No. 19A____

IN THE

# Supreme Court of the United States

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

JAMES H. ROANE, JR., et al.,

*Applicants*,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, et al.,

*Respondents.*

On Application for Stay

**EMERGENCY APPLICATION FOR A STAY OF MANDATE PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI**


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June 10, 2020

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## PARTIES TO THE PROCEEDING

Alfred Bourgeois, Dustin Lee Honken, Daniel Lewis Lee, and Wesley Purkey, petitioners on review, were the plaintiffs-appellees below.

William P. Barr, Attorney General, the U.S. Department of Justice; Timothy J. Shea, Acting Administrator, Drug Enforcement Administration; Michael Carvajal, Director, Federal Bureau of Prisons; Nicole C. English, Assistant Director, Health Services Division, Federal Bureau of Prisons; Jeffrey E. Krueger, Regional Director, Federal Bureau of Prisons, North Central Region; T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute; William E. Wilson, M.D., Clinical Director, U.S. Penitentiary Terre Haute; Joseph McClain, United States Marshal, Southern District of Indiana; and John Does 1-X, individually and in their official capacities, are respondents on review.

William P. Barr, Attorney General, the U.S. Department of Justice; Uttam Dhillon, (former) Acting Administrator, Drug Enforcement Administration; Michael Carvajal, Director, Federal Bureau of Prisons; Nicole C. English, Assistant Director, Health Services Division, Federal Bureau of Prisons; Jeffrey E. Krueger, Regional Director, Federal Bureau of Prisons, North Central Region; T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute; William E. Wilson, M.D., Clinical Director, U.S. Penitentiary Terre Haute; Joseph McClain, United States Marshal, Southern District of Indiana; and John Does 1-X, individually and in their official capacities, were the defendants-appellants below.

## RELATED PROCEEDINGS

There are several related proceedings, as defined in Supreme Court Rule 14.1(b)(iii).

This case has previously been before this Court on the Government's unsuccessful motion for a stay or vacatur of the District Court's preliminary injunction. *See Barr* v. *Roane*, 140 S. Ct. 353 (2019) (mem.). A petition for certiorari is currently pending, docketed as No. 19-1348 (June 5, 2020).

There are several related cases in the District Court that have been consolidated into the single master case from which this appeal originates. *See* Order, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (D.D.C. Aug. 20, 2019), Dkt. #1 ("Dist. Dkt."). Those related cases are: *Roane* v. *Barr*, No. 05-cv-2337 (D.D.C. filed Dec. 6, 2005); *Robinson* v. *Barr*, No. 07-cv-2145 (D.D.C. filed Nov. 28, 2007); *Bourgeois* v. *U.S. Dep't of Justice*, No. 12-cv-782 (D.D.C. filed May 15, 2012); *Fulks* v. *U.S. Dep't of Justice*, No. 13-cv-938 (D.D.C. filed June 21, 2013); *Lee* v. *Barr*, 19-cv-2559 (D.D.C. filed Aug. 23, 2019); *Purkey* v. *Barr*, No. 19-cv-3214 (D.D.C. filed Oct. 25, 2019); *Holder* v. *Barr*, No. 19-cv-3520 (D.D.C. filed Nov. 22, 2019); *Bernard* v. *Barr*, No. 20-cv-474 (D.D.C. filed Feb. 19, 2020); *Nelson* v. *Barr*, No. 20-cv-557 (D.D.C. filed Feb. 25, 2020).

One of these related District Court cases previously resulted in two appeals to the D.C. Circuit, which were decided on July 6, 2012, and January 24, 2014. *See Roane* v. *Leonhart*, 741 F.3d 147 (D.C. Cir. 2014); *Roane* v. *Tandy*, No. 12-5020,

2012 WL 3068444 (D.C. Cir. July 6, 2012). Neither decision was appealed to this Court.

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

This administrative law case concerns a rule with an extraordinary impact on the rights and interests of those it affects: the federal death-penalty execution protocol. Although this Court has instructed that this case must be handled with "appropriate dispatch," it has also acknowledged that Petitioners' executions should not proceed until novel and complex questions about the protocol's legality are settled. *See Roane* v. *Barr*, 140 S. Ct. 353, 353 (2020).[1] Yet, out of all the judges and Justices to have considered this case, only one has embraced the novel interpretation that would now become the law of the land absent this Court's review; a second begrudgingly accepted it in order to produce a majority opinion. This Court should maintain the status quo while deciding whether to answer the important questions presented in Petitioners' pending petition for a writ of certiorari.

Taking a life is the "most extreme sanction available," *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002), and the States have far more experience in levying that sanction than the federal government. That is why, in both 1937 and 1994, Congress mandated that, when a federal death sentence is to be carried out, the government "shall * * * implement[]" it "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a); *see* 18 U.S.C. § 542 (1937). Yet, in 2019, the Government ignored that directive and instead announced a uniform, nationwide lethal-injection protocol for all federal executions. As the D.C.

[1] This Application uses the term Petitioners, rather than Applicants, as there has already been a petition for writ of certiorari filed.

Circuit correctly held, that was error: By referring to the "manner" of execution prescribed by state law, Congress required the federal government to heed the States' experience crafting execution *procedures*.

Despite the Government's disregard of Congress's mandate, the panel majority nevertheless upheld the protocol. In so doing, it committed three errors: First, the panel relied on unrelated statutes and cases to hold that that the very procedures integral to this federalist approach—those contained in state execution protocols—are not "prescribed by" state law. Second, the panel majority disregarded a principle of administrative law settled since the 1940s: It adopted a reading of the protocol the agency never advanced—or even mentioned in the Administrative Record. Finally, the panel held that the protocol—which dictates the manner in which Petitioners will die—is merely a procedural rule exempt from notice and comment.

This Court should stay issuance of the D.C. Circuit's mandate pending disposition of the pending petition for a writ of certiorari. This case satisfies each consideration relevant to that determination.

There is "a reasonable probability" that four Justices will vote to grant certiorari and "a fair prospect" that this "Court will conclude that the decision below was erroneous." *Indiana State Police Pension Trust* v. *Chrysler LLC*, 556 U.S. 960, 960 (2009) (per curiam) (internal quotation marks omitted). The case concerns whether the Government may employ its 2019 protocol in executing more than sixty prisoners currently under federal sentences of death. But the decision below raises more questions than it resolves about how to conduct federal executions. And it an-

nounces sweeping principles that will reshape administrative practice if they take root. It is also wrong, as proper application of prevailing principles of statutory interpretation and administrative law readily demonstrate.

Petitioners are likely to suffer irreparable harm absent a stay. Absent one, the Government may execute Petitioners according to an unlawful protocol—an "irremediable" harm. *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.). Failure to stay the mandate also risks the "irreparable harm" of "foreclos[ing] * * * certiorari review by this Court." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers).

