statutes "in accord with the ordinary public meaning of [their] terms," because "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738. Here, the relevant words provide that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c). That language prohibits the federal government from executing someone who "is" intellectually disabled under standards applicable at the time of execution, as traditional interpretive canons confirm.

1. Congress' present-tense construction must be presumed to be deliberate.

1. a. Congress' use of the present-tense phrase "*is* mentally retarded" reflects its intent to preclude execution of individuals who are intellectually disabled as assessed at the time the sentence will be implemented. Verb tense matters. This Court "frequently look[s] to Congress' choice of verb tense to ascertain a statute's temporal reach," as the Dictionary Act requires. *Carr*, 560 U.S. at 448 (citing *United States v. Wilson*, 503 U.S. 329, 333 (1992); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987); *Barrett v. United States*, 423 U.S. 212, 216 (1976)). The Dictionary Act provides that "words used in the present tense include the future as well as the present," 1 U.S.C. § 1—but "the present tense generally does not include the past," *Carr*, 560 U.S. at 448. That principle tracks "the typical understanding of the present tense in either normal discourse or statutory construction." *Id.* at 448 n.5.

In *Carr*, for example, the Court held that a sex-offender registration statute applying to anyone who "is required to register" applied to only post-enactment conduct. *Id.* at 441–42. "Had Congress intended preenactment conduct to satisfy" that provision, the Court reasoned, "it presumably would have varied the verb tenses." *Id.* at 450. Indeed, "numerous federal statutes use" past-tense constructions "when coverage of preenactment events is intended." *Id.*

Those plain-meaning principles apply here too. Had Congress intended to permit the execution of a defendant who litigated an intellectual-disability claim under outdated standards prevailing *before* implementation of the death sentence, even though he is

intellectually disabled under current standards, it could have said so.

b. The Seventh Circuit here disagreed, asking "what other word would Congress have chosen" other than "the word 'is'" given that "[i]ntellectual disability is a permanent condition." Pet. App. PA014. But "omnitemporality" "is not the typical understanding of the present tense." *Carr*, 560 U.S. at 448 n.5. Congress *would* have used another formulation—in another section of the statute, *see infra* pp. 12–14, and "varied the verb tenses," *Carr*, 560 U.S. at 450—if it had not intended an intellectual-disability assessment under current standards. For example, Congress could have provided that a person "shall not be eligible for a death sentence if a court has determined that he is mentally retarded." Such a present-perfect formulation would focus on a defendant's opportunity to raise intellectual disability earlier rather than—as Congress provided—on whether he "is" intellectually disabled as assessed at the time the execution will "be carried out." 18 U.S.C. § 3596(c). Timing matters, because the standards for assessing intellectual disability are constantly advancing. *Infra* pp. 23–24.

Such care with language is not too much to expect. Congress "knows how to avoid … prospective implication by using language that explicitly targets" the past. *Gwaltney*, 484 U.S. at 57; *see Barrett*, 423 U.S. at 216 (present-perfect tense "denot[ed] an act that has been completed"). Indeed, Congress used the present-perfect tense elsewhere in the FDPA, when addressing facts adjudicated in the past. *See, e.g.*, 18 U.S.C. § 3592(b) (sentencer may consider "any other aggravating factor *for which notice has been given*" (emphasis added)); *id.* § 3592(c)(2) (aggravating factor if "the

defendant *has previously been convicted* of" a felony (emphasis added)). And, perhaps most significantly, alongside the prohibition on executing someone "who is mentally retarded," Congress prohibited executing someone who "lacks the mental capacity to understand the death penalty and why it *was imposed* on that person." *Id.* § 3596(c) (emphasis added). When Congress wanted the decisionmaker to look to the past, it said so.

So too when Congress wanted to require a present-tense determination, as here. Congress provided that a sentence of death "shall not be carried out upon a woman while she *is* pregnant"; "upon a person who, as a result of mental disability, *lacks* the mental capacity to understand the death penalty and why it was imposed"; or "upon a person who *is* mentally retarded." 18 U.S.C. § 3596(b), (c) (emphases added). The Seventh Circuit nonetheless wrongly concluded, as it had in *Carr*, "that Congress' use of present-tense verbs … is not very revealing.*"* 560 U.S. at 451.

