No. 19-1348

IN THE
Supreme Court of the United States

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

JAMES H. ROANE, JR., ET AL.,
Petitioners,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF ADMINISTRATIVE LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JAIME A. SANTOS
Counsel of Record
ANDREW KIM
STEPHEN R. SHAW
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, DC 20036
JSantos@goodwinlaw.com
(202) 346-4000

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INTEREST OF THE AMICI CURIAE[1]

Amici are law professors who study and teach federal administrative law. Their academic work includes extensive study of the procedural protections afforded by the Administrative Procedure Act (APA), as well as the scope of judicial review of agency decisions. A complete list of amici is set forth in an appendix to this brief.

This case presents a trifecta of classic administrative-law problems: The Bureau of Prisons (BOP) (1) misinterpreted a statute, (2) after having failed to engage in required notice-and-comment processes, and (3) the court below upheld BOP's action on grounds not provided by the agency itself.

Amici submit this brief to highlight: (1) the need for guidance from this Court as to what constitutes a "procedural rule" exempt from notice-and-comment requirements, especially in light of a confusing split amongst the circuits on the right standard to apply and (2) the panel majority's radical departure from bedrock principles of administrative law in rewriting an agency decision for the sake of upholding it. As administrative law scholars, *amici* have an interest in having this Court address these issues by granting the petition for a writ of certiorari.

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[1] All parties have consented to the filing of this brief. *Amici curiae* timely provided notice of intent to file this brief to all parties. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

The petition presents two extraordinarily important administrative law questions. First, when does an agency rule become sufficiently "substantive," such that notice-and-comment rulemaking is necessary? Second, can a court rewrite an agency decision in an effort to uphold it? Both of these questions warrant this Court's review.

A. This Court should grant certiorari to resolve a longstanding disagreement in the circuits over what makes a rule "procedural," and therefore allows an agency to escape the APA's notice-and-comment requirement prior to promulgating the rule. *See* 5 U.S.C. § 553. This Court has stated what a procedural rule is *not*—a rule that affects a party's "rights and obligations." But the circuits are divided about what a procedural rule *is*, and the division stems from the different positions that the D.C. Circuit has taken over the years. Initially, the court applied a "substantial-impact" test, which has since been followed by the Third and Fifth Circuits. Under this test, the greater the impact on regulated entities, the more substantive the agency action is. Later, the court reversed course, reasoning that even procedural rules will affect outside parties to some degree, making the test a poor yardstick for determining whether agency action is sufficiently "substantive" to warrant notice and comment. And so the court switched focus to whether the rule alters a substantive right or obligation, an approach the Fourth and Federal Circuits adopted. The different approaches have unsurprisingly yielded inconsistent results in seemingly similar cases.

B. There is no question that the Protocol affects "rights and obligations," and that it should have been

subjected to notice and comment. But the panel majority altered both the Protocol itself and the existing frameworks for determining whether a rule is "procedural" to shield the Protocol from public scrutiny. Judge Katsas concluded that the Protocol is a "procedural rule" because any rights or obligations of the prisoners affected by the Protocol were actually lost at the time of sentencing. Judge Katsas confused the right to challenge the sentence with the right to have the sentence carried out in a manner that comports with the Eighth Amendment—the Protocol certainly affects the latter. As for Judge Rao, she determined that the Protocol was procedural because the items covered by the Protocol amounted to little more than agency "house-keeping." Pet. App. 84a (citation omitted). That position is deeply misguided. The means for ending a human life is not mere house-keeping. Nor is the interest in being in the company of one's loved ones and spiritual advisers during execution. The Protocol affects these serious rights and interests and therefore should trigger notice and comment as a "substantive" rule. The panel majority, however, skirted the APA by arbitrarily narrowing the rights and interests that are relevant in determining whether notice and comment are necessary, further muddling the analytical framework in the process.

C. The second issue—involving the grounds on which agency decisionmaking can be upheld—is equally deserving of this Court's attention. For nearly 80 years, judicial review of agency decisions has been guided by *Chenery*'s bedrock principle. A court therefore cannot supply alternative reasons to uphold an agency action. The panel majority's decision to ignore *Chenery* and rewrite the Protocol to fit the

court's various interpretations of the FDPA gives courts precisely the policymaking role that *Chenery* prohibits. This Court should grant certiorari.

