Nos. 07-343

In the Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari to the
to the Louisiana Supreme Court

BRIEF OF TEXAS, ALABAMA, COLORADO, IDAHO, MISSISSIPPI, MISSOURI, OKLAHOMA, SOUTH CAROLINA, AND WASHINGTON AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether imposing the death sentence on an adult male who brutally rapes his eight-year-old stepdaughter is a disproportionate punishment that violates the Eighth Amendment.

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INTEREST OF *AMICI CURIAE*

The *amici* States have a vital interest in imposing the death sentence upon those persons who commit heinous and depraved capital crimes, especially upon those offenders who prey upon the most innocent and vulnerable members of society—children. Concerning the rape of an adult woman, the Court has observed that "[s]hort of homicide, [rape] is the 'ultimate violation of self.'" *Coker* v. *Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion); *see id.*, at 612 (Burger, C.J., dissenting) (same). Rape victims can suffer grievous physical or psychological injuries, *id.*, at 603 (Powell, J., concurring), and inevitably endure "a gross assault on the human personality," *id.*, at 612 (Burger, C.J., dissenting).

These harms apply with even greater force to the rape of a prepubescent child, as at issue here.

The *amici* States urge the Court to reject the entreaty of Petitioner and his *amici* to impose a categorical Eighth Amendment ban on the application of the death penalty in cases of nonhomicide aggravated child rape. Enacting a categorical ban, irrespective of the will of the people as expressed through their States' legislative enactments, would be "antithetical to considerations of federalism," and would "cut off . . . normal democratic processes," *Atkins* v. *Virginia*, 536 U.S. 304, 322, 323 (2002) (Rehnquist, C.J., dissenting). The *amici* States seek to preserve the ability of their democratically elected legislatures to enact penal laws that are reflective of the contemporary moral judgment of society concerning the unique and horrific crime of aggravated child rape.

SUMMARY OF ARGUMENT

Patrick Kennedy committed an unspeakable crime. He savagely raped his eight-year-old stepdaughter, leaving her bleeding and badly injured in her own bed. A recidivist child rapist, this was the second time he had brutally raped a little girl.

Thirty one years ago, the Court concluded that the Constitution does not allow the imposition of the death penalty for adult rape. Fourteen times in the course of that opinion, the Court carefully cabined the reach of that decision to adult rape, anticipating and implicitly reserving the issue in this case.

This Court's precedents have long spoken of evolving standards of decency. Such evolution need not be in only one direction.

Indeed, one of the most important evolutions of modern times has been the growing understanding and appreciation of the singular horror that is child rape. Child sexual abuse occurs with saddening frequency, and the deviant desires of pedophiles have proved markedly difficult to combat.

And yet, aggravated child rape is even worse. It is an irreparable crime, one that inflicts permanent, grievous harm on the heart, mind, and soul of a young child. Tragically, the children raped by Patrick Kennedy will feel the pain of his crime every day of their lives.

Violent child rape is unique. No other crime inflicts comparable damage. And no other crime requires the peculiar depravity manifested by those who rape small children. The pitiless infliction of permanent lifelong suffering upon a young child reflects a degree of

culpability, a degree of manifest evil, that is qualitatively distinct.

Reflecting society's growing understanding of the nature and consequences of violent child rape, six different States, in recent years, have enacted laws subjecting the worst such offenders to the death penalty. The direction of that legislative change is uniform. And several more States are now considering similar legislation.

Those laws evince the broader understanding of modern society, informed by medicine and social science, that violent child rape is a crime unlike any other. Consonant with these evolving conceptions of decency, the Court should conclude that the Constitution allows democratically elected legislatures to choose the most severe punishment for the most heinous child rapists.

ARGUMENT

I. APPLICATION OF THE DEATH PENALTY IN THIS CASE DOES NOT OFFEND THE CORE PRINCIPLES OF THE EIGHTH AMENDMENT.

Patrick Kennedy was indicted, tried, convicted, and sentenced to death for the aggravated rape of an eight-year-old female child, L.H. *State* v. *Kennedy*, 957 So.2d 757, 760 (La. 2007). The Eighth Amendment's proscription of cruel and unusual punishment stands as no barrier to his death sentence.

The Eighth Amendment, applicable to the States via the Fourteenth Amendment, *Robinson* v. *California*, 370 U.S. 660, 667 (1962), provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. This prohibition prevents the imposition of inhumane and

barbarous executions. *Gregg* v. *Georgia*, 428 U.S. 153, 170 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *see In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death.").

The irreducible minimum of the Eighth Amendment's injunction is that punishments must not be an affront to "human dignity." *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *see also Atkins*, 536 U.S., at 311; *Gregg*, 428 U.S., at 173, 182 (opinion of Stewart, Powell, & Stevens, JJ.); *Furman* v. *Georgia*, 408 U.S. 238, 270 (1972) (opinion of Brennan, J.).

Petitioner's death sentence comports with these core principles. Petitioner and his *amici* urge that the death penalty can never be applied to child rapists like himself because it is a *per se* disproportionate punishment for the crime of aggravated child rape. That claim does not flow from this Court's precedents.

II. The Eighth Amendment Does Not Require a Categorical Ban of the Death Penalty in All Cases of Nonhomicide Aggravated Rape of a Child.