Although this is not a "close case" where consideration of the equities is warranted, they too favor a stay. *Indiana State Police Pension Trust*, 556 U.S. at 960 (internal quotation marks omitted). Any marginal harm the Government might face from a potentially short stay pending resolution of the petition for a writ of certiorari pales in comparison to the irreversible harm that "[r]efusing a stay may visit" on Petitioners. *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1305 (2010) (Scalia, J., in chambers). The public interest in ensuring the Government acts in accordance with the law—an interest that is particularly important in the context of an execution—and judicial economy favor a stay, too.

Unlike most capital cases, this case involves thorny questions of administrative law and statutory interpretation about which only one other court—the panel below—has issued a decision. As that panel's fractured decision demonstrates, these questions are difficult and prone to differing interpretations. Moreover, these

questions arise from a brand new policy—one that Petitioners immediately challenged in the District Court after the Government simultaneously issued it and scheduled their execution dates. The Government's bypassing of standard procedures and the panel majority's departure from the adversarial process further counsel a stay, particularly given the capital context. *See Thompson* v. *Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring in the judgment) (capital sentence should "not [be] imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality").

Petitioners respectfully ask this Court to stay the D.C. Circuit's mandate pending the disposition of their petition for certiorari. Because the mandate will issue on June 12, 2020, at 5:00 p.m., Petitioners respectfully ask this Court to order briefing on this Application before then or to administratively stay issuance of the mandate pending disposition of this Application.

## OPINIONS BELOW

The D.C. Circuit's decision is reported at 955 F.3d 106 (2020). Pet. App. 1a-100a. The D.C. Circuit's decisions denying rehearing en banc and withholding issuance of the mandate are not reported. *Id.* at 127a-128a; Appl. App. 1. The District Court's order granting the preliminary injunction is reported at 2019 WL 6691814. Pet. App. 101a-119a. This Court's decision denying a stay of the preliminary injunction is reported at 140 S. Ct. 353 (2019) (mem.). Pet. App. 124a-126a. The D.C. Circuit's decision denying a stay of the preliminary injunction is not reported. *Id.* at 120a-123a.

## JURISDICTION

The D.C. Circuit entered judgment on April 7, 2020. Petitioners timely sought rehearing en banc, which was denied on May 15, 2020. In response to Petitioners' timely motion to stay the mandate, the D.C. Circuit stayed its issuance through June 8, 2020, which it later extended to June 12, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The Federal Death Penalty Act, 18 U.S.C. § 3596(a), provides:

> A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.

The Administrative Procedure Act, 5 U.S.C. § 553(b), provides:

> General notice of proposed rule making shall be published in the Federal Register * * * . Except when notice or hearing is required by statute, this subsection does not apply * * * to * * * rules of agency organization, procedure, or practice * * * .

The Administrative Procedure Act, 5 U.S.C. § 706(2)(C), provides:

> The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * in excess of statutory jurisdiction, authority, or limitations, or short of statutory right * * * .

## STATEMENT

### A. Statutory and Regulatory Background

Until 1937, federal law mandated that the U.S. Marshals Service (USMS) carry out all federal executions by hanging. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 33, 1 Stat. 112, 119 (1790). In 1937, however, Congress switched to a federalist approach. Because Congress viewed the States as working to make executions "more humane" at that time, H.R. Rep. No. 75-164, at 2 (1937), Congress required that the USMS carry out executions in the "manner prescribed by the laws of the State within which the sentence is imposed," rather than mandate a uniform federal execution procedure. 18 U.S.C. § 542 (1937) (the "1937 Act").

Congress repealed the 1937 Act in 1984, leaving the federal government without a mechanism for carrying out executions. *See* Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1987 (1984). To address that gap, the Department of Justice (DOJ), after notice and comment, issued a rule in 1993 requiring executions to take place by lethal injection. Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898-01 (Jan. 19, 1993) (codified at 28 C.F.R. pt. 26).

Congress displaced this regulation the next year with the Federal Death Penalty Act (FDPA). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), *codified at* 18 U.S.C. §§ 3591-3598. The FDPA reverts to the earlier approach of requiring the federal government to follow the States' lead: It directs "a United States Marshal [to] supervise implementation

of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a).

DOJ understood that the 1994 FDPA would preclude the federal government from implementing a single, uniform set of federal execution procedures. Prior to the FDPA's enactment, then-Attorney General Janet Reno "recommend[ed]" instead "perpetuat[ing] the current approach, under which the execution of capital sentences * * * is carried out * * * pursuant to uniform regulations issued by the Attorney General." *See* H.R. Rep. No. 104-23, at 22 (1995) (quoting Letter from Att'y Gen. Janet Reno to Hon. Joseph R. Biden, Jr., at 3-4 (June 13, 1994)). Congress declined. DOJ has since asked Congress several times to amend the FDPA to grant the Bureau of Prisons (BOP) authority to perform executions "pursuant to uniform regulations." *Id.* Congress has consistently rejected those overtures. *See* Appellees' C.A. Br. 9-10 (collecting examples).

**B. Factual and Procedural History**

1. In 2004, BOP adopted a protocol detailing a set of uniform federal procedures for carrying out federal executions. *See* Pet. App. 105a. In so doing, BOP purported to rely on the 1993 rule, making no mention of the FDPA's intervening enactment and its contrary requirements. *See id*. at 104a.

The next year, several individuals facing federal death sentences sued to challenge that protocol (the "*Roane* litigation"). *See id*. During that litigation, BOP issued several "addenda" to the 2004 Protocol, specifying a three-drug protocol for

use in federal executions and revising certain requirements for conducting executions. *See id*. at 105a-106a. No executions took place under those addenda.

In 2011, DOJ announced that it lacked the drugs necessary to implement its existing protocol and that it was considering revisions. *See id.* at 106a. As a result, the *Roane* litigation was stayed. *See id.*

Eight years later, on July 25, 2019, DOJ announced that BOP had adopted a new Protocol and Addendum (collectively, the "2019 Protocol" or "Protocol"). *Id.* at 130a-213a. The 2019 Protocol, which was adopted without notice or an opportunity for comment, replaces the prior three-drug protocol with a single, different drug (pentobarbital sodium); modifies requirements for the selection, training, and oversight of the execution team; and makes other relevant changes. *See id.*

At the same time, DOJ scheduled execution dates for Petitioners. *See id.* at 101a.

2. Petitioners brought suit and sought preliminary injunctions against the use of the 2019 Protocol in their executions. *Id.* at 107a; *see* Dist. Dkt. #1 (joining Petitioners' suits with the *Roane* litigation). Petitioners explained, among other grounds, that the 2019 Protocol violates the Administrative Procedure Act (APA) because it (1) exceeds BOP's authority under the FDPA; (2) was adopted in violation of the APA's notice-and-comment requirement; and (3) is arbitrary and capricious.