ARGUMENT

A. This Court should grant certiorari to resolve disagreement in the circuits about what makes a rule sufficiently "procedural" to avoid notice-and-comment obligations.

The Administrative Procedure Act generally requires notice and an opportunity for "interested persons" to "participate in the rule making" before an agency can promulgate a rule. 5 U.S.C. § 553(b), (c). There are narrow exceptions for "interpretative rules, general statements of policy, . . . rules of agency organization, procedure, or practice," and rules for which the agency has "good cause" to bypass notice and comment because review would be "impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(3)(A)-(B).

1. The circuits disagree on how to determine whether a rule is one of "agency organization, procedure, or practice," and thus exempt from notice-and-comment requirements. While this Court has long recognized that a distinction exists between "substantive" and "procedural" rules, the absence of guidance from this Court as to the hallmarks of a "procedural" rule has caused the circuits to come up with different and conflicting tests.

In cases such as *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and *Morton v. Ruiz*, 415 U.S. 199 (1974), this Court acknowledged that a substantive rule "affect[s] individual rights and obligations." *Chrysler*, 441 U.S. at 302 (quoting *Morton*, 415 U.S. at 232). But this

standard has proven to be a poor differentiator of substantive and procedural rules. In some sense, all rules—even "procedural" ones—can "affect[] individual rights and obligations." So the circuits have struggled to identify what crosses the line from substantive to procedural, yielding inconsistent analyses and results.

To see this inconsistency, this Court needs to look no further than the D.C. Circuit. After *Chrysler*, the court of appeals observed that agency action is substantive, not procedural, if it "jeopardizes the rights and interest of parties." *Batterton v. Marshall*, 648 F.2d 694, 708 & n.83 (D.C. Cir. 1980). In the D.C. Circuit's view, if agency action had a "substantial impact" on regulated parties, that action would be treated as a substantive rule. Such an approach would secure the "fundamental fairness and . . . advantages from informing the agency" that notice and comment were intended to promote. *Id.*

The court "gradually shifted focus from asking whether a given procedure has a 'substantial impact' on parties to inquiring more broadly whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (citation omitted). The court reasoned that "every change in rules will have some effect on those regulated," and so, the "substantial impact" test was unworkable. *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984). Instead, the court returned its focus to a standard closer to what was articulated by this Court in *Chrysler* and *Morton*: whether an agency action "alter[ed] the rights or interests of parties," rather than "the manner in which parties present themselves or their viewpoints to their

agency." *Bowen*, 834 F.2d at 1047 (quoting *Batterton*, 648 F.2d at 707); *see also James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) ("[A]n otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties.").

Or so it seemed. Despite the purported disavowal of the substantial-impact test, the test has managed to survive in some form in the D.C. Circuit. Some panels have concluded that, in outlier cases, purely procedural rules can have "substantive effects . . . 'sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA.'" *JEM Broad. Co. v. FCC*, 22 F.3d 320, 327 (D.C. Cir. 1994) (quoting *Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295, 328 (D.C. Cir. 1983)); *e.g.*, *Mendoza v. Perez*, 754 F.3d 1002, 1023-24 (D.C. Cir. 2014). Others pay lip service to the circuit's departure from the "substantial impact" test, but state in the same breath that the relevant inquiry is whether "the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 6 (D.C. Cir. 2011). And some panels have simply smooshed the tests together. *E.g.*, *Chamber of Commerce of U.S. v. Dep't of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (noting that, under *Bowen*, a substantive rule "has a 'substantial impact'" and "puts a stamp of [agency] approval or disapproval on a given type of behavior" (quoting 834 F.2d at 1047)).

But this is not simply a matter of intra-circuit inconsistency. Other circuits, following the D.C. Circuit's lead at different points in time, have come to varying conclusions about the appropriate approach for identi-

fying procedural rules. The Third and Fifth Circuits have retained some form of the substantial-impact test. *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011) ("substantive adverse impact on the challenging party" (citation omitted)); *U.S. Dep't of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1153 (5th Cir. 1984) ("[T]he substantial impact test is the primary means by which courts look beyond the label 'procedural' to determine whether a rule is of the type Congress thought appropriate for public participation.").[2] The Second Circuit has adopted *JEM Broadcasting*'s more limited take on the burden test, measuring whether a rule is substantive by considering "whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 168 (2d Cir. 2013) (citation omitted).