The Court has held "that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Gregg*, 428 U.S., at 187 (opinion of Stewart, Powell & Stevens, JJ.); *see also id.*, at 226 (White, J., concurring) ("[N]either can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment."); *id.*, at 226-27 (statement of Burger, C.J., & Rehnquist, J.) (concurring in

judgment and joining opinion of White, J.); *id.*, at 227 (Blackmun, J., concurring); *Coker*, 433 U.S., at 591 ("It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eighth Amendment . . . .") (plurality opinion).

It is well settled that the death penalty may be an appropriate punishment under the Eighth Amendment in the proper circumstances. The Court has never definitively set forth a list of those crimes for which the death penalty passes constitutional muster. Nonetheless, Petitioner and his *amici* argue that the Court, in *Coker* v. *Georgia*, 433 U.S., at 584, effectively banned the death penalty in every type of *nonhomicide* case.

Specifically, they argue that "the Louisiana Supreme Court's decision allowing the imposition of capital punishment for the crime of child rape cannot be squared with *Coker*" and that "[t]he *Coker* Court considered all legislative variations of rape and forbade capital punishment for that offense for the simple reason that the crime 'does not take [a] human life.'" Pet. at 13. Petitioner's implicit claim, however, that *Coker* created a constitutional rule requiring a death-of-the-victim litmus test for imposing the death penalty is unfounded.

Death of the victim neither is nor should be the absolute litmus test for imposing the death sentence for three reasons. First, the scope of the *Coker* plurality opinion is not so broad as Petitioner suggests. Second, a death-of-the-victim test would be contrary to the Eighth Amendment precept that death-penalty cases must be evaluated according to evolving standards of decency. And, third, the logic of that test would reach beyond all rape cases and potentially thwart legislatures' ability to

reflect society's present moral judgment concerning the propriety of imposing the death penalty in several other types of nonhomicide crimes that the Court never expressly considered, much less invalidated, in *Coker*.

A. The *Coker* Plurality Carefully Limited Its Holding To Avoid Imposing a Categorical Ban of the Death Sentence in All Cases of Nonhomicide Rape.

Coker did not decree a categorical ban of the death sentence for nonhomicide rape. To the contrary, the *Coker* plurality took great pains in carefully cabining its holding. The plurality repeatedly couched its analysis in terms of the narrower situation involving the rape of an "adult woman," as opposed to all rape victims. The plurality used the phrase "rape of an adult woman" no less than 14 times in its opinion. *Kennedy*, 957 So.2d, at 781; Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Capital Child Rape Statutes*, 45 ARIZ. L. REV. 197, 202 (2003).

Even more telling is how the issue was framed in *Coker*. After noticing that the Court in *Gregg* had "reserved the question of the constitutionality of the death penalty when imposed for . . . crimes [other than 'deliberate murder']," the plurality stated: "That question, *with respect to rape of an adult woman*, is now before us." *Coker*, 433 U.S., at 592 (emphasis added). Justice Powell, concurring in the judgment of the Court, apparently believed that the plurality's opinion was carefully circumscribed because he wrote: "I concur in the judgment of the Court *on the facts of this case*, and also in the plurality's reasoning supporting the view that ordinarily death is disproportionate punishment for the crime of

raping an adult woman." *Id*., at 601 (emphasis added). Thus, under the terms of the opinions that issued, a majority of the Justices in *Coker* did not conclude that the Eighth Amendment prohibits the death penalty in all nonhomicide cases of rape.

B. A Categorical Ban of the Death Penalty in All Cases of Rape Is Contrary to the Court's Well-Established "Evolving Standards of Decency" Test.

A constitutional rule that the death penalty has already been definitively decided to constitute cruel and unusual punishment in a nonhomicide case would also be contrary to the concept of "evolving standards of decency" first announced in *Trop* v. *Dulles*. The "evolving standards of decency" benchmark "is not a static command," *Roper* v. *Simmons*, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting); rather, it is interpreted "in a flexible and dynamic manner," *Stanford* v. *Kentucky*, 492 U.S. 361, 369 (1989) (quoting *Gregg*, 428 U.S., at 171 (opinion of Stewart, Powell, & Stevens, JJ.)). It asks whether capital punishment for the crime being tried "is morally unacceptable to the people of the United States *at this time* in their history," *Furman*, 408 U.S., at 360 (opinion of Marshall, J.) (emphasis added). Interpreting *Coker* to have settled the constitutionality of the death penalty for *all* nonhomicide rapes (especially given the narrow issue before the Court at that time) would unnecessarily ossify death-penalty jurisprudence and frustrate society's ability to express its current moral judgment through legislation.