The District Court preliminarily enjoined the Government from conducting Petitioners' executions under the Protocol, concluding that the FDPA requires the Government to follow execution procedures mandated by state law. Pet. App. 108a-

116a. Having held for Petitioners on the FDPA claim, the District Court did not address their remaining claims. *Id.* at 116a. The District Court also found that, absent a preliminary injunction, Petitioners would "be executed under a procedure that may well be unlawful"—a "manifestly irreparable" harm—and that the equities favored Petitioners. *Id.* at 117a.

The Government asked the District Court, the D.C. Circuit, and this Court to stay or vacate the injunction pending appeal. All three declined. *Id.* at 122a-126a; Dist. Dkt. Minute Order (Nov. 22, 2019).

3. A divided D.C. Circuit panel vacated the preliminary injunction.

Judges Rao and Tatel rejected the Government's argument on the merits, concluding that the FDPA requires the Government to comply with more than solely the execution method (i.e., lethal injection) prescribed by state law. Pet. App. 49a, 86a.

But the panel did not hold the Protocol invalid, even though it does not account for *any* conflicting state requirements. Rather, to save the Protocol, Judge Rao adopted a reading of the FDPA and the Protocol that the Government had not advanced and that does not appear in the Administrative Record: The phrase "law of the State" includes only statutes "and binding regulations," which Judge Rao defined by reference to "formal rulemaking" and other procedures outlined in the federal APA. *Id.* at 51a, 60a, 79a. Judge Rao next held that the Protocol contains a broad carve-out that permits BOP to "depart" from it "as necessary to conform to" state procedures. *Id.* at 11a. Finally, Judge Rao concluded that the Protocol is a

procedural rule not subject to the APA's notice-and-comment requirement. *Id.* at 83a-85a.

Despite expressing deep reservations about Judge Rao's approach, Judge Katsas joined those portions of her opinion necessary to produce a majority on the interpretation of "law of the State" and the Protocol. *Id.* at 36a-37a & n.10, 42a n.12.[2] Judge Katsas agreed that the Protocol was exempt from notice and comment. *Id.* at 40a-41a.

Judge Tatel dissented. He agreed with Judge Rao that "'manner' refers to more than just general execution method." *Id.* at 87a. But he read the FDPA to "require[] federal executions to be carried out using the same procedures that states use to execute their own prisoners," *id.* at 87a, regardless of "the happenstance of" where the "state chose to write [them] out," *id.* at 91a (internal quotation marks omitted). And because the Government had "insisted that requiring it to comply with state law would * * * hamstring implementation of the federal death penalty," Judge Tatel declined to "rewrite the [P]rotocol" and sustain it based on "a rule which the agency has never adopted at all." *Id.* at 96a (internal quotation marks omitted).

4. Petitioners sought rehearing en banc, which the D.C. Circuit denied. As Judge Tatel explained, although "this case is en banc worthy," because this Court "directed" the D.C. Circuit "to proceed 'with appropriate dispatch,'" *id.* at 129a

[2] Judge Katsas accepted the Government's argument that "manner" refers to only the "method" of execution—e.g., lethal injection or hanging.

(quoting *Barr* v. *Roane*, 140 S. Ct. 353, 353 (2019) (mem.)), "review should be concluded without delay," *id.* (internal quotation marks omitted).

Petitioners sought a fourteen-day stay of the mandate pending the filing of this petition. In response, the D.C. Circuit stayed its mandate through June 8. *Id.* at 121a; *see* Appl. App. 1.

Petitioners filed their petition for a writ of certiorari on June 5. In further response to their request for a ruling on the still-pending motion, the D.C. Circuit subsequently denied the motion to stay the mandate, citing this Court's "direct[ive] * * * to proceed 'with appropriate dispatch.'" Appl. App. 1 (quoting *Barr* v. *Roane*, 140 S. Ct. 353 (2019)). It then amended its prior order and "directed [the Clerk] to issue the mandate [on] June 12, 2020, at 5:00 p.m." *Id.*

5. While review of the District Court's preliminary injunction based on the FDPA is ongoing, Petitioners continue to press their remaining claims before the District Court. An amended complaint was filed on June 1; Defendants' response is due July 31. *See* Dist. Dkt. #92, #93; Dist. Dkt. Minute Order (Mar. 18, 2020).

**REASONS FOR GRANTING THE STAY**

To obtain a stay pending the disposition of a petition for a writ of certiorari, the applicant must demonstrate "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction; (2) a fair prospect that a majority of the Court will conclude that the decision below was erroneous; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Indiana State Police Pension Trust*, 556 U.S. at 960

(quoting *Conkright* v. *Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). "'[I]n a close case it may [also] be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Id.* (quoting *Conkright*, 556 U.S. at 1402). Those standards are satisfied here.

## I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI TO DETERMINE THE PROPER INTERPRETATION OF THE FDPA AND THE LEGALITY OF THE PROTOCOL.

Petitioners' certiorari petition raises three "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court," Sup. Ct. R. 10(c): (1) the meaning of the phrase "in the manner prescribed by State law" in the FDPA; (2) whether the panel erred in upholding the Protocol on a basis not found in the Administrative Record; and (3) whether the APA required the Protocol to undergo notice and comment procedures. *See* Pet. i. It is likely this Court will grant certiorari on all three, both to definitively resolve those questions and to prevent the severe confusion and negative consequences that would result if the decision below is allowed to stand. In fact, the Government already recognized that this case involves important issues worthy of this Court's attention when it took the unorthodox step of seeking an immediate stay of the preliminary injunction in this Court.

1. This case involves a question of exceptional importance: What procedures the federal government must follow in carrying out the "most extreme sanction available." *Atkins*, 536 U.S. at 319. Absent this Court's intervention, that sanction

may be imposed pursuant to an unlawful Protocol. Granting certiorari would prevent that "irremediable" harm. *Ford*, 477 U.S. at 411.

It would also allow this Court to offer definitive guidance on the proper interpretation of the FDPA. This Court has never before been called on to interpret Section 3596(a) of that statute. It has never decided what Congress meant when it chose the word "manner" instead of "method," or whether Congress intended for the federal government to follow those execution procedures the State has directed its officials, by law, to establish. And although three Justices have indicated that they "very likely" agree with the Government that the FDPA requires adherence to only a State's *method* of execution, *Roane*, 140 S. Ct. at 353 (statement of Alito, J., respecting the denial of stay or vacatur), the panel held precisely the opposite: "[T]he term 'manner' refers to more than just general execution method." Pet. App. 87a; *see id.* at 49a.