2. Fundamental interpretive principles confirm that Congress deliberately used present-tense language.

"[S]tatutory context" likewise "strongly supports a forward-looking construction." *Id.* at 449.

First, words are known by the company they keep (*noscitur a sociis*). *E.g.*, *Lagos v. United States*, 138 S. Ct. 1684, 1688–89 (2018). Here, Congress placed the present-tense intellectual-disability prohibition alongside two other conditions that preclude execution *at the time* of implementation of the sentence: pregnancy and lack of capacity. 18 U.S.C. § 3596(b),

(c). Pregnancy *must* be assessed at the time of implementation, rather than imposition, of the sentence. The same is true for mental incompetence. As *Ford* illustrates, a defendant competent at sentencing may deteriorate and become incompetent before execution. 477 U.S. at 401–02; *infra* pp. 10–11. Combined with the statute's present-tense language, *noscitur a sociis* provides "powerful evidence," *Carr*, 560 U.S. at 450, that the intellectual-disability prohibition is forward-looking. Congress intended the FDPA's ban on executing intellectually disabled prisoners to be treated the same as the statute's parallel present-tense provisions for pregnant and incompetent prisoners.

Second, § 3596's historical roots confirm that Congress deliberately used present-tense language. Section 3596 incorporates the common-law and Eighth Amendment rule that mental incompetence at the time of execution spares a prisoner from death. Placing intellectual disability alongside mental incompetence suggests the same present-tense construction.[3]

Courts "presume that Congress legislates against the backdrop of the common law," *Comcast Corp. v. Nat'l Ass'n of African Am.–Owned Media*, 140 S. Ct. 1009, 1016 (2020), expecting common-law principles to apply absent contrary provisions, *United States v. Texas*, 507 U.S. 529, 534 (1993). Here, the common-law rule "stayed" execution of mentally incompetent prisoners, even those sentenced to death while competent and "becom[ing] of nonsane memory" only "after judgment." *Ford*, 477 U.S. at 406–07 (quoting 4 W. Blackstone, *Commentaries* *24–25).

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[3] The common law also prohibited the execution of pregnant women. *See, e.g.*, 4 W. Blackstone, *Commentaries* *395.

That was the situation in *Ford*, where this Court held that "[t]he Eighth Amendment prohibits the State from *inflicting* the penalty of death upon a prisoner who is insane." *Id.* at 408, 410 (emphasis added). Although Ford was not "incompetent at the time of his offense, at trial, or at [capital] sentencing," his behavior subsequently changed and "became more serious over time." *Id.* at 401–02. *Ford* requires an assessment of "the prisoner's ability to comprehend the nature of the [death] penalty" at the time of execution. *Id.* at 417. The question centers not on *imposition* of the death penalty, but rather on the government's "ability to *execute* its sentences." *Id.* at 409 (emphasis added); *see infra* pp. 12–14.

This Court presumes that Congress is aware of both the common law and "relevant judicial precedent." *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010). And like the common law, *Ford* was on the books when Congress enacted the Anti–Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, § 700(*l*), 102 Stat. 4390, 21 U.S.C. § 848(*l*), containing the intellectual-disability prohibition on which the FDPA prohibition at issue here was modeled, *see infra* pp. 18–19. Congress' placement of a prohibition on executing individuals who are intellectually disabled alongside common-law prohibitions requiring time-of-execution assessments is strong evidence that Congress "expect[ed] that the common law [timing] principle [would] apply" across the board. *Texas*, 507 U.S. at 534 (cleaned up).

* * *

"Where, as here, Congress uses similar statutory language in two adjoining provisions, it normally intends similar interpretations." *Nijhawan v. Holder*,

557 U.S. 29, 39 (2009). Congress, by using present-tense verbs for all three conditions prohibiting the government from "carr[ying] out" the sentence, intended for all three conditions to be assessed under standards applicable at the time of execution. Thus, "the only way to avoid an incongruity among neighboring" provisions, *Carr*, 560 U.S. at 449 (quoting *Gwaltney*, 484 U.S. at 59), is to construe the prohibitions on "carr[ying] out" the execution of individuals who are pregnant, mentally incompetent, or intellectually disabled as all requiring a present-tense determination. Congress' "undeviating use of the present tense" is a "striking indic[ator]" of the statute's "prospective orientation." *Id.*

B. The FDPA's structure and context confirm that Congress intended a present-tense assessment of intellectual disability under current standards.