Moreover, the "evolving standards of decency" framework is not a one-way street that may lead only towards the elimination of the death penalty. Rather, "'evolving standards' may also support an expansion of the

punishment as society learns more about the nature of crime." Ashley M. Kearns, *South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder That Societal Progression Continues Through Action, Not Idleness*, 58 S.C. L. REV. 509, 526 (2007). Under the Court's "dynamic and flexible" approach to "evolving standards of decency," there still is room for the interpretation that, as the prolonged effects of child rape have become better known and society has become ever more aware of the harm to children and of the recidivism and depravity of the worst child sex offenders, societal standards have progressed to the point where capital punishment is recognized as proportional for the crime of child rape. *See id.*, at 527. Each State's legislature should be allowed the flexibility to adopt capital-sentencing laws that reflect its citizens' current moral judgment regarding the just deserts for certain capital crimes. *Coker*, 433 U.S., at 615 (Burger, C.J., dissenting); *see also Harmelin* v. *Michigan*, 501 U.S. 957, 989-90 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.) (noting that a State may choose to impose a penalty or even a reward for the same conduct that another State imposes a different penalty); *cf. New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Indeed, in Texas, for example, the Legislature has this past year enacted legislation that permits the death sentence in cases involving repeat sex crimes against

young children. *See* Jessica Lunsford Act, 80th Leg., R.S., ch.593, §1.15, 2007 Tex. Gen. Laws 1120, 1125-26 (codified at TEX. PENAL CODE §12.42(c)). The legislation is "Texas's version of Jessica's Laws, the name given to a set of proposed laws targeting sex criminals with child victims and to a national movement to implement those laws in every state." House Research Org., Bill Analysis, Tex. H.B. 8, 80th Leg., R.S., at 5-6 (2007), *available at* http://www.hro.house.state.tx.us/hrodocs/ba80r/hb0008.pdf [hereinafter H.R.O., Bill Analysis]. It was "named for Jessica Lunsford, a nine-year-old girl who was kidnapped, sexually assaulted, and murdered in 2005" in Florida by a registered sex offender who was convicted of Jessica's killing and sentenced to death. *Id.*, at 6; FoxNews.com, *Judge Sentences John Couey to Death for Murdering Jessica Lunsford*, Aug. 24, 2007, *at* http://www.foxnews.com/story/0,2933,294371,00.html.

Supporters of the Texas legislation believed that (1) "[s]ex offenses against children are so horrific that the death penalty for repeat offenders would be appropriate and just punishment"; (2) "Texas should protect children by authorizing the most severe penalty for people who repeatedly commit violent sex crimes against them"; (3) "long prison sentences[] [were] not adequate to address the harm offenders have caused and the danger to the community they represent"; and (4) "[c]oncerns that making serious sex crimes against children eligible for the death penalty would prompt offenders to kill victims [were] unfounded" because "[o]ther states with similar laws ha[d] seen no rash of child killings." H.R.O., Bill Analysis, at 6.

The Texas Legislature decided to enact the legislation and join at least five other States—Florida, Louisiana,

Montana, Oklahoma, and South Carolina—in authorizing the death penalty for people who commit repeat sex crimes against children. *Id.* In doing so, the Legislature believed that it was "far from certain" that *Coker* applied to cases involving "repeat child rapists." *Id.*, at 7.

Texas's experience illustrates well the progression in the "evolving standards" approach that this Court has explained animates the proportionality inquiry under the Eighth Amendment. The State of Texas, and other States like it,[1] should be permitted the leeway to decide for themselves and their citizens what constitutes appropriate and proportionate punishment, in keeping with the constitutional prohibition against inhumane and torturous punishments, for the crime of nonhomicide child rape.

C. A Categorical Ban of the Death Sentence in All Cases of Nonhomicide Rape Would Effectively Overturn Many Statutes That Permit the Death Sentence in Nonhomicide Cases Other Than Rape.

Furthermore, taken to its logical end, Petitioner's argument would forbid the imposition of the death penalty for any type of nonhomicide crime. Such a sweeping conclusion, however, is not consistent with the history of the death penalty and society's current moral judgment reflected in modern legislative enactments. Both Congress and state legislatures have repeatedly enacted statutes that permit the imposition of the death penalty for

1. Currently, the States of Alabama, Colorado, Mississippi, Missouri, and Tennessee are considering similar legislation. *See* Ala. H.B. 456, Leg., R.S. (2008); Colo. S.B. 08-195, 66th Gen. Assembly, 2d R.S. (2008); Miss. S.B. 2596, Leg., R.S. (2008); Mo. S.B. 1194, 94th Gen. Assembly, 2d R.S. (2008); Tenn. S.B. 0157, 105th Gen. Assembly, R.S. (2007-08).

nonhomicide crimes. *See* Meister, *Constitutionality of Child Rape Statutes*, 45 ARIZ. L. REV., at 210-12 (listing jurisdictions allowing the death penalty for nonhomicide crimes); *see also* DeathPenaltyInfo.org, Death Penalty for Offenses Other Than Murder, *at* http://www.deathpenaltyinfo.org/article.php?&did=2347 (last visited Mar. 1, 2008) (same).

Current nonhomicide crimes include: child rape,[2] treason,[3] aggravated kidnapping,[4] drug trafficking,[5] aircraft hijacking,[6] espionage,[7] aggravated assault by incarcerated, persistent felons, or murderers,[8] and

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2. GA. CODE ANN. §16-6-1(a)-(b); LA. REV. STAT. ANN. §14:42(D)(2); MONT. CODE ANN. §45-5-503(c); OKLA. STAT. tit. 10, §7115(I); S.C. CODE ANN. §16-3-655; TEX. PENAL CODE §12.42(c)(3). The Supreme Court of Georgia recently confirmed that GA. CODE ANN. §16-6-1 authorizes the death penalty for the crime of raping a child and that neither that court nor this Court's decision in *Coker* makes the imposition of the death penalty for nonhomicide child rape unconstitutional. *State* v. *Velazquez*, No. S07G1012, 2008 WL 480078, at *2 (Ga. Feb. 25, 2008).