Granting certiorari in this case would allow this Court to offer an authoritative resolution of those questions sooner rather than later. *Cf. Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1134 (2019). The FDPA governs every federal execution. But as even Judge Katsas acknowledged in joining Judge Rao's opinion to produce a majority, the panel's interpretation of "law of the State" suffers from significant shortcomings and raises more questions than it resolves about how to conduct federal executions. Pet. App. 36a-37a & n.10. The Government, too, has recognized that the controlling opinion could spawn additional "rounds of litigation." Opp'n to Mot. to Stay Issuance of the Mandate 6 (internal quotation marks omitted).

Absent this Court's intervention, the parties will have to return to the District Court to litigate issues including whether the binding effect of each State's protocol is a matter of federal or state law, how to determine when something has "binding effect," and how to apply those principles to decide what has been "prescribed by the law of" the relevant State. And these issues may be relitigated every time a State changes its execution statute or protocol, and every time the Government moves to execute a federal prisoner under the law of another State. What is more, future challenges may be filed outside the D.C. Circuit, where the panel's opinion will provide no controlling authority at all. *See* 28 U.S.C. § 1391(e)(1) (authorizing venue, in a case where an officer of the United States—such as a BOP warden—is a defendant, in a district where the officer "resides"). Certiorari will allow this Court to supply a clear, controlling opinion that applies nationwide *now*, instead of resolving these claims state-by-state and procedure-by-procedure.

2. The petition also presents important questions of administrative law. The panel's cobbled-together majority announces sweeping principles that, given the D.C. Circuit's outsized influence on administrative law, will reshape administrative practice if they take root.

*First*, the panel's decision creates a massive loophole in the *Chenery* doctrine, a bedrock of administrative law that prevents "courts [from] substitut[ing] their or counsel's discretion for that of the [agency]," and thus ensures that policy remains in the hands of politically accountable policymakers. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169 (1962). The panel's opinion permits exactly

what *Chenery* prohibits: It authorizes courts to "interpret" agency rules to mean something the agency has never claimed and to achieve results the Administrative Record expressly repudiates. *See infra* pp.23-26.

This case is a perfect illustration of the wisdom of *Chenery*. Through its reading of the Protocol, the Court imposed on the Government what it has repeatedly disavowed as an unwelcome, unworkable policy. *See* Gov't C.A. Br. 27 (panel interpretation would "defy common sense"); Gov't C.A. Reply Br. 13 (panel interpretation would "hamstring" officials); C.A. Oral Arg. Tr. 19:3 (panel interpretation would invite "state obstructionism"). Granting certiorari would allow this Court to correct that erroneous conclusion, while reaffirming this basic limit on Article III judges' power.

*Second*, the panel broke new ground concerning the procedural-rule exemption to the APA's notice-and-comment requirement. *See* 5 U.S.C. § 553(b) (excepting "rules of agency organization, procedure, or practice" from notice and comment). Although this issue frequently recurs and is the subject of an existing circuit split, *see* Pet. 37a-38a & n.10, this Court has yet to articulate any definition for what counts as procedural. This case presents an ideal opportunity for this Court to clarify the limits of that exemption.

Postponing consideration of this issue will have serious consequences. In the absence of guidance from this Court, many other circuits have instead turned to the D.C. Circuit. But the panel opened a new rift in that circuit's procedural-rule caselaw, dramatically expanding the definition of procedural rules. *Infra* pp.26-31.

Given the D.C. Circuit's influence, that definition may spread nationwide. Although this conflict could—and should—have been resolved by en banc review, that was not a viable option here in light of this Court's admonition to resolve this case "with appropriate dispatch." *See* Pet. App. 129a (quoting *Roane*, 140 S. Ct. at 353). That further increases the likelihood that this Court will grant certiorari.

## II. THERE IS A FAIR PROSPECT THAT THIS COURT WILL HOLD THAT THE D.C. CIRCUIT'S INTERPRETATION OF THE FDPA OR DECISION TO UPHOLD THE PROTOCOL WAS ERRONEOUS.

There is at least "a fair prospect" that this Court will conclude the D.C. Circuit erred with respect to each of the three questions presented in the petition. At this stage, Petitioners need not show that outcome is a certainty. *See Araneta* v. *United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers) ("such matters cannot be predicted with certainty"); *Bd. of Educ. of City of L.A.* v. *Super. Ct. of Cal., Cty. of L.A.*, 448 U.S. 1343, 1347 (1980) (Rehnquist, J., in chambers) (comparing this exercise to "the reading of tea leaves"). Instead, the arguments in the petition need pass only the threshold of "plausibility." *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California* v. *Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers). Although it is enough to make that showing with respect to any of the questions presented in the petition, here, Petitioners clear that bar with respect to all three.

1. In deference to the collective experience of the States in conducting executions, Congress in the FDPA provided that a federal death sentence must be "implemented * * * in the manner prescribed by the law of the State in which the sen-

tence is imposed." 18 U.S.C. § 3596(a). The decision below correctly read the term "manner" to incorporate all execution procedures a State has deemed necessary to the implementation of a death sentence. Pet. App. 50a, 87a.

But the panel went on to hold that the phrase "prescribed by the law of the State" refers only to "positive law and binding regulations" adopted in rulemaking procedures that sufficiently resemble those of the federal APA. *Id.* at 51a; *see id.* at 37a n.10. The panel reached that result by uncritically importing the definition from cases interpreting unrelated statutes, primarily those addressing the legal effect of *federal* law. That misguided approach conflicts with this Court's precedent, disregards Congress's choice to defer to the States in an important area of law, and will have severe consequences. There is a fair prospect this Court will agree.

a. When interpreting a statute, a court must consider "'the entire text, in view of its structure' and 'logical relation of its many parts.'" *Mont* v. *United States*, 139 S. Ct. 1826, 1833-34 (2019) (quoting A. Scalia & B. Garner, Reading Law 167 (2012)). This approach is a requirement, not a suggestion. *See, e.g.*, *Sturgeon* v. *Frost*, 136 S. Ct. 1061, 1070 (2016) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted.")). These tools ensure that courts do not "extend" statutes beyond their "language" to "achieve" other "purposes." *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010).

The panel majority did not follow that approach in this case. Instead, it looked exclusively to cases interpreting other statutes. *See* Pet. App. 55a-56a & n.4.

Most of those cases did not even mention *state* law; they concerned what is "authorized" or "prescribed" by federal law. Those cases therefore did not grapple with the substantial federalism interests presented by the FDPA. *See Chrysler Corp.* v. *Brown*, 441 U.S. 281, 294 (1979); *Samuels* v. *District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985); *see also Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92 (2015). In any event, the panel drew the wrong lesson from those cases. As this Court's opinion in *Chrysler* exemplifies, what constitutes "law" must be understood by reference to the relevant text, history, and "evidence of legislative intent" in a given statute. *See* 441 U.S. at 296-316. None suggests that a uniform federal definition of "law" is appropriate.