The FDPA's structure and context confirm what the law's plain text commands: Congress expected a present-tense intellectual-disability assessment under the governing standards applicable when the execution would be "carried out." 18 U.S.C. § 3596(c).

1. Congress distinguished between imposition and implementation of a death sentence throughout the FDPA.

"[T]he structure of the [FDPA] and its other provisions" support reading § 3596(c)'s prohibition on executing individuals who are intellectually disabled to require a present-tense assessment. *Culbertson v. Berryhill*, 139 S. Ct. 517, 522 (2019) (quotation marks omitted); *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("language and design of the statute

as a whole"). The FDPA's design shows that Congress intended the intellectual-disability determination to be made under standards prevailing at *implementation*, rather than *imposition*, of a death sentence.

Congress devoted separate provisions to imposition and implementation of a death sentence, and ranked intellectual disability as a reason not to *implement* a sentence. "Impose" means "to put or subject … to a penalty," *Impose*, Oxford English Dictionary,[4] and "Imposition of a sentence of death" is the title and subject of a separate provision, 18 U.S.C. § 3594. "Implement," in contrast, means "to complete, perform, carry into effect …; to fulfil," *Implement*, Oxford English Dictionary,[5] and Congress devoted § 3596, the provision at issue, to "Implementation of a sentence of death." *See generally Porter v. Nussle*, 534 U.S. 516, 527–28 (2002) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.").

That choice is significant, because it tells prosecutors, defendants, and judges that the intellectual-disability question can be conclusively resolved against a defendant only under the legal and clinical standards applicable when the execution is to be completed, performed, or, in Congress' words, "carried out." "Carry out," of course, means "to conduct duly to completion or conclusion." *Carry out*, Oxford English Dictionary.[6]

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[4] https://oed.com/view/Entry/92591.

[5] https://oed.com/view/Entry/92452.

[6] https://oed.com/view/Entry/28252.

"[T]he imposition and carrying out of the death penalty," *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam), are two different things.

The distinction between imposition and implementation pervades the FDPA. Not only does § 3596 contain prohibitions that *must* be assessed at implementation, *supra* pp. 9–12, but other provisions with no mention of intellectual disability are designed to guide the imposition stage: "Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified," *id.* § 3592, at a "Special hearing to determine whether a sentence of death is justified," *id.* § 3593, with appellate "Review of a sentence of death" to follow, *id.* § 3595. That scheme reflects Congress' expectation that, on a sufficient showing, intellectual disability would be assessed at implementation, regardless of what transpired earlier.

What's more, § 3596 itself distinguishes between imposition and implementation. "[T]he sentence is to be implemented" only after "exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence." *Id.* § 3596(a). And "[a] sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it *was imposed* on that person." *Id.* § 3596(c) (emphasis added); *supra* pp. 9–12.

2. The backdrop of this Court's decision in *Penry v. Lynaugh* confirms that Congress intended a present-tense prohibition.

Congress' decision to define the prohibition on "carr[ying] out" a death sentence on someone "who is"

intellectually disabled at implementation is particularly significant given this Court's decision just several years earlier in *Penry v. Lynaugh*, 492 U.S. 302 (1989). The Court in *Penry* viewed mental retardation not as a bar on execution but as a non-dispositive factor relevant to whether a death sentence should be *imposed*. Section 3596 diverged from that approach, confirming that Congress expected an assessment at implementation. *Cf. Porter*, 534 U.S. at 528 ("Congress expects its statutes to be read in conformity with th[e] Court's precedents").