Florida's capital "child-rape" statute, FLA. STAT. ANN. §794.011, is still on the books despite the Florida Supreme Court's decision in *Buford* v. *State*, 403 So.2d 943, 951 (Fla. 1981), declaring the law unconstitutional in light of *Coker*. The validity of Florida's law remains less than clear, however, because the death sentence of the offender in *Buford* was upheld on the grounds that the victim had been murdered, not on the grounds of the rape. *Id*.

3. 18 U.S.C. §2381; 720 ILL. COMP. STAT. ANN. 5/30-1; ARK. CODE ANN. §5-51-201; CAL. PENAL CODE §37; COLO. REV. STAT. ANN. §18-11-101; GA. CODE ANN. §16-11-1; LA. REV. STAT. ANN. §14:113; MISS. CODE ANN. §97-7-67; WASH. REV. CODE ANN. §9.82.010.

4. COLO. REV. STAT. ANN. §18-3-301; GA. CODE ANN. §§16-5-40(b), 17-10-30; IDAHO CODE §§18-4502, -4504; MONT. CODE ANN. §45-5-303.

5. 18 U.S.C. §3591(b); FLA. STAT. ANN. §§893.135, 921.142.

6. GA. CODE ANN. §16-5-44; MISS. CODE ANN. §97-25-55.

7. 18 U.S.C. §794; N.M. STAT. ANN. §20-12-42.

8. CAL. PENAL CODE §4500; MONT. CODE ANN. §46-18-220.

attempting, authorizing or advising the killing of any officer, juror, or witness in a case involving a continuing criminal enterprise, regardless of whether such killing actually occurs.[9]

Of these nonhomicide crimes, treason is perhaps the most unique and presents the best argument against reading the *Coker* plurality opinion as broadly as Petitioner and his *amici* do. Treason is the only crime defined in the text of the Constitution. U.S. CONST. art. III, §3. And the Constitution expressly confers on Congress the power "to declare the Punishment of Treason." *Id.* Under that authority, a congressional enactment authorizing the death sentence for treason has been in continuous effect since 1790. *See* 18 U.S.C. §2381. *See generally* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983) (giving detailed history of the U.S. treason statute).

Treason is the gravest crime against the security of a nation. *See Stephan* v. *United States*, 133 F.3d 87, 90 (CA6 1943) ("Treason is the most serious offense that may be committed against the United States, and its gravity is emphasized by the fact that it is the only crime defined by the Constitution." [citations omitted]); WILLIAM BLACKSTONE, 4 COMMENTARIES *75 (calling treason "the highest civil crime"). And the Court has never ruled that the death penalty for treason is unconstitutional in a case not involving murder.

Given its "historical precedent and significant impact on society," it is doubtful that the plurality opinion in *Coker* meant to invalidate capital punishment for treason.

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9. 18 U.S.C. §3591(b)(2).

Charles C. Boettcher, Note, *Testing the Federal Death Penalty Act of 1994, 18 U.S.C. §§3591-98 (1994):* United States *v.* Jones*, 132 F.3d 232 (5th Cir. 1998)*, 29 TEX. TECH L. REV. 1043, 1061 (1998); *see also* Ryan Norwood, Note, *None Dare Call It Treason: The Constitutionality of the Death Penalty for Peacetime Espionage*, 87 CORNELL L. REV. 820, 839 (2002) (recognizing treason as a still-viable capital crime). To believe otherwise, one must accept that the Court *sub silentio* set aside over 200 years of history in permitting the death sentence for treason, without even mentioning the treason statute. Such a reading goes too far, as does Petitioner's interpretation of *Coker*. Fairly read, *Coker* did not ban the death penalty in all nonhomicide cases.

III. THE COURT'S EIGHTH AMENDMENT JURISPRUDENCE PERMITS STATES TO IMPOSE THE DEATH PENALTY IN CASES OF AGGRAVATED CHILD RAPE.

Short of the absolute prohibition on executions that are inhumane or inflict "unnecessary pain," *see Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion), the Eighth Amendment has been interpreted to prohibit only punishments that are *disproportionate* to the crime or are *excessive*. *See Atkins*, 536 U.S., at 311 n.7 ("[W]e have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive."); *Weems* v. *United States*, 217 U.S. 349, 371 (1910) (stating that the Eighth Amendment is "directed '. . . against all punishments, which by their excessive length or severity, are greatly disproportioned to the offenses charged. . . .' 'The whole inhibition is against that which is excessive in . . . punishment inflicted.'") (quoting

O'Neil v. *Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)); *see also Roper*, 543 U.S., at 560 ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions."). This proportionality determination, in turn, considers "evolving standards of decency that mark the progress of a maturing society" in deciding a punishment's constitutionality. *Trop*, 356 U.S., at 101 (plurality opinion); *see also Atkins*, 536 U.S., at 324 (Rehnquist, J., dissenting); *Lockett* v. *Ohio*, 438 U.S. 586, 620 (1978) (Marshall, J., concurring); *Furman*, 408 U.S., at 242 (Douglas, J., concurring).

