No. 07-343

In the Supreme Court of the United States

PATRICK KENNEDY, PETITIONER

v.

LOUISIANA

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITION FOR REHEARING

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TABLE OF AUTHORITIES

Statutes, regulation and rules—Continued: Page

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The Acting Solicitor General, on behalf of the United States, respectfully moves pursuant to Rule 21 for leave to file this brief as amicus curiae supporting respondent's petition for rehearing. The United States has a substantial interest in rehearing because the Court's decision casts grave doubt on the validity of a recent Act of Congress and Executive Order of the President authorizing capital punishment for child rapists under the Uniform Code of Military Justice. The Court's decision and, in particular, its assessment of the "national consensus with respect to the death penalty for child rapists" (slip op. 15), was not informed by those recent pronouncements. The United States regrets that it did not

previously bring those pronouncements to the Court's attention. Because the Court did not have a complete description of the relevant legal landscape, the Court's decision rests on an erroneous and materially incomplete assessment of the "national consensus" concerning capital punishment for child rape. That error undermines the foundation for the Court's decision.

While the Court appropriately limits rehearing to extraordinary cases, rehearing is warranted here in light of the material error described above, and to permit the Court to reconsider its decision in light of the currently prevailing moral judgment of society—as recently expressed through the acts of the Nation's Legislative and Executive Branches—that capital punishment is appropriate for child rapists. While the United States believes that the Court's decision is incorrect and that the State's law should be upheld under a proper analysis, even if the Court reaches the same result following rehearing, rehearing is warranted to ensure that a material omission in the decisionmaking process has not tainted the Court's decision on a matter of such profound constitutional, moral, and practical importance. Accordingly, the United States urges the Court to grant rehearing.

STATEMENT

The Court's divided decision holds that the Eighth Amendment prohibits a capital sentence for child rapists who do not kill and do not intend to kill their victims. Slip op. 1. That broad holding has no articulated exception, seemingly extending to all instances of child rape and any set of aggravating circumstances (short of the victim's death), no matter how extraordinarily heinous or depraved the offense, no matter the child rapist's

prior criminal history, and no matter the limiting circumstances a State may prescribe in channeling the death penalty for child rape. See *id.* at 28-30.

The Court based that decision on two factors. First, the Court examined "objective indicia" of current societal norms, slip op. 11; see *id.* at 8, and concluded that a "national consensus" had emerged against capital punishment for child rapists, *id.* at 15, 36. See *id.* at 11-23 (citing *Roper* v. *Simmons*, 543 U.S. 551 (2005); *Atkins* v. *Virginia*, 536 U.S. 304 (2002); *Enmund* v. *Florida*, 458 U.S. 782 (1982); and *Coker* v. *Georgia*, 433 U.S. 584 (1977) (plurality opinion)). Second, after stating that such "objective evidence of contemporary values" was entitled to "great weight," *id.* at 23, the Court applied its "own independent judgment" and ultimately concluded that "the death penalty is not a proportional punishment for the rape of a child." *Id.* at 10, 35; see *id.* at 23-25.

Significantly, in finding a "national consensus" against capital punishment for child rape, the Court examined both state and federal legislation concerning capital punishment and child rape. Slip op. 15. That review led the Court to conclude that, while the Federal Government currently imposes capital punishment for some crimes, Congress has not "authorize[d] the death penalty for rape of a child." *Ibid.*; see *id.* at 12-13; see also dissenting op. 13 (Alito, J.). That conclusion, however, was in error. Just two years ago, Congress and the President explicitly authorized the death penalty for child rape.

In 2006, Congress enacted the National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, 119 Stat. 3136. That Act substantially revised Article 120 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920. See NDAA § 552(a)(1), 119 Stat.

3257; *id.* § 552(f), 119 Stat. 3263 (amendments effective October 1, 2007).[1] Among other things, in enacting the NDAA, Congress sought to establish "a series of graded [sex] offenses * * * based on the presence or absence of aggravating factors" and, further, to specify "interim maximum punishments [for those crimes] based on the degree of the offense." H.R. Rep. No. 89, 109th Cong., 1st Sess. 332 (2005) (House Report); see H.R. Conf. Rep. No. 360, 109th Cong., 1st Sess. 703 (2005).

