No. 07-343

IN THE
Supreme Court of the United States

PATRICK KENNEDY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF *AMICI CURIAE* MISSOURI GOVERNOR MATT BLUNT AND MEMBERS OF THE MISSOURI GENERAL ASSEMBLY IN SUPPORT OF RESPONDENT

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Pursuant to this Court's Rule 37.2, *amici curiae* respectfully file this brief in support of respondent on the first question presented.*

INTEREST OF THE *AMICI CURIAE*

Amici curiae are Missouri Governor Matt Blunt and Members of the Missouri General Assembly. *See* App. 1a (listing *amici* Members of the Missouri General Assembly). The Missouri Constitution vests the Governor with "[t]he supreme executive power" in the State, including a duty faithfully to execute the laws, to be "a conservator of the peace throughout the state," and to recommend to the General Assembly "such measures as he shall deem necessary and expedient." Mo. Const., art. 4, §§ 1, 2, 9. Similarly, the Missouri Constitution vests the General Assembly with the legislative power in the State, including the power to define crimes and affix punishments. Mo. Const., art. 3, § 1. Together, the Governor and the General Assembly have the duty to ensure that the laws of Missouri deter and punish crime and protect the State's children.

In light of that duty, *amici* have an acute interest in the first question presented in this case: whether the Eighth Amendment to the United States Constitution categorically prohibits States from

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* Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and global consent letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

authorizing the death penalty for child rape. In December 2007, before this Court granted the writ of certiorari in this case, Governor Blunt publicly proposed that Missouri authorize the death penalty for child rape. In his January 2008 State of the State report, the Governor formally recommended that the General Assembly enact legislation to this effect. Pursuant to that recommendation, legislation has been duly introduced in the General Assembly and is working its way through the legislative process. *See* Mo. S.B. 1194 (2008) (App. 2-21a); Mo. H.B. 2384 (2008) (same). *Amici* would like to have a full and fair debate on that bill, so that they can enact legislation that best protects Missouri's children.

BACKGROUND

Petitioner describes the circumstances of his particular case in great detail. *See* Pet'r Br. 6-14. But the first question presented here does not ask whether the death penalty is constitutional on the particular facts of petitioner's case. Rather, the first question presented here asks whether the death penalty is categorically unconstitutional in *all* cases of child rape where the victim does not die. Indeed, the first question presented does not even refer to petitioner at all. *See id.* at i ("Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty.").

Under these circumstances, it is both necessary and appropriate for this Court to appreciate the types of crimes that have sparked calls to authorize the death penalty for child rape. In Missouri, for instance, the Governor's pending legislative proposal stems in part from the recent and notorious Michael

Devlin case. In October 2002, Devlin abducted S.H., an eleven-year-old boy, who was riding his bicycle near his home in Richwoods, Missouri. For the next four years, Devlin detained and sexually abused S.H. Devlin took sexually explicit photographs and videotapes of some of his attacks and, at one point, attempted to kill the boy.

Four years later, as S.H. matured, Devlin decided to abduct a second boy. So in January 2007, Devlin kidnapped a thirteen-year-old boy, W.O., near a school bus stop. Days later, investigative leads from W.O.'s kidnapping led law enforcement officers to Devlin's apartment, where they discovered both boys.

Missouri charged Devlin with 72 counts of forcible sodomy, as well as other counts for kidnapping, assault, and attempted murder. Devlin was also indicted on federal charges for production of child pornography and for taking S.H. across state lines for purposes of a criminal sexual act. In October 2007, Devlin pleaded guilty to all counts but one in three state circuit courts and the U.S. District Court for the Eastern District of Missouri. For his federal crimes, Devlin received a sentence of 170 years' imprisonment. For most of the state counts, the Missouri courts imposed the maximum sentence available—life imprisonment—for a total of 74 life sentences (many of which were consecutive).

The Devlin case led many in Missouri, including *amici*, to question whether life imprisonment is sufficient punishment for crimes of this type. It is against this backdrop that *amici* are considering the pending legislation.