Assessing evolving standards of decency under proportionality review initially requires "objective evidence of the country's present judgment concerning the acceptability of death as a penalty for [the crime being tried]," *Coker*, 433 U.S., at 593 (plurality opinion); *Atkins*, 536 U.S., at 312, or, in other words, "sufficient evidence at present of a national consensus," *Roper*, 543 U.S., at 563. Objective indicia of society's standards may be found in legislative enactments, *see Roper*, 543 U.S., at 564-68; *Atkins*, 536 U.S., at 313-17; *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989); *Stanford*, 492 U.S., at 369-73, and the responses of juries in their sentencing decisions regarding the capital crime, *Enmund* v. *Florida*, 458 U.S. 782, 793-94 (1982); *Coker*, 433 U.S., at 596-97 (plurality opinion); *Gregg*, 428 U.S., at 181 (opinion of Stewart, Powell & Stevens, JJ.).

The inquiry into society's evolving standards of decency does not end with objective indicia of national consensus, *Roper*, 543 U.S., at 563; *Atkins*, 536 U.S., at 313, because "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under

the Eighth Amendment," *Coker*, 433 U.S., at 597 (plurality opinion). The objective data give the Court "essential instruction," but the Court still "must determine, in the exercise of [its] own independent judgment, whether the death penalty is a disproportionate punishment [for the crime being tried]." *Roper*, 543 U.S., at 564.

The Court's "independent" proportionality review asks whether there is any "reason to disagree with the judgment of 'the legislatures that have recently addressed the matter.'" *Atkins*, 536 U.S., at 321. This determination focuses on the defendant's culpability and whether the death penalty, when applied to those in the defendant's position, "measurably contributes" to one or both of the principal justifications for the death penalty—retribution and deterrence. *See Roper*, 543 U.S., at 568-75; *Atkins*, 536 U.S., at 318-19; *Tison* v. *Arizona*, 481 U.S. 137, 155-58 (1987); *Enmund*, 458 U.S., at 798; *Coker*, 433 U.S., at 597-99 (plurality opinion).

The Louisiana Supreme Court carefully applied the Court's two-part proportionality analysis in holding that Petitioner's death sentence was constitutional. *See Kennedy*, 957 So.2d, at 783-89. Regarding objective indicia of national consensus, the court examined legislative enactments of other States and found that 38 States allowed the death penalty, and five of those imposed the death sentence for child rape. *Id*., at 785.

But the court did not limit its analysis to only those enactments involving child rape; the court also looked for an indication of national consensus by "consider[ing] all nonhomicide capital statutes to determine the national consensus for capital punishment in nonhomicide cases." *Id*. Under this metric, the court determined that 14 of the 38 States permitting capital punishment, as well as the

federal government, provide the death penalty for nonhomicide crimes. *Id.*, at 787-88. Accordingly, the court found that 38 percent of capital jurisdictions authorized some form of nonhomicide capital punishment. *Id.*, at 788.

Even more significant to the court, however, was the direction of change in the national consensus. *Id.* In *Atkins*, this Court noted that "[i]t is not so much the number of the[] States that is significant, but the consistency of the direction of change." 536 U.S., at 315; *see also Roper*, 543 U.S., at 565. Taking direction of change into account, the Louisiana Supreme Court found that "the number of jurisdictions allowing the death penalty for nonhomicide crimes more than doubled between 1993 and 1997." *Kennedy*, 957 So.2d, at 788. The court found it telling that "four states [had] enacted laws which capitalize[d] child rape since [1996]," and, what is more, that five states had capitalized child rape since *Coker* decided that the death penalty for rape of an adult woman was unconstitutional. *Id.*

After finding this objective evidence of national consensus, the court performed an independent proportionality analysis. *See id.*, at 788-89. The court noted this Court's characterization of "rape as a crime second to only homicide in the harm that it causes," *id.*, at 788 (citing *Coker*, 433 U.S., at 597), and speculated that "if the court is going to exercise its independent judgment to validate the death penalty for any nonhomicide crime, it is going to be child rape," *id.*

The Louisiana Supreme Court further observed that child rapists as a class of offenders possessed no characteristics that would tend to mitigate their moral culpability, and that the death sentence would serve the goals of deterrence and retribution just as well as does the

execution of first-degree murderers. *Id.*, at 789. The court observed that children are "particularly vulnerable" and in need of "special protection" by the State; that the degradation and devastation of child rape is felt by both the child and the community; that the physical, psychological, and emotional harm a child suffers at the hands of a rapist "leaves lasting scars" on the child and on "generations to come"; that child rape "undermines the community sense of security"; and that "[t]he physical trauma and indignities suffered by the young victim of this offense [are] of enormous magnitude." *Id.* Accordingly, the court held that "the death penalty for the rape of a child under twelve is not disproportionate." *Id.*

The *amici* States agree with the Louisiana Supreme Court's Eighth Amendment holdings and analysis. The Court should uphold the Louisiana Supreme Court's judgment and confirm that the death penalty may be constitutionally applied to the nonhomicide crime of aggravated child rape.