As is pertinent here, the NDAA established child rape as a separate criminal offense under Article 120 defined as either (1) any sexual act with a child under the age of 12 or (2) a sexual act with a child aged 12 to 15

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[1] Before the 2006 amendments, Article 120 of the UCMJ defined the military offense of rape without regard to the victim's age and authorized death as the maximum punishment. 10 U.S.C. 920(a); see also 50 U.S.C. 714(a) (Supp. IV 1950). In 1984, the President promulgated capital sentencing factors under Rule for Courts-Martial 1004. See *Loving* v. *United States*, 517 U.S. 748, 754 (1996). Under that rule, a capital sentence could have been imposed for rape if the members of the court-martial unanimously found that, among other things, the victim was younger than 12. Rule for Courts-Martial 1004(c)(9). Congress subsequently requested that the Secretary of Defense review the UCMJ to "determin[e] what changes are required to improve the ability of the military justice system to address issues relating to sexual assault" and report his recommendations. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 571(a), 118 Stat. 1920. After extensive study, the Defense Department recommended that Congress amend Article 120 to eliminate the absence of consent as an element of rape and provided Congress with a draft of complementary, non-statutory changes to the *Manual for Courts-Martial* that clarified that rape would continue to be a capital offense where the victim was younger than 12. See Dep't of Defense, *Proposed Amendments to the Uniform Code of Military Justice* 16-17, 21 (Apr. 7, 2005) <http://www.dod.mil/dodgc/php/docs/HASCMeeting42105.pdf>.

committed by using force; causing grievous bodily harm; threatening death, grievous bodily harm, or kidnaping; rendering the child unconscious; or administering a drug, intoxicant, or similar substance that impairs the victim's ability to appraise or control his or her conduct. NDAA § 552(a)(1), 119 Stat. 3257, 3261 (10 U.S.C. 920(b) and (t)(9)). Congress further directed that, "based on the degree of the offense" (House Report 332) and until the President determines otherwise, the maximum penalty that courts-martial may impose for child rape is death. See NDAA § 552(b)(1), 119 Stat. 3263.

In 2007, the President issued an executive order concurring with the judgment of Congress that death is the appropriate maximum penalty for child rape. See Exec. Order No. 13,447, § 3(d), 3 C.F.R. 278 (2008) (amending *Manual for Courts-Martial*, Pt. IV ¶ 45.f.(1)).

REASONS FOR GRANTING REHEARING

The Court's decision is grounded on a materially erroneous understanding of federal law. Contrary to statements in the opinion, both Congress and the President have recently determined that a maximum sentence of death is appropriate and proportionate for cases involving the extraordinarily grave crime of child rape. That determination by two co-equal Branches of the National Government not only is entitled to great weight, it also underscores the emerging "national consensus" supporting—not opposing—capital punishment in cases of child rape. This Court, moreover, has never found the *absence* of a "national consensus" that capital punishment was appropriate for a particular offense or category of offenders where the Congress of Representatives from all 50 States had affirmatively authorized such punishment, nor has it substituted its own "inde-

pendent judgment" for a national consensus that *did* exist in favor of capital punishment for a particular offense or offender. Rehearing is warranted to allow the Court to correct the material error in its opinion, reconsider this case in light of the recent judgments of the Nation's political Branches, and ensure that a decision of exceptional constitutional, moral, and practical consequence is not tainted by a significant omission in the Court's decisionmaking process.