SUMMARY OF ARGUMENT

Petitioner's argument that the Eighth Amendment categorically forbids the death penalty for child rape suffers from a fundamental flaw. On the one hand, petitioner argues that "this Court's decision in *Coker v. Georgia*[, 433 U.S. 584 (1977),] precludes capital punishment for any rape in which death does not result." Pet'r Br. 19 (capitalization modified). On the other hand, petitioner argues that there is a "national consensus against punishing child rape by death," as apparently evidenced by "objective indicia of legitimacy." *Id.* at 28 (capitalization modified). But these two arguments are logically and legally intertwined: there is no way to assess whether there is a "national consensus against punishing child rape by death" without first knowing whether *Coker* foreclosed a national debate on that very issue. By definition, there cannot be a "consensus" before there has been a debate, and *Coker* has distorted any debate on this issue for a generation.

This Court should clarify in this case that *Coker* does not categorically foreclose the death penalty for child rape. Then, and only then, can there be a real debate on appropriate punishment for that crime, and the possibility of a "national consensus" on this issue. As petitioner's brief underscores, those who oppose the death penalty for child rape currently argue that the debate itself is illegitimate, on the ground that this Court in *Coker* foreclosed that debate as a matter of federal constitutional law. *Amici* disagree with petitioner on that score, given that *Coker* did not even involve child rape. But petitioner certainly cannot argue *both* that *Coker*

answered the first question presented here *and* that there is a "national consensus" on the answer to that question. Given the distorting lens of *Coker*, any such "consensus" is illusory.

As matters now stand, petitioner cannot possibly demonstrate by "objective indicia"—separate and apart from petitioner's erroneous interpretation of *Coker*—that the people of this Nation have reached a "national consensus" that the death penalty is never warranted for child rape. To the contrary, if anything, a spate of recent legislative activity (in Missouri as well as other States) underscores that no such "consensus" exists. Petitioner is essentially inviting this Court to outlaw the death penalty for child rape as a matter of raw federal judicial power. *Amici* respectfully ask this Court to decline that invitation.

ARGUMENT

This Court Should Not Foreclose A National Debate On Appropriate Punishment For Child Rape.

This case is controlled by the fundamental principle that, except to the limited extent prescribed by the Federal Constitution, States are generally free to define crimes and their punishments. *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 824 (1991); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *Gore v. United States*, 357 U.S. 386, 393 (1958). *Amici* seek to have a debate in Missouri about whether the crime of child rape, at least in certain circumstances, warrants the death penalty. Depending on the outcome of that debate in Missouri and other States, perhaps it will be possible in the future to discern a "national consensus" one way or the other on this

controversial and emotional issue. But petitioner seeks to foreclose that debate altogether, by arguing both that current law categorically precludes the death penalty for child rape, and that a "national consensus" to the same effect already exists. Petitioner is wrong on both scores.

As an initial matter, petitioner overreads this Court's decision in *Coker*. The question there was whether a State constitutionally could impose the death penalty for the rape of "an adult woman." *See Coker*, 433 U.S. at 592 (plurality opinion) ("Th[e] question [of the constitutionality of the death penalty], *with respect to rape of an adult woman*, is now before us.") (emphasis added). This Court answered that question in the negative, based largely on "objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of *an adult woman*." *Id.* at 593 (emphasis added); *id.* at 596 ("The current judgment with respect to the death penalty for rape … obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping *an adult woman*.") (emphasis added); *id.* at 597 ("[T]he legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping *an adult woman*.") (emphasis added).

Petitioner nonetheless insists that *Coker* "held" that the death penalty is categorically unconstitutional for the crime of rape, even where the victim is a child. Pet'r Br. 6; *see also id.* at 17 ("Punishing the crime of child rape with the death penalty cannot be squared with this Court's decision

in *Coker*."). Petitioner bases that argument on several passages in the plurality opinion in *Coker* that refer to the crime of "rape" without qualification. *See id.* at 20-21 (citing 433 U.S. at 594-95, 598-99, 600). But those passages cannot be divorced from their context, which (as the *Coker* plurality repeatedly emphasized) involved the rape of "an adult woman." 433 U.S. at 592-93, 596-97. And this Court's more recent cases only confirm this limited scope. *See*, *e.g.*, *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (characterizing *Coker* as involving the "rape of an adult woman"); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) ("[W]e have held that death is an impermissibly excessive punishment for the rape of an adult woman.") (citing *Coker*, 433 U.S. at 593-96).

