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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutions, statutes, regulation and rule:

Statutes, regulation and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

The Court's decision in this case holds that the Eighth Amendment prohibits a capital sentence for child rapists who neither kill nor 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 rapist's prior criminal history, and no matter the limiting circumstances a State may prescribe in channeling capital sentences for child rape. *Id.* at 28-30.

The Court relied on two factors. First, examining "objective indicia" of current societal norms, slip op. 11; see *id.* at 8, it found a "national consensus" 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); *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," concluding 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 concluded that Congress has not "authorize[d] the death penalty for rape of a child." Slip op. 15; see *id.* at 12-13; see also dissenting op. 13 (Alito, J.). That conclusion was in error. Although the government regrettably did not bring it to the Court's attention at the merits stage, just two years ago, Congress and the President explicitly authorized capital punishment 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, which 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.[1] Among other things, Congress intended the

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[1] Before 2006, Article 120 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) (2000); see 50 U.S.C. 714(a) (Supp. IV 1950). In 1984, the President promulgated sentencing factors, allowing a capital sentence to be imposed for rape if the members of the court-martial unanimously found, *inter alia*, that the victim was younger than

NDAA to establish "a series of graded [sex] offenses * * * based on the presence or absence of aggravating factors" and 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).

The NDAA established child rape as a separate criminal offense 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 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. 10 U.S.C. 920(b) and (t)(9) note. Congress further directed that, "based on the degree of the offense" (House Report 332) and until the President determines otherwise, the maximum penalty for child

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12. Rule for Courts-Martial 1004(c)(9); see *Loving* v. *United States*, 517 U.S. 748, 754 (1996). 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." 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* clarifying that rape would continue to be a capital offense where the victim was younger than 12. See DoD, *Proposed Amendments to the Uniform Code of Military Justice* 16-17, 21 (Apr. 7, 2005) <http://www.dod.mil/dodgc/php/docs/HASCMeeting42105.pdf>.

rape under Article 120 is death. See NDAA § 552(b)(1), 119 Stat. 3263.

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

ARGUMENT

The Court's analysis rests on a critical error of federal law, which the United States regrets that it did not correct at the merits stage. Both Congress and the President have recently determined that a maximum sentence of death is appropriate and proportionate for the extraordinarily heinous crime of child rape. That determination by two co-equal Branches not only deserves great weight, it underscores the emerging "national consensus" supporting—not opposing—capital punishment for child rape. This Court has never found a "national consensus" *against* capital punishment for a particular offense or category of offenders when Congress, consisting of Representatives from all 50 States, has affirmatively authorized such punishment. Nor has it imposed its own "independent judgment" to invalidate a law when a national consensus *favored* capital punishment for a particular type of offense or offender.

Rehearing is warranted to ensure that a decision of such constitutional, moral, and practical consequence is not undermined by a significant omission in the Court's decisionmaking process. The Court should therefore reconsider this case in light of the recent judgments of the Nation's political Branches and a correct understanding of federal law. The United States believes that, in light of those judgments, Louisiana's law should

be upheld as a constitutional exercise of power to prescribe a proportionate punishment for the exceptionally egregious crime of child rape and that, at a minimum, the seemingly categorical nature of this Court's decision is unwarranted.

A. An Emerging National Consensus Supports Capital Punishment In Cases Of Child Rape

1. The Court's holdings in *Roper*, *Atkins*, *Enmund*, and *Coker* that the death penalty was unconstitutional in particular circumstances was *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. *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 holding was similarly supported by a federal statute that did "not permit a defendant such as Enmund to be put to death." 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 capital punishment for the rape of an adult woman was unconstitutional accorded with Congress's silence on the subject at that time. See 433 U.S. at 593-596.[2] The Court thus has never held the death penalty

[2] In *Coker*, Congress was silent on the pertinent question because it had not reauthorized the death penalty for rape after 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 was "the sole jurisdiction in the United States at [that] time" authorizing capital punishment for the rape of an "adult woman").

unconstitutional for an offense for which Congress has *authorized* such punishment at the time of its decision.

The Court's decision here contradicts the considered judgments of Congress and the President that child rape may be punished by death. At a minimum, those judgments are entitled to great weight in assessing whether a national consensus against capital punishment exists in this context. Indeed, Congress comprises 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. 21, 2005), underscores, if not independently expresses, a current societal judgment that such punishment can be proportionate to the crime of child rape.