IV. PATRICK KENNEDY'S DEATH SENTENCE IS A PROPORTIONATE PUNISHMENT FOR HIS AGGRAVATED RAPE OF L.H.

A. Objective Indicia of National Consensus Supports Capital Punishment for Aggravated Child Rape.

The Louisiana Supreme Court accurately described the objective indicia of national consensus favoring the death penalty for child rape, specifically state legislative enactments regarding capital punishment for child rape and nonhomicide crimes. *See Kennedy*, 957 So.2d, at 784-88. Indeed, the legislative indicia are even stronger, because, after the Louisiana court ruled, the Texas statute

became effective. *Compare id*., at 757 (decided May 22, 2007), *with* Jessica Lunsford Act, 80th Leg., R.S., ch.593, §4.02, 2007 Tex. Gen. Laws, at 1148 (effective Sept. 1, 2007). So, rather than there being five States allowing the death penalty for child rape, there are now six. *See supra* note 2, at 11.

Perhaps more important than simply the change in number from five to six States is "the consistency of the direction of change." *Atkins*, 536 U.S., at 315; *see also Roper*, 543 U.S., at 596-97 (same). As the Louisiana Supreme Court observed, since 1996 and post-*Coker*, five States "have capitalized child rape." *Kennedy*, 957 So.2d, at 788. Five states, the court noted, was a sufficient indicator of national consensus in favor of the death penalty for nonhomicide child rape because, in *Roper*, it took just five States abolishing the juvenile death penalty for this Court to find that society had turned its face against the juvenile death penalty. *Id*. Now, with Texas joining the fold, there is even stronger evidence of the consistency of the direction of change and a favorable national consensus towards capitalizing child rape.

The number of legislative enactments that permit the death sentence for child rape and the consistency of the direction of change is the best objective indicium to inform the Court's own independent proportionality analysis. "[L]egislation enacted by the country's legislatures," the Court has said, "[is] [t]he clearest and most reliable objective evidence of contemporary [societal] values." *Penry*, 492 U.S., at 331; *see also Roper*, 543 U.S., at 594 (O'Connor, J., dissenting); *Stanford*, 492 U.S., at 370; *Coker*, 433 U.S., at 594 (plurality opinion); *Gregg*, 428 U.S., at 175-76, 179 (opinion of Stewart, Powell & Stevens). Although jury sentencing decisions and

international opinion have also been cited as objective factors that may reflect national consensus, *see*, *e.g.*, *Enmund*, 458 U.S., at 788; *Coker*, 433 U.S., at 592 (plurality opinion), these indicia need not be examined to uphold capital statutes. *See*, *e.g.*, *Roper*, 543 U.S., at 564-68 (looking exclusively at state legislative enactments in invalidating imposition of death penalty on juveniles); *id.*, at 575 (looking to international opinion only for "confirmation" of the determination that the death penalty is disproportionate punishment for offenders under 18, and noting that international opinion was not "controlling"); *Atkins*, 536 U.S., at 313-17 (looking exclusively at state legislative enactments in invalidating imposition of death penalty on the mentally retarded); *Tison*, 481 U.S., at 152-55 (looking exclusively at state legislative enactments in upholding the imposition of death penalty on felony murderers whose participation in a crime evinced a reckless indifference to human life); *Enmund*, 458 U.S., at 796 n.22 (describing international opinion on the acceptability of a particular punishment as merely "an additional consideration which is 'not irrelevant'") (quoting *Coker*, 433 U.S., at 596 n.10); *Stanford*, 492 U.S., at 369 n.1 (emphasizing that "*American* conceptions of decency . . . are dispositive" [emphasis in original]). And, at least in the instant case, a jury of his peers unanimously agreed that Patrick Kennedy's crime merited the death penalty.

The relevant question is whether there is a compelling reason for the Court to disagree with the judgment of the State legislatures that have recently addressed this matter. *Enmund*, 458 U.S., at 801; *see 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." [citation omitted]). To the contrary, the *amici* States submit that there are powerful independent reasons for the Court to agree with the legislative judgment on this issue.

B. Subjective Analysis Confirms That Patrick Kennedy's Death Sentence Is Proportionate Punishment for His Aggravated Rape of L.H.

Taking "essential instruction" from the objective indicia of the direction of state legislation, the Court should "exercise . . . [its] own judgment" to see whether it agrees with the State legislatures' judgment. *See Roper*, 543 U.S., at 564; *Atkins*, 536 U.S., at 313. The "underlying principle" that informs this inquiry is "that the death penalty is reserved for a narrow category of crimes and offenders." *Roper*, 543 U.S., at 568-69. The Court must look to see whether "the extreme culpability" of the offender makes him "deserving of execution," *id.*, at 568 (quoting *Atkins*, 536 U.S., at 319), and whether child rapists may "reliab[ly] be classified among the worst offenders," *id.*, at 569. A "critical facet" of the culpability determination "is the mental state with which the defendant commits the crime," either intent or "reckless indifference to the value of human life." *See Tison*, 481 U.S., at 157. Additional considerations include the injury to the public, *Coker*, 433 U.S., at 598 (plurality opinion), the severity and irrevocability of the injury to the victim, *id.*, and the brutality of the crime, *id.*, at 601 (Powell, J., concurring). In sum, the subjective proportionality inquiry examines the "heinous[ness]," *Roper*, 543 U.S., at 570, and "moral depravity" of the crime, *Enmund*, 458 U.S., at 823 (O'Connor, J., dissenting), and asks whether it "is evidence of irretrievably depraved character," *Roper*, 543 U.S., at 570, that warrants the death penalty.