The cases relied on by the panel concerning the effect of state law only reinforce the error in the panel's one-size-fits-all approach. In *United States* v. *Howard*, the federal government charged Howard with violating the Black Bass Act, which prohibits the transportation of fish in a manner "contrary to the law of the State from which [it] is to be transported." 352 U.S. 212, 213 (1957) (cleaned up) (quoting 16 U.S.C. § 852). The state "law" in question was a Florida Game Commission rule, which Howard argued "lack[ed] sufficient substance and permanence to be the 'law' of Florida." *Id.* at 217. This Court disagreed: It was "beyond question that *the Florida Legislature* * * * intended to and did make infraction of any commission regulation a violation of state law." *Id.* at 217-218 (emphasis added). The Court accordingly held that the regulation was a "law of the State" even though it could not "ascertain[] from the record" whether the order was "promulgat[ed]" as required by

Florida law. *Id.*; *see also United States* v. *Rodriguez*, 553 U.S. 377, 381-383, 390-393 (2008) (relying on earlier, related statutes and stressing the use of "offense" in holding that "the maximum term * * * prescribed" for "an offense under State law" means the state statutory maximum, not the maximum in the federal sentencing guidelines (quoting 18 U.S.C. § 924(e)(2)(A)(ii)).

Not only is the panel's analytical approach all wrong, its result is riddled with "practical difficulties." Pet. App. 36a (Katsas, J.). For example, it is unclear what exactly the panel majority counts as "law of the State," and thus how Petitioners must be executed. The controlling opinion refers haphazardly to "positive law," "binding regulations," "binding law," "formal rulemaking," and informal notice-and-comment rulemaking. *See id.* at 51a, 55a, 63a, 70a-80a & n.15 (Rao, J.). Which of those definitions governs? And, as many of them are apparently drawn from the federal APA, what happens if the state's lawmaking procedures do not correspond with the federal APA? *Compare* 5 U.S.C. § 553(b) (exempting "interpretive rules" from notice and comment), *with* 5 Ill. Comp. Stat. 100/1-70 (subjecting "statements of general applicability that * * * interpret[] law or policy" to notice and comment), *and* Ark. Code §§ 25-15-202(9)(A), 25-15-203 (similar). Or if a state allows other mechanisms to create binding law? Take Missouri: Although the State's execution protocol is statutorily exempt from notice and comment, it nevertheless imposes a "series of directives." *Middleton* v. *Missouri Dep't of Corr.*, 278 S.W.3d 193, 195 & n.2 (Mo. 2009) (en banc); *see also Directive*, Merriam-Webster Online ("an authoritative order * * * issued by a high-level body or official"). Texas, too, exempts its exe-

cution procedure from the state APA. *Foster* v. *Texas Dep't of Criminal Justice*, 344 S.W.3d 543, 545 (Tex. Ct. App. 2011) (citing Tex. Gov. Code § 2001.226). But it still considers that procedure to be a "'rule' under the APA," *id.* at 547, and "administrative rules * * * have the same force as statutes," *Rodriguez* v. *Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999). These questions are a direct result of the panel's attempt to discern the effect of state law by looking to federal procedures.

b. Properly understood, the text, context, and history of the FDPA demonstrate that the Government must follow those procedures that officials are directed by state law to implement or establish.

The FDPA instructs the USMS to "supervise implementation" of a death sentence in the manner "prescribed by the law of the State." 18 U.S.C. § 3596(a).[3] "Prescribed" is a capacious term, encompassing multiple forms of action including "to lay down as a guide, direction, or rule of action." *Prescribe*, Merriam-Webster's Collegiate Dictionary 921 (10th ed. 1994); *see also Prescribe*, Oxford English Dictionary Online ("[t]o write or lay down as a rule or direction to be followed; to impose authoritatively, to ordain, degree; to assign"). "In the death penalty context, the term 'implementation' is commonly used to refer to a range of procedures and safeguards" involved in "carrying out the sentence of death," Pet. App. 59a, including the "choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements," *id.* at 99a.

[3] The Protocol violates the FDPA twice over by relying on *BOP*, not USMS, to impose a uniform federal execution procedure. *See* Appellees' C.A. Br. 36-43.

Thus, to implement the manner of execution prescribed by the law of the State means to follow those execution procedures the State has "la[id] down as a rule or direction to be followed" and would accordingly give the force of law. *Prescribe*, Oxford English Dictionary Online; *see* Pet. App. 90a. This includes procedures and safeguards created by statute, *see, e.g.*, Ga. Code § 17-10-41 ("[t]here shall be present at the execution of a convicted person * * * at least * * * two physicians"), and those the State has directed its officials, by law, to establish. For as this Court has long held, the "law of the State" includes anything "from whatever source originating, to which *a State* gives the force of law." *Williams* v. *Bruffy*, 96 U.S. 176, 183-184 (1877) (emphasis added).

Context and history confirm this reading. Congress first abandoned a uniform approach to federal executions in 1937. *See* 18 U.S.C. § 542 (1937). Using wording very similar to the FDPA, Congress directed the federal government to follow execution procedures in state law. *Id.* Consistent with this directive, "almost all federal executions pursuant to the 1937 Act were carried out by state officials, who, supervised by U.S. Marshals, executed federal prisoners in the same 'manner' as they executed their own." Pet. App. 92a. That system enabled the federal government to benefit from the States' experience "as laboratories for devising solutions to difficult legal problems." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (internal quotation marks omitted). The FDPA carries forward this language and purpose. *See Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is obviously transplanted from an-

other legal source, it brings the old soil with it." (internal quotation marks omitted)).

Each of the States whose law applies to Petitioners has adopted protocols at the direction of state statute. *See* Pet. 20. Those protocols address several consequential choices, such as the composition of the drug formula, the procedures associated with its administration, and the qualifications required of those supervising and performing the execution. Each decision bears on the risk of a botched execution, the amount of pain and suffering a prisoner will experience, and the public's perception of the execution process. *See Glossip* v. *Gross*, 135 S. Ct. 2726, 2742 (2015).

It is little wonder why Congress left these complicated decisions to the States. Today, just as in 1937 and 1994, they have far more experience with them. From 1927 to 1993, the States collectively carried out more than 4,400 executions[4]; the federal government, thirty-four.[5] Since 1994, the States have conducted another 1,292 executions, compared to BOP's three.[6] State statutes and the execution protocols established under state law, combined, capture the sum-total of this experience.