In *Penry*, this Court rejected the argument, later accepted in *Atkins*, that "the Eighth Amendment prohibits the execution of mentally retarded persons." 492 U.S. at 329; *see infra* pp. 19–21. The Court thus declined to "impose a new obligation on the States and the Federal Government" regarding their "power to *impose*" the death penalty." *Penry*, 492 U.S. at 329–30 (emphasis added). Instead, the Court held that the Eighth Amendment required an instruction at sentencing that the jury could consider and "give mitigating effect to Penry's evidence of mental retardation" "as relevant evidence that might cause it to *decline to impose* the death sentence." *Id.* at 324, 327 (emphasis in original). The Court added that "mental retardation" was potentially "a two-edged sword: it may diminish [Penry's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.* at 324. In short, the Court's reasoning and holding located "mental retardation" as a key consideration in the decision whether to *impose* a death sentence, not whether to *implement* one.

Several years later in the FDPA, however, Congress charted a different course both substantively

and procedurally. Not only did Congress provide that an intellectually disabled individual cannot be executed, but it did so at the *implementation* stage, providing that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c). That choice is particularly telling given Congress' detailed provisions for consideration of enumerated mitigating and aggravating factors in 18 U.S.C. §§ 3592 and 3593—where intellectual disability would be found had Congress followed the Court's approach in *Penry*.

Congress' choice was not accidental. For one thing, Congress is presumed to be "aware of relevant judicial precedent." *Merck*, 559 U.S. at 648. For another, Congress made other legislative choices showing that it deliberately placed the intellectual-disability prohibition at implementation.

When Congress enacted the ADAA (containing the precursor to the FDPA's intellectual-disability prohibition) the year before *Penry*, it provided in a single section, "Imposition of sentence," that "[a] sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed" or "upon a person who is mentally retarded" or incompetent. 21 U.S.C. § 848(*l*) (1994). Despite the section's title, those provisions were parallel present-tense prohibitions on the implementation of sentences already imposed. *See id.* ("Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death.").

When Congress modeled the FDPA on the ADAA just a few years after *Penry*, it retained the language that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 21 U.S.C.

§ 848(*l*) (1994); 18 U.S.C. § 3596(c) (2018). But Congress placed the prohibition in a section entitled "Implementation of a sentence of death," 18 U.S.C. § 3596. At the same time, Congress treated the prohibition on executing juveniles differently, putting it in a section on *imposing* capital punishment, "Sentence of death," *id.* § 3591, and changing its once-parallel language to provide "that no person may be *sentenced* to death who was less than 18 years of age at the time of the offense," *id.* § 3591(a), (b) (emphasis added). Congress' modifications to "include[] particular language in one section of a statute but omit[] it in another section" show that "Congress act[ed] intentionally and purposely," *Russello v. United States*, 464 U.S. 16, 23 (1983), in classing the prohibition on executing someone "who is mentally retarded" as a present-tense bar requiring present-tense assessment at implementation.

3. The FDPA's design and purpose reflect Congress' desire to ensure that capital punishment would be administered fairly.

The FDPA's design and purpose likewise support a present-tense assessment of intellectual disability because they show Congress' concern for fairly administering the death penalty and avoiding executing individuals who are in fact intellectually disabled.

Given strong public and political support for the death penalty, Congress passed the FDPA to help ensure fair administration of the ultimate punishment. *See* H.R. Rep. No. 103-467, at 1 (1994) ("The purpose of this Act is to establish constitutional procedures for the imposition of the Federal death penalty."). Congress pursued that goal by designing separate phases

before implementation of a death sentence and providing additional protections against unlawful executions. *See supra* pp. 12–14.

Congress was aware of the consequences of a slapdash scheme. Congress first enacted in 1988 the ADAA provision on which the FDPA's intellectual-disability provision was modeled precisely because Georgia had recently executed an intellectually disabled person. *See* 134 Cong. Rec. 22993 (1988) (Rep. Bartlett). As Petitioner observes (at 25), the prohibition's sponsor made clear that "[t]he purpose of this [amendment] is very much confined to prohibit *execution* of those who are mentally retarded." *Id.* (Rep. Levin) (emphasis added). And another Representative underscored that "the *execution* of a mentally retarded person" "becomes a cruel and excessive response" because "a mentally retarded person" "has insufficient cognitive capacity to appreciate the length between his prior action and *such belated punishment*." *Id.* at 22994 (Rep. Ravenel) (emphases added).