1. Patrick Kennedy's aggravated rape of L.H. was morally depraved and allows him to be classified as among the worst type of criminal offenders.

Here, the facts reveal that Patrick Kennedy's rape of L.H., who was eight years old at the time, was so heinous that it marks him as among the worst type of criminal offenders, deserving of the death penalty. Kennedy was L.H.'s stepfather. *Kennedy*, 957 So.2d, at 760. L.H. was asleep in her bedroom when the rape began. *Id.*, at 768-69. She awoke to find Kennedy "on top of her" in her bed. *Id.* Kennedy covered L.H.'s eyes with his hand and continued to rape her. *Id.* Afterwards, Kennedy attempted to cover up the crime by destroying evidence, fabricating an alibi, implicating two innocent youths in the crime, and threatening L.H. "that she had better tell [the authorities] the story that he made up." *See id.*, at 761-71.

Kennedy's rape of L.H. was brutal. She sustained vaginal injury with profuse bleeding, as well as a tear of her entire perineum and prolapse of her rectum into her vagina. *Id.*, at 761. According to an expert in pediatric forensic medicine, her "injuries were the most serious he had seen, within his four years of practice, that resulted from a sexual assault." *Id.* Photographs of L.H.'s injuries showed "more severe injuries than are typically seen in a rape case," as well as "the extreme brutality of th[e] rape." *Id.*, appendix, at "Gruesome Photographs."

Aside from her physical injuries, L.H. also suffered evident psychological and emotional injuries. For a period after the rape, L.H. was separated from her mother and brother and placed in foster care, which "was upsetting to [L.H.]." *Id.*, at 771. Kennedy's threat that L.H. had better

tell the story that he made up created fear in L.H. and caused her psychological pain. She was "extremely reluctant" to tell the authorities the truth about her rape. *Id.*, at 765. L.H.'s participation in Kennedy's trial caused her to relieve her psychological torment. When called upon to testify at Kennedy's trial, L.H. "lost her composure," and, more than once while on the witness stand, she cried. *Id.*, at 767, 768.

During the sentencing phase of the trial, the jury heard evidence that Kennedy was a serial child rapist. On prior occasions, Kennedy had sexually abused another child, S.L., who was about eight or nine-years-old at the time. *Id.*, at 772. S.L. was the cousin and godchild of Kennedy's then-wife, C.S. *Id.* The sexual abuse occurred during the summer when S.L. was staying with Kennedy and C.S. *Id.* Kennedy sexually abused S.L. three times, the first time involved inappropriate touching and the last entailed sexual intercourse. *Id.*

These facts reveal Patrick Kennedy to be a morally depraved and highly culpable individual. The way in which Kennedy sexually violated his prepubescent stepdaughter demonstrates extreme culpability on his part. L.H. suffered such severe and painful physical injuries that surgery and other invasive medical procedures were required. The rape also inflicted painful emotional and psychological trauma on L.H. Kennedy's attempts to hide his crime and intimidate L.H. into misleading the authorities were also morally reprehensible and depraved. Plus, the evidence of Kennedy's previous predatory behavior involving the repeated sexual assault of another child about eight or nine years old marks him as among the worst offenders. In sum, the premeditation, furtiveness, brutality,

deceitfulness, and predatory recidivism of this crime shows that Kennedy is deserving of society's severest moral condemnation and, in the judgment of his peers, the death penalty.

2. Further evidence of the long-lasting and devastating effect on the victim of child rape and society show that capital punishment is appropriate.

The Court should also consider the lasting and devastating effects that child rape inevitably has on the victim and society. *Cf. Coker*, 433 U.S., at 597-98 & nn.11-12 (plurality opinion) (discussing findings of harm to rape victims and "public injury as well"); *also Roper*, 543 U.S., at 569-70 (referencing scientific and sociological studies on the comparative immaturity and irresponsibility of juveniles); *Atkins*, 536 U.S., at 318 & nn.23-24 (citing "abundant evidence" on the diminished cognitive capacities and impulsivity of the mentally retarded). Studies show that "child abuse and neglect have pervasive and long-lasting effects on children, their families, and the society." Ching-Tung Wang & John Holton, Prevent Child Abuse Am., Chicago, Ill., Total Estimated Cost of Child Abuse and Neglect in the United States, *at* http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf [hereinafter Wang & Holton]. To get some sense of the magnitude of the problem of child abuse and neglect in the United States, it is estimated that the annual economic cost of child abuse and neglect in 2007 value is $103.8 billion. *Id.* In 2005, the U.S. government reported that "an estimated 899,000 children in the 50 States, the District of Columbia, and Puerto Rico were determined to be victims of abuse or neglect." U.S. Dep't of Health & Human

Servs., Admin. for Children & Families, Admin. on Children, Youth & Families, Children's Bureau, Child Maltreatment 2005, Summary, at xiv. Of these children, 9.3 percent suffered sexual abuse. *Id*., at xv. And these are just the reported cases; it is widely recognized that incidents of child abuse are largely under-reported. *See*, *e.g*., Advocates for Youth, Fact Sheet, *Child Sexual Abuse I: An Overview*, *at* http://www.advocatesforyouth.org/PUBLICATIONS/factsheet/fsabuse1.htm. (last visited Feb. 14, 2008) [hereinafter Advocates for Youth, Fact Sheet, *Child Sexual Abuse*]; Report of the Indep. Expert for the United Nations Study on Violence Against Children, U.N., Gen. Assembly, *Rights of the Child*, at 8 (Aug. 29, 2006).