The Fourth, Ninth, and Federal Circuits, by contrast, appear to have rejected the substantial-impact test. The Fourth and Federal Circuits consider whether the agency action "effect[s] a change in existing law or policy or affect[s] individual rights or obligations." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1356 (Fed. Cir. 2011); *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 350 (4th Cir. 2001). The Ninth Circuit has yet to articulate a clear rule, but has indicated that it will not discern the substantiality of a rule by looking to the burden it imposes. *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 (9th Cir. 1992).

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[2] The D.C. Circuit has expressly disavowed the test used by the Fifth Circuit. *Kaspar Wire Works, Inc. v. Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001).

2. The disarray amongst and within the circuits has unsurprisingly yielded inconsistent results on what it means for a rule to be "procedural." Rules that may appear to be mere house-keeping can be deemed "substantive," and thus subject to notice-and-comment requirements, while rules that undeniably "affect individual rights and obligations," *Chrysler*, 441 U.S. at 303, can be deemed "procedural."

Take, for example, the question of how an application is processed. If procedural rules are rules that "alter the manner in which the parties present themselves or their viewpoints to the agency," *JEM Broad.*, 22 F.3d at 326 (citation omitted), then rules governing who is responsible for processing a request for benefits or how such a request may be presented should be classically procedural and exempt from notice and comment.

Yet experience has suggested otherwise and has yielded conflicting results. In *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932 (D.C. Cir. 1982), the D.C. Circuit considered an HHS rule regarding who would handle Medicare reimbursement determinations for home health agencies. The statute allowed the entities to choose either an intermediary or the Secretary; the Secretary, in turn, could decide that assigning an intermediary would be more efficient for the administration of Medicare, regardless of the entities' preferences. *Id.* at 934-35. The Secretary decided that all freestanding home health agencies would use intermediaries for reimbursement determinations. *Id.* at 935. A group of home health agencies filed suit, arguing in part that the Secretary was required to undergo notice and comment before promulgating the requirement. *Id.* The Secretary asserted that the desig-

nation was "a rule of agency procedure." *Id.* at 949. The D.C. Circuit disagreed, concluding that the choice of whom "to deal with" for reimbursement requests was substantive, not procedural. *Id.* It cited the enormous administrative burden associated with the change: home health agencies would undertake "great expense and inconvenience," as they would be "required to change or scrap electronic billing systems which have been designed to interface with equipment used by the Secretary." *Id.*

Compare that to the result in *James V. Hurson,* another case from the D.C. Circuit. There, the court addressed a USDA rule governing food labeling approval requests. 229 F.3d at 279. Prior to the rule, FDA had allowed commercial food producers to submit their requests by (1) mail, (2) a personal visit to the agency, or (3) a courier/expediter service. *Id.* The last method allowed producers to "secure instant approval . . . , whereas other methods could take days or even weeks." *Id.* USDA removed the last option without notice and comment, so a courier/expediter firm sued, alleging a violation of § 553. *Id.* at 279-80. The D.C. Circuit concluded that the elimination was a procedural change, despite the disruption caused to the food industry and to the livelihood of couriers/expediters. *Id.* at 281. It noted that even procedural rules "may have a substantial impact on the rights of individuals"—the fact of the impact does not make a rule any less procedural. *See id.* (citation omitted).