In short, by relying on a deeply flawed approach to statutory interpretation, the panel reached a decision that disregards the statutory text, and "run[s] contrary" to both the FDPA's "ultimate purpose" and "the means Congress has deemed

[4] *See* Death Penalty Info. Ctr. (DPIC), *Executions in the U.S. 1608-2002: The Espy File*, https://bit.ly/306iyVU (last visited June 4, 2020).

[5] BOP, *Capital Punishment*, https://bit.ly/2A5ek6v (last visited June 4, 2020).

[6] DPIC, *Executions by State and Region Since 1976*, https://bit.ly/2MvHj5S (last visited June 4, 2020); BOP, *supra* n.5.

appropriate for the pursuit of that purpose." Pet. App. 92a-93a (cleaned up). There is a fair prospect of reversal on this issue.[7]

2. The panel's reading of the Protocol is incompatible with the *Chenery* doctrine. Under that iconic pair of cases, a court is "powerless to affirm [an] administrative action by substituting what it considers to be a more adequate or proper" policy judgment for the one the agency actually made, *SEC* v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947); it may uphold agency action only on "[t]he grounds * * * upon which the record discloses that [it] was based," *SEC* v. *Chenery Corp*. (*Chenery I*), 318 U.S. 80, 87 (1943).

The decision below directly conflicts with these "settled propositions." *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019). The Protocol is devoid of any mention of state law or state procedures; to save it from invalidation, the panel performed what it called a "*de novo*" interpretation of the "words DOJ used in promulgating its [P]rotocol." Pet. App. 82a; *id.* (conducting an "independent assessment" of "the text of the [P]rotocol"). Based on that, it held that BOP included in the Protocol a carve-out that *requires* "the government * * * depart from [it] as necessary" to adhere to execution procedures "prescribed by state law." *Id*. at 81a; *see id.* at 42a n.12 (Katsas, J., joining this portion of Judge Rao's opinion to produce a majority). That is wrong for two reasons.

[7] Three Justices have already signaled that they are unlikely to agree with the panel majority's reasoning on this issue. *Roane*, 140 S. Ct. at 353 (statement of Alito, J., respecting the denial of stay or vacatur). In the capital context, that disagreement further militates in favor of a stay, even if it would not necessarily lead to reversal. *See Indiana State Police Pension Trust*, 556 U.S. at 960 (suggesting that a stay may be appropriate when "a majority * * * will conclude that the decision below was erroneous"); *Thompson*, 487 U.S. at 856 (capital sentence should "not [be] imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality").

*First*, although a court reviews *de novo* the text of a statute, its review of the Protocol—an administrative rule—is governed by *Chenery*, meaning the court may only judge the Protocol on grounds offered by the agency itself. The panel nevertheless justified its decision to apply the *de novo* standard of review to the *Protocol* by concluding that "the issue * * * in this case is whether the [Protocol] exceeds the government's authority under the FDPA, and it is entirely appropriate to conduct an independent assessment of all relevant materials—including, in particular, the text of the [P]rotocol—in order to fulfill our duty to say what the law is." *Id.* at 82a.

Not quite. Yes, "the issue in this case" is whether the Protocol violates the FDPA. Yes, to answer it, the court must interpret *de novo* the text of the FDPA, relying on all relevant materials. And yes, it must decide for itself whether the Protocol, an agency regulation, exceeds the statute's limits. *See* 5 U.S.C. § 706(2)(C).[8]

But no, the duty to "say what the law is"—that is, what the *FDPA* requires of the *Protocol*—does not give a court license to rewrite the *Protocol* in a manner contrary to the agency's own design in order to match the text of the *FDPA*. If the text of the Protocol does not comport with the FDPA, the court must hold the Protocol invalid; it may not replace the agency's chosen plan with the *court's* judgment about what is "a more adequate or proper" action. *Chenery II*, 332 U.S. at 196.

*Second*, although the panel purported to "rest" its "interpretation" of the Protocol "on the words DOJ used," even a cursory analysis betrays that it did, in fact, "rewrite" the Protocol. *See* Pet. App. 81a-82a.

[8] The Government has never claimed that its interpretation of the FDPA deserves *Chevron* deference, or that its interpretation of the Protocol is entitled to *Auer* deference.

Nothing in the Protocol or the Administrative Record supports the notion that *BOP itself* designed the Protocol to yield when it conflicts with state procedures. The Protocol sets forth mandatory procedures that "shall be" followed, unless "the Director or his/her designee" exercises their "discretion" to modify it "as necessary to (1) comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances." *Id.* at 210a. The panel concluded that this passing reference to "other circumstances" operates as a vast savings clause that silently—and inadvertently—satisfies the FDPA's command that federal executions be conducted in accordance with the procedures required by state law.

That language does not salvage the panel's decision to defy *Chenery*. There is no indication in the Protocol or the Administrative Record that the Director of BOP or his designee has ordered that the Protocol be modified to accommodate conflicting state law. Moreover, only the third category "could possibly encompass inconsistent state law," but that provision "mentions neither state law nor section 3596(a)." *Id.* at 95a-96a. As this Court explained in *Federal Power Commission* v. *Texaco, Inc.*, general language stating an agency "shall consider all relevant factors" that does not *itself* "expressly mention the" relevant statutory standard cannot alone "supply the requisite clarity" necessary to confirm the agency took that statutory requirement into account. 417 U.S. 380, 396-397 (1974).

Nor does the Administrative Record here suggest that this "other circumstances" exception would require (or even permit) the Government to follow conflict-

ing state requirements. To the contrary, the Protocol provides that BOP "*must* implement death sentences 'by intravenous injection of a lethal substance,'" and outlines procedures tailored to that execution mechanism. Pet. App. 133a (emphasis added) (quoting 28 C.F.R. § 26.2(a)(2)). BOP was well aware that several States allow for alternative execution methods, for example, but never mentioned whether it would permit a prisoner to make that election, or how it might carry out such a sentence if he did. *E.g.*, Mo. Rev. Stat. § 546.720(1) (lethal gas); S.C. Code § 24-3-530 (electrocution); Va. Code § 53.1-234 (same). Indeed, the Government has consistently argued that its decision in the Protocol to *displace* any conflicting state requirements serves important policy goals. *See supra* p.15.

Had the panel "judged [the Protocol] solely on the basis of" the "grounds upon which [BOP] itself based its action," then, it would have been "plain[]" that the Protocol, which mandates a uniform procedure for federal executions, "cannot stand." *Chenery I*, 318 U.S. 80 at 88. There is a fair prospect this Court will agree and reverse.

3. The panel's classification of the Protocol as a "procedural rule" that is exempt from the APA's notice and comment requirement is likewise incompatible with foundational principles of administrative law. And the reasoning the controlling opinion used to arrive at that conclusion, if allowed to stand, would turn what Congress designed as a procedural-rule *exception* into the norm.

a. The APA is a "check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."