The most vulnerable age group for child sexual abuse is children between ages 8 and 12. Advocates for Youth, Fact Sheet, *Child Sexual Abuse*. The average age for first abuse is 9.9 years for boys and 9.6 years for girls. *Id*. One study found that in over 20 percent of the cases of child sexual abuse, the victim was under 8 years of age. *Id*. And 24 percent of female child sexual abuse survivors were 5 years old or younger when they were first abused. *Id*.

Childhood "maltreatment" (which includes sexual, physical, and emotional abuse) "represents an *extreme traumatic insult* to the developing child." Dana M. Hagele, Commentary, *The Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J. 356, 356 (2005) (emphasis in original). Indeed, the trauma is considered so severe that it is "comparable to that of military combat." *Id*., at 357. Victims of child sexual abuse suffer adverse consequences in their physical, emotional, social, and cognitive development and "are more likely to experience adverse outcomes throughout their life span."

Wang & Holton. Victims of child abuse experience nearly twice the number of serious health problems as children without these problems. Hagele, *Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J., at 357. Adverse outcomes of childhood sexual abuse may include:

- Poor physical health (*e.g.*, chronic fatigue, altered immune function, hypertension, sexually transmitted diseases, obesity);
- Poor emotional and mental health (*e.g.*, depression, anxiety, eating disorders, suicidal thoughts and attempts, post-traumatic stress disorder);
- Social difficulties (*e.g.*, insecure attachments with caregivers, which may lead to difficulties in developing trusting relationships with peers and adults later in life);
- Cognitive dysfunction (*e.g.*, deficits in attention, abstract reasoning, language development, and problem-solving skills, which ultimately affect academic achievement and school performance);
- High-risk health behaviors (*e.g.*, higher number of lifetime sexual partners, younger age at first voluntary intercourse, teen pregnancy, alcohol, and substance abuse); and
- Behavioral problems (*e.g.*, aggression, juvenile delinquency, adult criminality, abusive, or violent behavior).

Wang & Holton; Hagele, *Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J., at 357-58; Amy Naugle, Nat'l Violence Against Women Prevention Ctr., Med. Univ. of S.C., Child Sexual Abuse Fact Sheet, http://www.nvaw.org/research/factsheet.shtml (last visited Feb. 14,

2008); Paul E. Mullen & Jillian Fleming, Nat'l Child Protection Clearinghouse, Issues in Child Abuse Prevention, vol. 9, Autumn 1998, *Long-Term Effects of Child Sexual Abuse*, http://www.aifs.gov.au/nch/pubs/issues/issues9/issues9.html (last visited Feb. 14, 2008).

As for the impact on society, child sexual abuse is similarly drastic. Child sexual abuse has been correlated with an increased prevalence of public-health problems, which, in turn, have been correlated with increased public utilization of public and private resources. Hagele, *Impact of Maltreatment on the Developing Child*, 66 N.C. MED. J., at 357. The evidence further suggests that child abuse is a frequent precursor to adult criminality. Patrick F. Fagan & Dorothy B. Hanks, Heritage Found., Backgrounder No. 1115, *The Child Abuse Crisis: The Distintegration of Marriage, Family, and the American Community*, at 6 (May 15, 1997), *available at* http://www.heritage.org/Research/Family/BG1115.cfm. "Child sexual abuse also can play a major role in shaping the future sex criminal" and "sexual revictimization" of the victim. *Id.*, at 22, 23.

3. The penological justifications for the death penalty are fully satisfied.

Finally, consideration must be given to "the penological justifications for the death penalty." *Roper*, 543 U.S., at 571. The "two distinct social purposes served by the death penalty" are "'retribution and deterrence of capital crimes by prospective offenders.'" *Atkins*, 536 U.S., at 319 (quoting *Gregg*, 428 U.S., at 183 (opinion of Stewart, Powell & Stevens, JJ.)). Both of these factors weigh in favor of imposing the death penalty on Petitioner. As the Louisiana Supreme Court correctly observed, the imposition of capital punishment for aggravated child rape

"will serve the goals of deterrence and retribution just as well as execution of first-degree murderers would." *Kennedy*, 957 So.2d, at 789.

Consistent with the modern trend among the States—and with the growing scientific understanding of the unique and irreparable harms of child rape—the Louisiana Legislature reasonably determined that the death penalty is an appropriate and proportionate punishment for the crime of aggravated child rape. A jury of Patrick Kennedy's peers unanimously agreed. Nothing in the Constitution prohibits that eminently reasonable determination.

CONCLUSION

The Court should affirm the judgment of the Louisiana Supreme Court.

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