3. These conflicting tests have sometimes strayed from the principles articulated by this Court in other contexts: a procedural rule should be *procedural*—governing the "*process* for enforcing rights and duties recognized by substantive law and for justly adminis-

tering remedy and redress for disregard or infraction of them." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (emphasis added) (citation omitted). Pure agency house-keeping, such as rules about an agency's "*internal* operations, including rules governing commission voting, . . . or structuring collaboration with other agencies," will typically have little direct impact on the broader public and can safely be called procedural rules. *See* Emily S. Bremer & Sharon B. Jacobs, *Agency Innovation in* Vermont Yankee*'s White Space*, 32 J. Land Use & Envt'l L. 523, 526 (2017). But beyond that, the dividing line becomes more difficult to draw: even rules that govern an agency's routine interactions with regulated entities can significantly affect members of the public, thus necessitating notice and comment. *Chamber of Commerce*, 174 F.3d at 212 (OSHA directive requiring employers either to undergo inspection or adopt a comprehensive compliance program was substantive rather than procedural in part because it was "intended to, and no doubt will, affect the safety practices of thousands of employers").

This Court should grant certiorari to clarify the extent to which "rights and obligations" must be burdened before notice and comment becomes necessary. When a rule affects both a party's "rights and obligations," *Chrysler*, 441 U.S. at 303, *and* "the manner and the means" by which substantive issues are addressed before the agency (or other internal "house-keeping" items), *Shady Grove*, 559 U.S. at 407, is the rule procedural or substantive, and does it escape notice and comment? In answering these questions, the Court should ensure that the phrase "rules of agency organization, procedure, or practice" is not construed so

broadly that § 553(b)(3)(A) can be used routinely to avoid public scrutiny for agency rules. While agencies need "latitude in organizing their internal operations," *Bowen*, 834 F.2d at 1047 (citation omitted), that latitude does not allow an agency to override Congress's mandate for agencies to obtain public input on the substantive issues and decisions that affect regulated entities and persons. *See* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 Minn. L. Rev. 2019, 2082 (2018) (notice-and-comment process is intended "to engage the affected public in grappling with questions of political value that have not been unambiguously settled by legislative enactment"); *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (core purpose of notice and comment is "to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies" (citation omitted)).

B. By any standard, the panel reached the wrong result on the necessity of notice and comment.

To conclude that "the 2019 protocol and addendum are rules of agency organization, procedure, or practice exempt from the APA's requirements for notice-and-comment rulemaking," Pet. App. 12a, the panel majority tried applying several of the tests described above, but misapplied all of them.

1. The panel majority incorrectly concluded that because no "rights" had been affected by the Protocol, the Protocol was a "procedural" rule exempt from notice and comment. Judges Katsas and Rao reached that conclusion for different reasons, but both viewed

the exception for procedural rules as sweeping far more broadly than it actually does (or should).

Judge Katsas took a needlessly narrow view of the rights affected by the Protocol. He determined that the Protocol *must* be procedural because petitioners' "rights or interests [] were all but extinguished when juries convicted and sentenced them to death," and because a federal regulation, and not the Protocol, established lethal injection as the method of execution. Pet. App. 40a-41a (citing 28 C.F.R. § 26.3(a)(4)).[3] In other words, the Protocol could not have deprived petitioners of any rights, because those rights had already been taken away by other means. This is plainly wrong: a prisoner sentenced to death who has exhausted all opportunities to challenge his conviction or sentence still maintains a distinct and separate interest in *how* he is to die. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019) (acknowledging that a "State's chosen method of execution [may] cruelly superadd[] pain to the death

[3] Judge Katsas would have concluded in the alternative that the Protocol is a general statement of policy. Pet. App. 41a. The Protocol bears none of the hallmarks of such a statement. As this Court explained in *Azar v. Allina Health Services*, 139 S. Ct. 1804 (2019), "statements of policy," as that phrase is used in the APA, "refer[s] to things that *really are* statements of policy." *Id.* at 1811 (citing *Pac. Gas. & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974)). Policy statements "announce[] the agency's *tentative* intentions for the future." *Pac. Gas*, 506 F.2d at 38 (emphasis added). There is nothing tentative about the Protocol. *See* Pet. App. 144a ("These procedures should be observed and followed as written unless deviation or adjustment is required . . . ."). The fact that the Protocol leaves to BOP *some* discretion to make adjustments does not make it a general statement of policy—no one would read the Protocol as suggesting BOP officials had unfettered discretion not to follow it at all. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

sentence"); *cf. Nelson v. Campbell*, 541 U.S. 637, 644 (2004) ("A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' and 'validity' of the sentence itself—by simply altering its method of execution, the State can go forward with the sentence.").