*United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950). Its linchpin is notice and comment: "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler*, 441 U.S. at 316. By funneling the bulk of agency rulemaking through notice and comment, the APA "assure[s] due deliberation," *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), "public participation," "and fairness," *Batterton* v. *Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

Although the APA exempts certain rules from notice and comment—including "rules of agency organization, procedure, or practice," 5 U.S.C. § 553(b)(3)(A), known as procedural rules—these exceptions should be "narrowly construe[d]." *E.g.*, *Elec. Privacy Info. Ctr.* v. *U.S. Dep't of Homeland Sec.* (*EPIC*), 653 F.3d 1, 6 (D.C. Cir. 2011) (internal quotation marks omitted). Congress "was alert to the possibility that these exceptions might, if broadly defined and indiscriminately used, defeat the section's purpose." *Am. Bus. Ass'n* v. *United States,* 627 F.2d 525, 528 (D.C. Cir. 1980). The exceptions therefore should not be read to "swallow the APA's well-intentioned directive," *American Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987), and unleash the "zeal" the APA was enacted to cabin, *Morton Salt Co.*, 338 U.S. at 644.

Because this Court has never defined a "procedural rule," the D.C. Circuit's law on that subject has taken on outsized importance in other federal circuits. Before this case, to distinguish substantive from procedural rules, that court employed

a "functional" inquiry, *Chamber of Commerce of U.S.* v. *Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999), that asked whether the rule "directly and significantly" affects or "alter[s] the [parties'] rights or interests," *EPIC*, 653 F.3d at 5-6 (internal quotation marks omitted), or otherwise "encodes a substantive value judgment," *Bowen*, 834 F.2d at 1047. Although this distinction is "one of degree," the question at bottom is "whether the [rule's] substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *EPIC*, 653 F.3d at 5-6 (internal quotation marks omitted).

Among those rules that qualify as substantive is a rule requiring railroads "to file proposed schedules of rates and tariffs with subscribers," a rule modifying food-stamp approval procedures, and a rule changing how motor carriers must pay shippers. *Batterton*, 648 F.2d at 708 (citations omitted). The choice to screen airline passengers using imaging technology instead of a magnetometer is substantive, *EPIC*, 653 F.3d at 6-7, as is the method for calculating labor statistics, *Batterton*, 648 F.3d at 698, 708. Visa procedures for foreign sheepherders are too. *Mendoza* v. *Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014).

b. Under that precedent, the Protocol is a substantive rule. This Court has recognized that execution procedures directly affect what a prisoner will experience during death. *See Bucklew*, 139 S. Ct. at 1124-25. The Protocol operates in this field: It dictates a federal prisoner's manner of death and bears on whether BOP can "perform[]" executions in a manner consistent with the Eighth Amendment, or at least consistent with BOP's stated goal of ensuring "humane" executions. *Am.*

*Mining Cong.* v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (a rule necessary to "ensure the performance of [an agency's] duties" is substantive); AR3. It thus, at a minimum, "directly and significantly" affects the rights and interests of federal prisoners who will be executed under it. *EPIC*, 653 F.3d at 6.

It also "alter[s] [prisoners'] rights." *Id.* at 5 (internal quotation marks omitted). Many state laws permit prisoners to choose whether to be executed using lethal injection or some alternative; the Protocol deprives those prisoners of that choice. *See supra* p.26. Moreover, by "put[ting] [the] stamp of [agency] approval" on the use of pentobarbital in federal executions—a choice the FDPA does not dictate—the Protocol "encodes a substantive value judgment." *Bowen*, 834 F.2d at 1047; *see Chamber of Commerce*, 174 F.3d at 211 (a rule makes a value judgement when it requires "more than mere compliance with the [empowering statute]"). Indeed, in emphasizing its view that the Protocol will "produce a humane death," the Government admits as much. Gov't C.A. Br. 9 (quoting AR525).[9]

Notice and comment is particularly important where, as here, the rule will have a "sufficiently grave" effect on issues outside the agency's area of expertise. *See EPIC*, 653 F.3d at 5-6 (internal quotation marks omitted). The Government's own actions confirm this: Its 1993 execution-protocol regulation was subject to notice and comment. "Nearly half the comments" it received "came from medical associations and physicians," and the Government revised the rule in response to their concerns. 58 Fed. Reg. at 4898-01. In contrast, BOP here merely "consulted with

[9] Petitioners do not concede that the procedures in the federal Protocol or the relevant state laws and protocols will "produce a humane death."

two medical experts" and "reviewed" "[p]ublicly available expert testimony" and other reports. AR3. But the point is to ensure the agency considers the views of the public and experts *writ large*, not just those few it has self-selected.

c. The decision below reached a contrary conclusion by jettisoning this jurisprudence in favor of a far broader theory. It holds that the Protocol is procedural because its "substantive burdens are * * * derived from the FDPA and the state laws it incorporates." Pet. App. 84a.[10] That reasoning is circular. Of course the Protocol's burdens are derived from federal law. *Every* burden a federal agency imposes is derived from federal law.

That standard will "swallow the APA's well-intentioned directive" mandating notice and comment. *Bowen*, 834 F.2d at 1044. To say that the Protocol is procedural because the burdens it imposes are "derived from" federal law is to say that *every* action an agency takes is procedural. It also ignores that the agency action can *itself* alter substantive rights by choosing how to effectuate a "burden" "derived" from federal law, as the Protocol does by selecting a specific lethal-injection drug and mandating certain execution procedures. In other words, effectuating a statutory burden often means imposing a *new* regulatory burden.

Indeed, if the Protocol is not substantive, it is difficult to fathom what would be. Consider a rule prohibiting the transfer of a firearm from one non-prohibited

[10] Judge Katsas also concluded in two sentences that the Protocol was a procedural rule, based on his unfounded belief that condemned persons' rights are "all but extinguished." Pet. App. 40a. Because Judge Rao's opinion "presents the narrowest grounds of the opinions forming a majority," it is "the controlling opinion" on this issue. *Stephens* v. *U.S. Airways Grp.*, 644 F.3d 437, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring in the judgment) (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977)).

person to another. Under the D.C. Circuit's logic, that could escape notice and comment because the "substantive burden" on firearms owners is ultimately derived from the Gun Control Act, 18 U.S.C. § 922. That question, and many more like it, will swiftly arise in this decision's wake, as one agency after another walks through the opening the panel majority created and promulgates without notice and comment significant—but nominally "procedural"—federal rules. On this issue too, then, there is a fair prospect of reversal.