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*, 453 U.S. 57, 64 (1981) (citation omitted). It is particularly appropriate to attach great significance to Congress's and the President's actions in the Eighth Amendment context, because it is difficult to say that a punishment is "cruel *and* unusual" when the Nation's political branches have recently endorsed it. Thus, a strong presumption (at the least) exists that the recent determination by Congress and the President that capital punishment is an appro-

priate sanction for child rape accurately reflects the views of our society.

The military context of those determinations does not diminish their significance. The Court has long recognized that the existence of a method of capital punishment for military personnel has relevance to whether such punishment for civilians is cruel and unusual. *Wilkerson* v. *Utah*, 99 U.S. 130, 134-135 (1879); Reh'g Pet. 10-11. A similar analysis applies in assessing the gravity of the crime. Indeed, Congress has expressly applied the UCMJ to civilians serving with or accompanying an armed force during contingency operations in the field and in other areas during armed conflict. 10 U.S.C. 802(a)(10)-(12). And, to the extent the military context were deemed distinctive, the NDAA demonstrates that no *categorical* societal judgment exists against the death penalty for child rape; rather, in aggravated circumstances (as when the crime is committed by a service member or civilians accompanying armed forces), a capital sentence is warranted.[3]

2. The recent federal pronouncements above amplify a broader trend of recognizing the incalculable individual and societal harms inflicted by the sexual abuse of young children. Over the last 14 years, Congress has repeatedly addressed that serious problem. As the dis-

[3] The categorical nature of the Court's decision is particularly problematic. For instance, while the Court's reasoning does not admit to any exception, the Court has yet to resolve whether the 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 child rape across-the-board, casting grave doubt on the constitutionality of the NDAA's provisions.

senting 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 subsequently revisited the issue in numerous statutes, including several that increase punishments for federal sex crimes. See, *e.g.*, 18 U.S.C. 2241(c) (imposing mandatory minimum of 30 years' imprisonment for sexual act with victim younger than 12 in federal enclaves or certain federal facilities and mandatory life sentence for repeat offenders); 18 U.S.C. 2244(c) (doubling maximum sentence for abusive sexual contact where victim is younger than 12).

Congress's express authorization of the death penalty for child rape 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.). The Court's national consensus analysis cannot be reconciled with those developments, particularly as expressed in the recent federal authorization of the death penalty for child rape.

B. The Court Should Reconsider Its Independent Judgment In Light Of The Recent Actions By Congress And The President

In invalidating Louisiana's law, the Court also invoked its "own independent judgment" in discerning the "[e]volving standards of decency" that it has consulted in Eighth Amendment cases. Slip op. 10, 23-25. The Court has yet to illuminate fully the relationship be-

tween that inquiry and its "national consensus" analysis, but it has never ever exercised its "independent judgment" to bar the imposition of the death penalty for a particular offense or offender in the face of a national consensus *supporting* it. The Court should not do so here.

The Court's independent judgment is necessary to *confirm* that a nationally repudiated practice is unconstitutional. But the Court should not displace a recent and emerging consensus reflected in the judgment of the Nation's political Branches that a particular punishment is appropriate and proportionate. At the very least, an exceptionally compelling showing should be required to displace that judgment. *Coker* itself indicates that this 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 should be informed "to the maximum possible extent" by objective measures of "public attitudes concerning a particular sentence." 433 U.S. at 592.

That restraint is particularly appropriate here, where the Court's independent judgment appears to have been governed in significant part by policy considerations about 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 political branches of the Federal Government determine that capital punishment is an appropriate sentence for a crime, the Court should be particularly hesitant to reach a contrary determination based on its own assessment of competing policy considerations rejected by both political Branches. No sound showing has been made that the judgment of Congress and the President is demonstrably incorrect, and that should be dispositive. See

also dissenting op. 15-23 (Alito, J.). At a minimum, the Court's seemingly categorical refusal to countenance capital punishment for child rape, regardless of aggravating factors, is overbroad and unnecessary. *Id.* at 16-19.

* * * * *

Rehearing is warranted to permit the Court to modify its decision in light of newly presented and important evidence. National representatives of the people of the United States do not share the Court's categorical view that the death penalty is inappropriate for child rapists, no matter how heinous the particular offense. For a crime of unspeakable depravity that results in such incalculable individual and societal harms, capital punishment is not categorically "cruel and unusual."

CONCLUSION

For the reasons above, rehearing should be granted and the judgment of the Supreme Court of Louisiana affirmed.

Respectfully submitted.

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