And Judge Katsas's suggestion that it is 28 C.F.R. § 26.3(a)(4), and not the Protocol itself, that determines how a prisoner is to die is equally misplaced. The regulation prescribes lethal injection as the method of carrying out a death sentence, but does not specify what is to be injected, or how it is to be injected. These details affect a prisoner's rights and interests, *Baze v. Rees*, 553 U.S. 35, 55 (2008) (plurality opinion), and they are set by the Protocol alone. The Protocol, not the regulation, specifies the crucial details—the specific drugs and dosages, the execution team's training and qualifications, and so on—that directly impact a prisoner's rights and interests. Pet. App. 130a.

Judge Rao took a different approach to the procedural-substantive distinction: she, too, focused on whether the Protocol altered the "rights or interests" of prisoners, but only those rights *accorded by the statute*. *See* Pet. App. 83a ("[T]he protocol does nothing to interfere with the Marshal's ability to comply with the FDPA or with the plaintiffs' right to have their sentences implemented 'in the manner prescribed by the law of the State.'" (quoting 18 U.S.C. § 3596(a))). But courts do not gauge whether a rule is substantive by looking only to whether the rights accorded by the statute being implemented are affected by the rule—agency regulation can be complex, and an agency action can reach all manner of "rights or interests" of regulated entities beyond that accorded by a particular

statute. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). Surely courts should not turn a blind eye, for instance, to agency actions that impinge on constitutional rights simply because those actions did not alter "rights accorded by the statute."

Furthermore, Judge Rao's determination (at Pet. App. 84a) that the Protocol is mere "internal housekeeping" defies logic. While the Protocol covers the more mundane aspects of a prisoner's execution, such as the prisoner's last meal, Pet. App. 84a, it also affects substantive interests in a way that the FDPA does not. As explained above, an execution protocol can affect a prisoner's Eighth Amendment right to not die by cruel and unusual means. *See Glossip v. Gross*, 135 S. Ct. 2726, 2742 (2015) (identifying "important safeguards" adopted "to ensure that [a drug] is properly administered"). This Protocol does so by identifying the drug, Pet. App. 133a, 212a-213a, the details of drug administration, Pet. App. 213a, and the execution-team participants, Pet. App. 211a. And a prisoner has other interests beyond the Eighth Amendment right that will be affected by the Protocol. He has an interest in dying in the company of his family, friends, and a spiritual adviser from his faith tradition—the Protocol dictates which of these individuals may attend the prisoner's execution. Pet. App. 153a; *see also Gutierrez v. Saenz*, __ S. Ct. __, 2020 WL 3248349, at *1 (June 16, 2020) (directing the district court to "promptly determine . . . whether serious security problems would result if a prisoner facing execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution"). The prisoner also has an interest in what happens to his property after he dies, and how his body is to be treated af-

ter his death—again, the Protocol has an impact on these interests. Pet. App. 153a-154a. A prisoner's interests relating to the termination of his life are at least as significant as the kinds of private interests that have traditionally triggered notice-and-comment requirements in other cases. *E.g.*, *Chamber of Commerce*, 174 F.3d at 211 ("safety practices of thousands of employers"); *Air Transport Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 375 (D.C. Cir. 1990) ("right to avail [oneself] of an administrative adjudication" where civil penalties at issue (citation omitted)), *vacated as moot*, 933 F.2d 1043 (Mem.) (D.C. Cir. 1991). It is therefore misguided to say that these rights and interests are mere agency "house-keeping." To the contrary, these are the very kinds of "private interests" that the Administrative Procedure Act's notice-and-comment provisions are designed to protect. Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* 31 (1947).

2. The Protocol is an example of an agency action where the need for notice-and-comment procedures is at its *greatest*. Unlike most statutes governing agency action, Congress did not even invest in the Attorney General (much less BOP) authority here, thereby evincing a lack of confidence that BOP had the expertise necessary to elaborate on the "manner" in which an execution is to be carried out. *See Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (denying deference to an interpretive rule concerning physician assisted suicide given the Attorney General's "lack of expertise."). Instead, the Attorney General must implement the sentence in "the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a).