Petitioner thus falls back on the assertion that the "rationale" of *Coker* necessarily encompassed child rape, quoting the plurality's observation that "'the death penalty … is an excessive penalty for the rapist who, as such, does not take human life.'" Pet'r Br. 20 (quoting *Coker*, 433 U.S. at 598), 25 n.5, 27. But even petitioner does not contend that *Coker* held that the death penalty is categorically unconstitutional for all crimes that "do[] not take human life." *See id.* at 26 & n.6. All that *Coker* held (and all that *Coker* could have held, given the case before it) is that the death penalty is categorically unconstitutional for the rape of "an adult woman." 433 U.S. at 592-93, 596-97. Indeed, had the *Coker* plurality intended its ruling to sweep more broadly, its repeated references to the rape of "an adult woman," *id.*, would be inexplicable.

Contrary to petitioner's assertion, thus, the issue here is not whether this Court should "retreat" from *Coker*, Pet'r Br. 17, but whether this Court should extend *Coker* to categorically prohibit the death penalty for the crime of rape not only of "an adult woman," 433 U.S. at 592-93, 596-97, but also of a child. Such an extension would be permissible, under this Court's precedents, only if petitioner could carry the "heavy burden" of establishing a national consensus against the death penalty for child rape. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989); *see also Roper*, 543 U.S. at 567; *Atkins,* 536 U.S. at 316; *Gregg v. Georgia*, 428 U.S. 153, 173-75 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Petitioner purports to discern such a "consensus" by reference to (1) "the number of states that prohibit the death penalty" for child rape, (2) "the 'frequency of its use even where it remains on the books,'" and (3) "the direction of any change" with respect to punishing that crime. Pet'r Br. 28 (quoting *Roper*, 543 U.S. at 567). But the problem for petitioner is that it is currently impossible to discern any such "consensus" free and clear from the distorting lens of *Coker*. Indeed, petitioner himself underscores the problem by arguing at great length that *Coker* governs this issue. *See* Pet'r Br. 19-27. If this Court were ever to hold the death penalty categorically unconstitutional for the rape of a child, it should do so only after a full and fair national debate on that issue confirmed the existence of a true "national consensus" against this punishment for this crime. It certainly should not do so on the basis of an illusory "consensus" that may reflect nothing more than an erroneous interpretation of this Court's decision in *Coker*.

Indeed, this case stands in stark contrast to recent cases in which this Court has perceived a "national consensus" against the death penalty in certain circumstances. *See Roper*, 543 U.S. at 564-67 (describing consensus against death penalty for juveniles); *Atkins*, 536 U.S. at 313-16 (describing consensus against death penalty for the mentally retarded). With respect to the specific circumstances at issue in both *Roper* and *Atkins*, this Court previously had made it crystal clear that the Federal Constitution did *not* categorically preclude the application of the death penalty. *See Stanford*, 492 U.S. at 380 (holding that the Federal Constitution did not categorically preclude the death penalty for juveniles at least 16 years old); *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (holding that the Federal Constitution did not categorically preclude the death penalty for the mentally retarded). Accordingly, any State that adopted (or retained) an exclusion from the death penalty for juveniles or the mentally retarded in light of *Stanford* and *Penry* unquestionably did so of its own volition, free from federal constitutional compulsion. *Stanford* and *Penry*, in other words, cleared the path for *Roper* and *Atkins* by clarifying that the Federal Constitution did not compel States to exempt juveniles and the mentally retarded from the death penalty. To the extent that various State legislatures, free of any federal constitutional compulsion, chose to exempt juveniles and the mentally retarded from the death penalty, those legislative decisions provided evidence of a shift in the national consensus.

Precisely because petitioner is able to argue in this Court that *Coker* controls the first question presented in this case as a matter of federal

constitutional law, his simultaneous discernment of a "national consensus" against the death penalty for child rape is, at the very least, premature. Petitioner is undeniably correct that certain courts and commentators have broadly interpreted *Coker* to foreclose the death penalty in all cases of rape, or even in all cases that do not involve a person's death. *See* Pet'r Br. 22-24, 25 & n.5. But that only underscores that it is impossible to discern a "national consensus" on this issue separate and apart from an erroneous understanding of this Court's Eighth Amendment jurisprudence.