A. Recent Judgments Of The Political Branches Reflect An Emerging National Consensus Supporting Capital Punishment In Cases Of Child Rape

1. In *Roper*, *Atkins*, *Enmund*, and *Coker*, the Court held the death penalty unconstitutional under circumstances that were *consistent with* congressional enactments reflecting the Nation's moral judgment at the time. In *Roper* and *Atkins*, the Court found a national consensus against applying the death penalty to juvenile and mentally retarded defendants where Congress prohibited federal death sentences for such defendants. See *Roper*, 543 U.S. at 567 (citing 18 U.S.C. 3591); *Atkins*, 536 U.S. at 314 & n.10 (citing 18 U.S.C. 3596(c) and 21 U.S.C. 848(*l*)). *Enmund*'s Eighth Amendment holding was similarly supported by a federal statute that did "not permit a defendant such as Enmund to be put to death." See *Enmund*, 458 U.S. at 791 & n.10 (citing 49 U.S.C. 1473(c)(6) (1976) (repealed 1994)). And, in *Coker*, the plurality's conclusion that the non-fatal rape of an adult woman could not constitutionally be punished with death was consistent with Congress's silence on the subject at that time. See *Coker*, 433 U.S. at 593-596.[2]

[2] In *Coker*, Congress was silent on the pertinent question because it had not affirmatively authorized the death penalty for rape in the wake

The Court has never held the death penalty unconstitutional under its "national consensus" analysis where Congress has *authorized* death for the offense at issue.

The Court's decision here significantly departs from those prior rulings by contradicting the considered judgments of Congress and the President that child rape may be punished appropriately as a capital offense. At a minimum, those judgments are entitled to considerable weight in assessing whether a national consensus against capital punishment exists in this context. Indeed, Congress acts through the representatives of all 50 States and, therefore, a "statute enacted by Congress expresses the will of the people of the United States." *United States* v. *Lee Yen Tai*, 185 U.S. 213, 222 (1902). The fact that Congress recently enacted legislation authorizing capital punishment for child rape by an overwhelming 374-to-41 vote in the House, see 151 Cong. Rec. H12,242 (Dec. 18, 2005), and a voice vote in the Senate, *id.* at S14,275 (Dec. 22, 2005), therefore underscores, if not independently expresses, a current societal judgment that such punishment can be graduated and proportionate to the offense of child rape.

Moreover, unlike determinations of state legislatures, this "Court accords 'great weight to the decisions of Congress'" in constitutional contexts because "Congress is a coequal branch of Government whose Members take the same oath [as the Court] to uphold the Constitution of the United States." *Rostker* v. *Goldberg*,

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of this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), which "invalidated most of the capital punishment statutes in this country, including the rape statutes." *Coker*, 433 U.S. at 593 (plurality opinion); see *id.* at 595-596 (concluding that "Georgia is the sole jurisdiction in the United States at the present time" authorizing capital punishment for the rape of an "adult woman").

453 U.S. 57, 64 (1981) (citation omitted). The Court accords such deference even where a "considered decision of the Congress and the President" "implicate[s] fundamental constitutional rights." *Fullilove* v. *Klutznick*, 448 U.S. 448, 472-473 (1980). Thus, there is (to say the least) a strong presumption that the recent determination by Congress and the President that capital punishment is an appropriate sanction for child rape accurately reflects the views of our society.

2. Those recent federal pronouncements also amplify a broader trend of recognizing the incalculable individual and societal harms inflicted by the sexual abuse of children. Over the last 14 years, Congress has repeatedly addressed the serious problem of sexual abuse of young children. As the dissenting opinion explains (at 9-11), Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. 14071 (2000 & Supp. V 2005), in 1994 in the face of increasing reports of child sexual abuse and growing public sensitivity to the grave nature of such offenses. Congress has subsequently revisited the problem of sexual abuse of young children in numerous statutes, including several that increase punishments for federal sex crimes. In 1996, for instance, Congress required a mandatory life sentence for defendants convicted of a sexual act with a child younger than 12 in federal enclaves or certain federal facilities if the defendant previously was convicted for a similar offense and, in 2006, Congress added a mandatory minimum of 30-years imprisonment for first-time offenders. 18 U.S.C. 2241(c). Congress similarly revised the penalties for abusive sexual contact in 1998 to double the maximum term of imprisonment whenever the victim is a child younger than 12. 18 U.S.C. 2244(c).