When Congress imported the ADAA's intellectual-disability prohibition into the FDPA, it was even more explicit. As noted, rather than placing the prohibition in an "imposition" section, as it had in the ADAA, Congress added the prohibition to a *new* section on "implementation." *Supra* pp. 16–17. That choice reflects Congress' judgment that, regardless of its imposition, a death sentence should not be implemented on someone who is intellectually disabled. Indeed, in a Senate Judiciary Committee Hearing on "Innocence and the Death Penalty," then-Chairman Joseph R. Biden, Jr., lamented that "the execution of" "the mentally retarded" "under our law is permissible at this very mo-

ment." S. Hrg. 103-468, at 8 (1993). By creating a unified scheme in the FDPA for administering the death penalty, Congress sought to ensure that federal execution of the intellectually disabled would no longer be permitted.

C. By amending the FDPA after *Atkins v. Virginia*, Congress indicated that it expected intellectual disability to be assessed under current standards.

Congress' amendments to the FDPA—which changed other provisions while leaving untouched the prohibition on executing someone "who is mentally retarded"—further demonstrate Congress' expectation that intellectual disability would be assessed under standards prevailing at the time the sentence is to be "carried out." 18 U.S.C. § 3596(c). Congress is presumed to be aware of this Court's precedents, *Merck*, 559 U.S. at 648, and to adopt the Court's construction of a statute "when it re-enacts a statute without change," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Here, those canons make clear that when Congress amended the FDPA after *Atkins v. Virginia*, it accepted the Court's conclusions both that the FDPA prohibits implementation of a death sentence on someone who is intellectually disabled and that the standards for evaluating intellectual disability advance over time. Consequently, Congress expected a present-tense assessment under standards "that currently prevail," *Atkins*, 536 U.S. at 311, before an execution may be "carried out," 18 U.S.C. § 3596(c).

1. a. In *Atkins*, the Court held that the execution of criminals with intellectual disabilities offends

our society's "evolving standards of decency" and violates the Eighth Amendment's prohibition on excessive punishment. 536 U.S. at 321. In addition to canvassing States exempting individuals with intellectual disability from capital punishment, the Court noted that "when Congress enacted legislation reinstating the federal death penalty, it expressly provided that a 'sentence of death shall not be carried out upon a person who is mentally retarded.'" *Id.* at 314. The Court read the FDPA to "prohibit[] any individual with mental retardation from being sentenced to death *or executed*." *Id.* at 314 n.10 (emphasis added).

The Court noted that its holding implicated disagreement about "which offenders are in fact retarded." *Id.* at 317. And the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction." *Id.* Even so, the Court explained that there is a "range of mentally retarded offenders about whom there is a national consensus," *id.*, and that States' definitions "generally conform to the clinical definitions" set out by the American Association on Mental Retardation and the American Psychiatric Association, *id.* at 308 n.3, 317 n.22. Earlier that year, the Court had noted that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science." *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

Atkins put Congress on notice that the definition of intellectual disability is subject to an advancing understanding informed by national consensus and current clinical guidelines. That was clear from the holding itself: the Court had found no such consensus against capital punishment of individuals with intel-

lectual disabilities just 13 years earlier in *Penry*. *Atkins*, 536 U.S. at 310, 314; *see supra* pp. 14–17. The Court changed course in *Atkins* in large part as a result of "the dramatic shift in the state legislative landscape" and the FDPA. 536 U.S. at 310, 314. The Court further observed that "this legislative judgment reflects a much broader social and professional consensus," with "organizations with germane expertise" and religious communities both expressing opposition to executing offenders with intellectual disability. *Id.* at 316 n.21.

In addition, the Court distinguished between imposition and implementation of a death sentence. "[E]ven in those States that allow the execution of mentally retarded offenders, the practice is uncommon." *Id.* at 316. While some states "continue to authorize executions, … none have been *carried out* in decades." *Id.* (emphasis added).

b. Since *Atkins*, the intellectual-disability inquiry has continued to advance. In *Hall*, the Court held that courts cannot bar a defendant from introducing evidence of intellectual disability just because he has an IQ score above 70. 572 U.S. at 722–23. The Court reiterated that "[t]he legal determination of intellectual disability" must be "informed by the medical community's diagnostic framework" and expertise, on which the Court has "placed substantial reliance." *Id.* at 721–22. And in *Moore*, the Court repeated its instruction that courts may not ignore the "medical community's current standards" or diagnostic manuals, which "offer 'the best available description of how mental disorders are expressed and can be recognized

by trained clinicians.'" 137 S. Ct. at 1053. A defendant's underlying impairments do not change, but the legal and diagnostic standards do.