## III. PETITIONERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

There is a clear "likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc.*, 561 U.S. at 1302. That is true for at least two reasons: Absent a stay, there is a risk (1) that Petitioners could be executed pursuant to an unlawful Protocol; and (2) that this Court will effectively be deprived of its jurisdiction to consider the petition for a writ of certiorari.

*First*, the harm of being executed is inarguably "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent [it]." *League of Women Voters of the U.S.* v. *Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks omitted). Once the mandate issues, the Government may, under the 2019 Protocol, set dates to execute Petitioners. That means Petitioners—and others—may be executed pursuant to an unlawful Protocol. That is an "irremediable" harm. *Ford*, 477 U.S. at 411; *cf. Hollingsworth* v. *Perry*, 558 U.S. 183, 193-195 (2010) (per curiam) (staying adoption of a new judicial rule in part based on the absence of "a meaningful comment period").

This Court has granted stay applications to prevent far less severe consequences. In *Hollingsworth*, for example, it granted a stay to stop "the District Court [from] broadcast[ing] [a] trial," which "may [have] chill[ed]" witness testimony, a harm that "would be difficult—if not impossible—to reverse." 558 U.S. at 195. Or take *U.S. Postal Service* v. *Nat'l Assoc. of Letter Carriers, AFL-CIO*, where failure to grant a stay would have required the Postal Service to reinstate a convicted criminal as a postal worker. 481 U.S. 1301, 1302-03 (1987) (Rehnquist, C.J., in chambers). That would have "seriously impair[ed] [the Postal Service's] ability to impress the seriousness of [its] mission upon its workers." *Id.* at 1302-03. And in *California* v. *American Stores Company*, the potentially "irreparable injury" was a "merger" of two supermarkets, which the applicant claimed "would substantially lessen competition." 492 U.S. at 1304, 1302. These harms pale in comparison to the irreparable harm that would result if the Government executed Petitioners in an unlawful manner.

*Second,* failure to stay the mandate risks "foreclos[ing] * * * certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison*, 468 U.S. at 1302; *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309. "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *John Doe Agency*, 488 U.S. at 1309 (alteration in original) (quoting *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)). Allowing the Government to proceed towards

executing Petitioners while their petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison*, 468 U.S. at 1302. Because "'the normal course of appellate review might otherwise cause the case to become moot,' issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin* v. *Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course"). Indeed, that is doubly true here, for allowing the Government to proceed with executions would also deprive Petitioners of the opportunity to fully litigate their other meritorious challenges to the 2019 Protocol, which remain pending before the District Court.

## IV. THE BALANCE OF EQUITIES AND RELATIVE HARMS WEIGH STRONGLY IN FAVOR OF GRANTING A STAY.

In addition to the stay factors identified above, "'in a close case it may be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Indiana State Police Pension Trust*, 556 U.S. at 960 (quoting *Conkright*, 556 U.S. at 1402). Because the other factors plainly point in favor of granting the requested stay, this Court need not consider the balance of equities here. But, if it does, this additional factor reinforces that result.

*First*, "[r]efusing a stay may visit an irreversible harm on [Petitioners], but granting it will * * * do no permanent injury to respondents." *Philip Morris USA Inc.*, 561 U.S. at 1305. Staying the mandate will not undermine the fact of Petitioners' convictions. Nor will granting a stay prevent the Government from eventually executing Petitioners in accordance with the law—whatever this Court determines

that it requires. It will merely allow Petitioners and the Government sufficient time to litigate the legality of the Protocol pursuant to which the Government seeks to execute Petitioners.

*Second*, the public has an interest in ensuring that agencies act in accordance with the law, particularly when the consequences are so grave and far-reaching. *See Maryland* v. *King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *League of Women Voters of United States*, 838 F.3d at 12; Pet. App. 118a ("[t]he public interest is not served by executing individuals before they have had the opportunity to avail themselves of legitimate procedures to challenge the legality of their executions"). The public, too, would therefore be ill-served if Plaintiffs were executed without being given a full opportunity to test the Protocol's legality.

Those concerns are heightened in the peculiar posture of this case. The panel majority rested its judgment on an interpretation of "law of the State" that neither party suggested in its briefing, and that the Government had affirmatively disclaimed. *See* C.A. Oral Arg. Tr. 37:15-20 (Government counsel concedes it would be "incongruous" for the FDPA's meaning to "depend on the happenstance of exactly where in its law or regulation * * * a state chose to write out very detailed procedures"). The court's departure from the normal adversarial process further counsels hesitation. *Cf. United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) (rejecting an appellate panel's "takeover of [an] appeal").

To be sure, this Court has recognized that the public also has an "interest in the timely enforcement of a [death] sentence." *Bucklew*, 139 S. Ct. at 1133 (quoting

*Hill* v. *McDonough*, 547 U.S. 573, 584 (2006)). But this is not a situation where Petitioners have filed a late-breaking challenge grounded in "settled precedent." *Cf. id.* And if, as the Government asserted, it "should not be faulted for undertaking its grave responsibility to select a mechanism for implementing the ultimate punishment in a conscientious manner," Gov't S. Ct. Stay Appl. 34, surely Petitioners should not be faulted for ensuring that the Government's chosen execution procedures comply with the law.

*Third*, staying the mandate will promote judicial economy and conserve resources. Plaintiffs still have several claims pending before the District Court, including their constitutional claims, their claim that the Protocol is arbitrary and capricious, and their arguments that the Protocol violates the Food, Drug, and Cosmetics Act and the Controlled Substances Act. "[I]t will be 'for the district court to determine, in the first instance, whether the plaintiffs' showing on [these claims] warrants * * * relief.'" Pet. App. at 85a (quoting *Sherley* v. *Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011) (first alteration in original)). A stay would allow that litigation to run its course in a timely, but not needlessly truncated or wasteful, fashion. *See* Dist. Dkt. Minute Order (Mar. 18, 2020) (adopting joint proposed briefing schedule).

On balance, a stay is therefore warranted. Failure to grant one "may have the practical consequence of rendering the proceeding moot" or otherwise cause irreparable harm to Petitioners. *Mikutaitis* v. *United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers). The Government would not "be significantly prejudiced by an additional short delay," and a stay would serve both the public in-

terest and judicial economy. *Id.* "In light of these considerations," this Court should "grant the application." *Id.*

## CONCLUSION

For all of these reasons, Petitioners respectfully request that this Court order that the mandate for the United States Court of Appeals for the D.C. Circuit be stayed pending the disposition of their petition for a writ of certiorari. Because the D.C. Circuit's mandate is set to issue on June 12, 2020, at 5:00p.m., Petitioners also respectfully request that this Court order that the issuance of the mandate be stayed while the Court considers this Application. Alternatively, Petitioners request that this Court order expedited briefing on this Application.

Respectfully submitted,

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