Congress's express authorization of the death penalty for child rape in the NDAA reflects a natural progression in Congress's efforts to stem the tide of child sexual abuse. Those efforts find close parallels in state legislation over the last 13 years that mark a "change towards making child rape a capital offense." See slip op. 21; see also dissenting op. 1-13 (Alito, J., dissenting) (explaining trend towards capital punishment for child rapists). And they are reflected by the President's own determination in 2007, by executive order, that the death penalty is appropriate for child rape.

Because the Court's decision in this case did not account for the recent federal pronouncements *supporting* the authorization of the death penalty for child rape, rehearing is warranted to reconsider the Court's determination that there is a national consensus *against* the imposition of the death penalty for child rape.

B. The Court's Own Independent Judgment May Be Affected By Its Consideration Of Recent Actions By Congress And The President.

In invalidating the Louisiana law at issue, the Court also invoked its "own independent judgment" in discerning the "[e]volving standards of decency" that the Court has looked to in construing the Eighth Amendment. Slip op. 10, 23-25. Setting aside whether the Eighth Amendment contemplates invalidation of capital punishment when objective indications of societal views reveal that the country regards that punishment as appropriate for a particular offense, the Court has not had occasion to illuminate the extent to which these two inquiries are interdependent. Nor has the Court ever exercised its "independent judgment" in the line of cases in which it has applied this two-step analysis to bar the imposition

of the death penalty for a particular offense or offender in the face of a national consensus *supporting* it.

At the least, the Court's exercise of its own judgment in this case presumably would be affected by the Court's consideration of the recent federal pronouncements discussed above. Not only are the judgments of co-equal Branches entitled to due regard by this Court, *Coker* itself indicates that the Court's "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices" and that the Court's jurisprudence in this area should be informed "to the maximum possible extent" by objective measures of "public attitudes concerning a particular sentence." 433 U.S. at 592. That cautious approach is particularly appropriate here, where the Court's application of independent judgment appears to have been governed in significant part by policy considerations regarding the "consequences of making child rape a capital offense." Slip op. 30-35. Where, as here (and in contrast to *Roper*, *Atkins*, and *Enmund*), the National Legislature and Executive have determined that capital punishment is an appropriate sentence for a crime, the Court should be particularly hesitant in making a contrary determination based on its assessment of competing policy considerations rejected by the political Branches.

Rehearing is warranted to permit the Court to address whether its decision should be tailored more narrowly in light of the newly presented and important evidence that national representatives of the people of the United States do not share the Court's categorical view that the death penalty is not appropriate in the case of child rape, no matter how heinous the particular offense. At a minimum, before such a categorical judgment is pronounced (if it is to be pronounced at all), the contrary

views of the Nation's Legislative and Executive Branches should be heard and fully considered following rehearing.[3]

Even if the Court were to conclude that its initial decision was correct following reconsideration of this case in light of the recent federal pronouncements discussed above, rehearing would still be warranted to permit the Court to correct the unnecessarily overbroad implications of the decision and to ensure that the Court's misunderstanding of federal law did not influence the judgment that this Court reached. Rehearing would thus enhance the integrity of the Court's decisionmaking process on a matter of exceptional importance. The rape of a child is an offense of unspeakable depravity, resulting in incalculable individual and societal harm. Likewise, for many Americans, the availability of capital punishment for a particular offense is a matter of profound moral concern. Rehearing is therefore warranted in the extraordinary circumstances of this case.

* * * * *

[3] The categorical nature of the Court's decision is particularly problematic. For example, while the Court's ruling that the imposition of the death penalty for child rape violates the Eighth Amendment does not admit to any exception, the Court has yet to resolve whether the Eighth Amendment's prohibition against cruel and unusual punishments applies differently in military capital cases. See, *e.g.*, *Loving*, 517 U.S. at 755 (assuming without deciding that "*Furman* applies to this case"); *Schick* v. *Reed*, 419 U.S. 256, 260 (1974) (finding it "unnecessary to reach" the question). Nevertheless, the Court's decision by its terms purports to rule out capital punishment for the offense of child rape across-the-board and thus casts grave doubt on the constitutionality of the NDAA provision discussed above.

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted.

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