2. Congress twice amended the FDPA after *Atkins*. Yet it never revisited the intellectual-disability prohibition. That choice, combined with Congress' presumed awareness of *Atkins*, confirms that Congress expected that current standards would be applied to determine intellectual disability at the time the death sentence will be "carried out." 18 U.S.C. § 3596(c); *see Forest Grove Sch. Dist.*, 557 U.S. at 239–40; *Merck*, 559 U.S. at 648.

First, later in 2002, Congress corrected a cross-reference in 18 U.S.C. § 3593, "Special hearing to determine whether a sentence of death is justified," without addressing any question of executing individuals with intellectual disabilities. Criminal Law Technical Amendments Act of 2002, Pub. L. No. 107-273, tit. IV, § 4002(e)(8), 116 Stat. 1758, 1810 (2002). Congress also declined to alter 18 U.S.C. § 3592, "Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified," and § 3591, "Sentence of death." If Congress viewed an assessment at time of imposition as sufficient, it could have placed an intellectual-disability prohibition at imposition (as § 3591 provides for juveniles).

Second, in 2006, Congress again amended the FDPA without addressing any question of intellectual disability. This time, Congress added an aggravating factor to § 3592 to be considered by capital sentencers. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. II, § 206(a)(4), 120 Stat. 587, 614 (2006).

Congress' choice not to alter § 3596(c)'s command that "[a] sentence of death shall not be carried out upon a person who is mentally retarded" in the wake of *Atkins* is revealing. All here agree that *Atkins* and the FDPA "provide substantively identical protection and are governed by the same standard." Pet. App. PA008. But while *Atkins* "le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," 536 U.S. at 317, Congress had already made the choice to require a present-tense assessment of whether "a person … is mentally retarded" at the time the sentence will be "carried out," 18 U.S.C. § 3596(c). Congress chose to retain that language when it amended the FDPA after the Court in *Atkins* interpreted the FDPA to prohibit *execution* of an intellectually disabled person and the intellectual-disability inquiry as turning on advancing standards reflecting national consensus and clinical guidance. That choice shows that Congress intended an assessment of intellectual disability under legal and diagnostic standards current at the time of execution.

D. Constitutional avoidance principles likewise support construing the FDPA according to its plain language.

Constitutional avoidance principles too support a present-tense assessment of intellectual disability under current legal and diagnostic standards.

The Eighth Amendment restricts the government's "'power to take the life of' *any* intellectually disabled individual." *Moore*, 137 S. Ct. at 1048 (quoting *Atkins*, 536 U.S. at 321). And States may not "disregard" the "constraint" supplied by "current medical

standards," which "[r]eflect improved understanding over time." *Id.* at 1049, 1053. Reading the FDPA to permit execution of a prisoner "who is mentally retarded," 18 U.S.C. § 3596(c), under standards current at implementation just because an earlier assessment under earlier standards reached a different result would "creat[e] an unacceptable risk that persons with intellectual disability will be executed," in violation of the Eighth Amendment. *Moore*, 137 S. Ct. at 1044 (quoting *Hall*, 572 U.S. at 704).

* * *

Statutory text, structure, purpose, and history, plus constitutional avoidance principles, all point in the same direction. Congress provided in the present tense, in a section devoted to the death penalty's implementation rather than its imposition, that "[a] sentence of death shall not be carried out upon a person who is mentally retarded." 18 U.S.C. § 3596(c). Congress grouped that prohibition with other present-tense prohibitions that indisputably must be assessed at the time the execution is to "be carried out." *Id.* § 3596(b), (c). And Congress adhered to that choice after *Atkins* made clear that the standards for assessing intellectual disability are continually advancing to reflect national and professional consensus informed by clinical guidelines. Congress' evident purpose—consistent with this Court's Eighth Amendment precedents—was to avoid the intolerable risk of executing people with intellectual disability.

The Court should honor Congress' intent.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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