Perhaps, if this Court were to clarify in this case that *Coker* does not categorically foreclose the death penalty for child rape, a national consensus will emerge with respect to the death penalty for child rape. *Amici* seriously doubt that any such consensus would be along the lines suggested by petitioner; if anything, *amici* venture to predict that any consensus would favor the death penalty, at least under certain circumstances, for child rape. But unless and until this Court clarifies that *Coker* does not categorically foreclose the death penalty for child rape, there is simply no basis for this Court to conclude that "objective indicia overwhelmingly show that society views capital punishment as excessive punishment for child rape." Pet'r Br. 18; *see generally Thompson v. Oklahoma*, 487 U.S. 815, 848-55 (1988) (O'Connor, J., concurring in judgment) (warning against premature assessment of "national consensus" regarding death penalty in certain classes of cases); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. Rev. 1089, 1149 (2006) ("The

essential problem is that although the Court may act as if it is an independent arbitrator, its actions actually affect the very national consensus in each case that it is attempting to ascertain and reflect.").

In any event, petitioner's discussion of the various "objective indicia" of a "national consensus" is flawed on its own terms. At the outset, petitioner asserts that "[f]orty-five states *bar* [the death penalty for child rape] outright." Pet'r Br. 18 (emphasis added). That assertion is misleading at best. Petitioner apparently means to suggest that these forty-five States, including Missouri, have affirmatively rejected the death penalty for child rape. But nothing in Missouri law indicates an affirmative rejection of the death penalty for child rape. Missouri law simply does not speak to the issue one way or the other. There has been no debate in Missouri over the death penalty for child rape. *Amici* in fact wish to conduct such a debate in Missouri, but petitioner seeks to silence that debate before it starts by asking this Court to declare that a "national consensus" (supposedly including Missouri) already rejects the death penalty for child rape.

Once again, *Roper* and *Atkins* provide relevant guidance. In discerning a "national consensus" against the application of the death penalty in particular circumstances, the Court in those cases focused on States that either (1) abolished the death penalty altogether, or (2) affirmatively barred the death penalty for juveniles or the mentally retarded. *See Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 314-15. The Court certainly did not purport to discern a "national consensus" based merely on the *absence* of legislation affirmatively authorizing the death

penalty for juveniles or the mentally retarded. *See also Thompson*, 487 U.S. at 829 (plurality opinion) (putting aside States that "do not focus" on the minimum age for the death penalty, and instead focusing on the States that "have *expressly established* a minimum age in their death penalty statutes") (emphasis added).

That point is important not only because the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,'" *Atkins*, 536 U.S. at 312 (quoting *Penry*, 492 U.S. at 331), but also because there are many reasons why legislatures may not act besides disagreement with potential legislation. *See, e.g.*, *United States v. Craft*, 535 U.S. 274, 287 (2002); *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Perhaps legislators in those States (like Missouri) that have not affirmatively authorized the death penalty for child rape have been focused on other issues, and have not been galvanized by shocking crimes like those revealed in the Devlin case. Or perhaps legislators erroneously believed that their hands were tied by *Coker*, or at the very least did not want to expend the resources necessary to litigate the question whether their hands were tied by *Coker*. For this reason, petitioner misses the mark by relying on legislative inaction to prove a national consensus against the death penalty for child rape. *See* Pet'r Br. 35-36 n.14. In the absence of legislation affirmatively "prohibit[ing]" the death penalty under certain circumstances, *see Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 314-15, a particular State cannot be deemed part of a "national consensus" rejecting the death penalty under those circumstances.

Thus, the fact that most of the States that authorize the death penalty in the first place have not yet extended it to child rape does not mean that those States have affirmatively rejected any such extension. Or, put differently, the fact that only a handful of States to date have taken that step does not mean that those States have departed from any national consensus to the contrary. It is, after all, virtually a truism that the States in our federal republic are the "laboratories" of democracy, *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing, *inter alia*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)), and a State is not to be condemned merely for taking the lead on a controversial issue, *see, e.g.*, *Ewing v. California*, 538 U.S. 11, 15, 24 (2003) (rejecting Eighth Amendment challenge to California's then-novel "three strikes" law); *see also Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) (opinion of Scalia, J.); *id.* at 998-99, 1007 (opinion of Kennedy, J.). In particular, the Eighth Amendment neither precludes States from undertaking innovations in criminal law and punishment, nor dictates that any such innovations may move only in the direction of ever-greater leniency. *See*, *e.g.*, *Gregg*, 428 U.S. at 176 (opinion of Stewart, Powell, and Stevens, JJ.).

