

No. 07-343

**In The
Supreme Court of the United States**

PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

**MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT
AND FOR DIVIDED ARGUMENT**

Pursuant to Supreme Court Rules 28.4 and 28.7, the State of Texas and eight other States (collectively the *amici* States) request that the Court divide oral argument for Respondent, Louisiana, and allow the undersigned, on behalf of the *amici* States, 10 minutes of argument time. Respondent supports this motion and has agreed to cede 10 minutes to the *amici* States.

- I. **LEAVE TO PARTICIPATE IN THE ORAL ARGUMENT SHOULD BE GRANTED BECAUSE THE COURT'S REVIEW OF PETITIONER'S EIGHTH AMENDMENT CLAIM WILL NECESSARILY FOCUS ON AMICI STATES' CAPITAL-PUNISHMENT STATUTES.**

This case requires the Court to address whether the Louisiana Supreme Court correctly held that the Eighth Amendment permits the death penalty to be assessed against those convicted of the aggravated rape of a child. *See State v. Kennedy*, 957 So.2d 757, 760 (La. 2007). In reviewing Petitioner's Eighth Amendment challenge, the

Court will focus largely upon the capital-punishment statutes of the States to determine whether there is a national consensus that nonhomicide crimes, such as child rape, may properly be considered a capital crime. *See Coker v. Georgia*, 433 U.S. 584, 593 (1977) (plurality opinion); *see also Roper v. Simmons*, 543 U.S. 551, 563 (2005). Therefore, oral argument by *amici* States will assist the Court in its analysis of the Eighth Amendment challenge presented in this case. SUP. CT. R. 28.4.

The Court has explained that the Eighth Amendment prohibits punishments that are excessive and disproportionate to the crime committed. *See Weems v. United States*, 217 U.S. 349, 371 (1910); *see also Roper*, 543 U.S., at 560. This proportionality analysis takes into account “evolving standards of decency,” *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion), and seeks “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), or, in other words, “sufficient evidence at present of a national consensus,” *Roper*, 543 U.S., at 563.

The Court’s analysis is informed by “objective factors to the maximum possible extent,” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quotation omitted), and the Court has stated that legislative enactments are the “clearest and most reliable objective evidence of contemporary values,” *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *see also Stanford v. Kentucky*, 492 U.S. 361, 370 (1989). And as the Court has explained, the direction of the change is even more important than the number of States when determining the national consensus. *See Atkins*, 536 U.S., at 315; *see also Roper*, 543

U.S., at 565. Thus, under the Court's standard, the recent enactments of state legislatures regarding capital punishment for child rape in particular, and nonhomicide crimes in general, are the best indicator of contemporary values in this area.

Amici States—three of which have statutes making child rape a capital crime and four of which are actively considering such a statute—represent the current trend. *See Amici States' Br.*, at 9-10, 10 n.1; *see also infra* Part II. Thus, *amici States'* participation in the oral argument will assist the Court in its review of the current national trend regarding the imposition of the death penalty for nonhomicide crimes. The State of Texas is the most recent State to enact legislation permitting capital punishment in cases involving repeated child rape. *See Amici States' Br.*, at 8-10. In enacting this statute, the Texas Legislature considered several factors, including whether the death penalty was an appropriate and just punishment for the crime and whether lengthy prison terms were adequate to address the harm caused by such offenders. *See id.*, at 9. These considerations, and the resulting Texas statute, represent an important element of the current national views with respect to “the country's present judgment concerning the acceptability of death as a penalty for” the crime of child rape, *see Coker*, 433 U.S., at 593 (plurality opinion). *Amici States* are thus well positioned to provide assistance to the Court at oral argument, *see SUP. CT. R. 28.4*, because it will be the Court's review of their state statutes that will inform the Court's decision.

Further, *amici* States' brief presents recent evidence of the long-lasting, devastating effects that child rape has on its victims. *See Amici States' Br.*, at 23-26. These studies, which explain the unique harms children endure when they are the victim of rape, *see id.*, are not the focus of the parties' briefs. Because this evidence provides some of the context for the considerations state legislatures continue to undertake in deciding whether the crime of child rape is deserving of the death penalty, *amici* States' participation in oral argument will be of assistance to the Court, *see* SUP. CT. R. 28.4.

II. BECAUSE *AMICI* STATES' STATUTES PERMITTING CAPITAL PUNISHMENT FOR NONHOMICIDE CRIMES REPRESENT THE NATIONAL TREND, *AMICI* STATES HAVE A STRONG INTEREST IN THE RESOLUTION OF THIS CASE.

The Louisiana Supreme Court noted that, at the time of its decision, fourteen States plus the federal government had statutes permitting capital punishment for some nonhomicide crimes, 957 So.2d, at 786, including the five States that permitted the death penalty for child rape, *id.*, at 785. In 2007, *Amici* State Texas became the fifteenth and the sixth State, respectively, to pass such a statute. Five of the fifteen States are *amici* States.

Amici States represent the current national trend toward permitting capital punishment for some nonhomicide crimes. As the Louisiana Supreme Court found, "the number of jurisdictions allowing the death penalty for nonhomicide crimes more than doubled between 1993 and 1997," *Kennedy*, 957 So.2d, at 788. And five States have made child rape a capital crime since 1996. *See Amici States' Br.*, at 16.

Additionally, five other States, including the *amici* States of Alabama, Colorado, Mississippi, and Missouri, are actively considering legislation that would make capital punishment available for child rape. *See id.*, at 10 n.1. As *amici*, the States enacting these statutes have a substantial interest in ensuring that the Court recognizes the trend represented by these statutes.

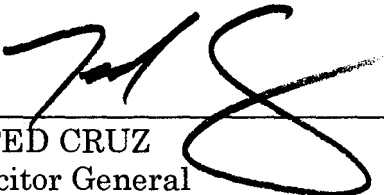
In recognition of the important and independent interests of the States, the Court has often granted motions for divided arguments. *See, e.g., Smith v. Texas*, 127 S. Ct. 855 (2007); *Holmes v. South Carolina*, 546 U.S. 1162 (2006); *Halbert v. Michigan*, 544 U.S. 969 (2005); *Clingman v. Beaver*, 543 U.S. 1041 (2005); *Jackson v. Birmingham Bd. of Educ.*, 543 U.S. 953 (2005); *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 901 (2004); *Aetna Health, Inc. v. Davila*, 540 U.S. 1175 (2004); *City of Boerne v. Flores*, 519 U.S. 1088 (1997). *Amici* States respectfully submit that the Court would benefit from divided argument in this case. *See* SUP. CT. R. 28.4.

Respectfully submitted,

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March 19, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one true and correct copy of this Motion for Leave to Participate in Oral Argument and for Divided Argument was served via Federal Express (Next Day Air Delivery), on March 19, 2008, to:

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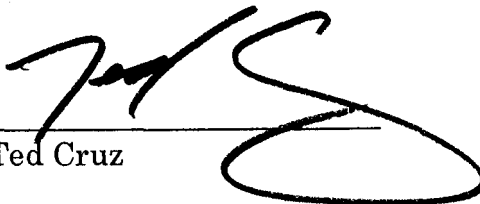
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The undersigned also certifies that on March 19, 2008, this Motion for Leave to Participate in Oral Argument and for Divided Argument, original and 11 copies thereof, was dispatched to the clerk, as addressed below, via Federal Express (Next Day Air Delivery):

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