For similar reasons, petitioner also misses the point by arguing that the actions of prosecutors and sentencing juries provide "objective indicia" of a national consensus against the death penalty for child rape. *See* Pet'r Br. 33-34. The short answer to that argument is that the available data are far too limited to warrant any such sweeping conclusion. As noted above, the various state statutes authorizing

the death penalty for child rape are very recent. Because there is virtually no track record one way or the other, petitioner cannot remotely carry his "heavy burden" of proof on this score. *Stanford*, 492 U.S. at 373.

Indeed, if anything, recent legislative activity among the States strongly suggests the absence of a "national consensus" against the death penalty for child rape, because a clear trend has emerged in favor of such punishment. As petitioner himself concedes, since Louisiana enacted its statute in 1995, at least four other States have enacted legislation similarly authorizing the death penalty for child rape under certain circumstances (and three of those enactments have taken place just within the past two years). *See* Mont. Code § 45-5-503(i) (1997); S.C. Code § 16-3-655(C)(1) (2006); 10 Okl. St. § 7115(I) (2006); Tex. Penal Code § 12.42(c)(3) (2007); *cf.* Ga. Code § 16-6-1 (1999). In addition, legislation that would authorize the death penalty for child rape is currently pending not only in Missouri, but also in Colorado (Colo. S.B. 195) (2008)), Mississippi (Miss. S.B. 2596 (2008)), Alabama (Ala. H.B. 456 (2008)), and Tennessee (Tenn. S.B. 0157 (2007)). It would be unorthodox, to say the least, for this Court to discern a "national consensus" on an issue where contrary legislation is currently pending in no fewer than five States. *See*, *e.g.*, *Atkins*, 536 U.S. at 315 ("[I]t is not so much the number of ... States that is significant, but the consistency of the direction of change.").

Petitioner asserts, however, that "the two states that had capital child rape statutes prior to *Coker* [Florida and Mississippi] have disallowed the death penalty for the crime." Pet'r Br. 35. Again, that

assertion is misleading at best. Neither Florida nor Mississippi "disallowed" the death penalty for child rape by concluding as a matter of state law that the penalty was excessive or unwarranted. To the contrary, the Florida Supreme Court invalidated the statute authorizing the death penalty for child rape because it erroneously believed that *Coker* compelled that result. *See Buford v. State*, 403 So. 2d 943, 951 (Fla. 1981) ("The reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."). And the Mississippi Supreme Court invalidated the Mississippi statute on the ground that it conflicted with the Mississippi statute governing capital trials, *see Leatherwood v. State*, 548 So. 2d 389, 403 (Miss. 1989), not because of any normative judgment that such punishment is unwarranted. Indeed, Mississippi is currently considering legislation to address that conflict and reinstate the death penalty for child rape. *See* Miss. S.B. 2596 (2008).

To be sure, petitioner and his *amici* make a variety of policy arguments against the death penalty for child rape. *See* Pet'r Br. 38-40; *see also, e.g.*, Br. of Nat'l Assoc. of Social Workers *et al.* as *Amici Curiae* 6-26; Br. of Nat'l Assoc. of Criminal Defense Attorneys *et al.* as *Amici Curiae* 7-21. *Amici* here do not lightly discount all of those policy arguments, such as the argument that evidence from children may present special reliability concerns. *See* Pet'r Br. 39-40. But petitioner and his *amici* are directing these policy arguments to the wrong forum in the first instance: these arguments present

"complex factual issue[s] the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *Gregg*, 428 U.S. at 186 (opinion of Stewart, Powell, and Stevens, JJ.). There is no reason to think that petitioner's various policy arguments, whatever their merits, compel this Court to hold that the Federal Constitution categorically forecloses state legislatures from debating these various policy arguments. Needless to say, whatever the results of such debates, the courts will always sit to ensure a defendant receives a fundamentally fair trial in every individual case.

In the final analysis, it is neither necessary nor appropriate for this Court to silence a debate in Missouri and other States on the death penalty for child rape before that debate has even been joined. Accordingly, this Court should answer the first question presented in the affirmative.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Louisiana Supreme Court at least insofar as the Eighth Amendment's Cruel and Unusual Punishment Clause does not categorically preclude the death penalty for child rape.

Respectfully submitted,

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