Federal administrative law often requires notice-and-comment rulemaking—and for good reason. When an agency announces a change by other means, it is drawing on the "benefit of [its] specialized experience" to do so. *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). Agencies, however, sometimes do not possess sufficient expertise to make sound policy judgments without the benefits of the external input that necessarily accompanies notice-and-comment rulemaking. BOP here is case in point, as it manifestly lacks the same sort of expertise over execution protocols that a specialist agency has over its responsibilities (such as the Food and Drug Administration for drugs and devices). Execution teams—even *state* execution teams, for that matter—often "lack[] basic understanding of the drugs [to be used in the execution] and their risks." *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029, 2083 (2011); *see also id.* at 2039 ("[M]any states have adopted lethal injection with neither expertise nor professionalism."). Far from being expendable, notice-and-comment rulemaking is especially important where, as here, the agency lacks expertise, precisely because public comments help the agency make more informed and sounder decisions. *See Mead*, 553 U.S. at 230; *see also* Berger, *supra*, at 2068-72; Pet. 32 (discussing 1993 execution-protocol regulation, which considered comments from medical associations and physicians).

C. The panel decision upends *Chenery*'s bedrock principle that a court may uphold agency action only for the reasons actually articulated by the agency.

Nearly 80 years ago, this Court announced a bedrock and fundamental principle that has served as a cornerstone of modern administrative law: "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (*Chenery I*). Four years after *Chenery I*, the Court stated the admonition even more clearly:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (*Chenery II*).

1. *Chenery*'s "express statement requirement" promotes "political accountability of decision-making as well as nonarbitrariness and regularity." Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 992 (2007). It provides "structural as-

surance that the grounds for agency policy have been embraced by the most politically responsive and public actors within the agency." *Id.* at 993. For a court to inject its own views as to what an agency decision should or could have said, "blur[s] the lines of political responsibility." *Id.* at 994; *e.g.*, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) ("For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review."). Moreover, *Chenery* confers to agencies the autonomy to create their own rules to govern future cases. Those choices should be left to politically accountable agencies—courts are ill-suited to make such consequential policy determinations. *See* Stack, *supra*, at 997-98 ("[T]he *Chenery* principle ensures that each step casts a shadow for the placement of each subsequent step.").

2. *Chenery* applies even in the context of an agency's interpretation of a statute. Of course, in applying *Chevron*'s first step, *Chenery* hardly plays a role: a court may discern "the unambiguously expressed intent of Congress" in enacting a statute without looking to the agency decision at all. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984); *see also Eagle Pharm., Inc. v. Azar*, 952 F.3d 323, 331 n.12 (D.C. Cir. 2020) (noting "it is not entirely clear that *Chenery* even applies at *Chevron* step one"); *Bank of Am., N.A. v. FDIC*, 244 F.3d 1309, 1319 (11th Cir. 2001) ("It is the duty of the courts to interpret statutory language, and courts should decide whether there is ambiguity in a statute without regard to an agency's prior, or current, interpretation.").

But at *Chevron*'s second step, *Chenery* does play a role. Step Two is where courts defer to an agency's

"reasonable interpretation" of a statute because the construction is the result of the "policy-making responsibilities" delegated to the agency by Congress. *Chevron*, 467 U.S. at 844, 865. In order to determine whether an agency picked a "reasonable interpretation" of a statute in pursuit of a "wise policy," *id.* at 865, a court must ensure that the policy is indeed *the agency's*. *E.g.*, *Council for Urological Interests v. Burwell*, 790 F.3d 212, 222 (D.C. Cir. 2015); Stack, *supra*, at 1005 ("[T]he deference the Court applies at Step Two is implicitly conditioned on the agency's having worked through the problem, with reason-giving as the overt expression of its exercise of discretion and expertise."). *Chenery*, thus, forbids a court from assuming that an agency would have justified a particular interpretation in a certain way and taken certain acts in accordance with that assumed rationale. *See Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015) (agency action "must be measured by what [it] did, not by what it might have done" (citation omitted)).

3. Although the *Chevron* framework does not apply here (as respondents have not claimed deference), Pet. 25 n.7, the panel majority nevertheless violated *Chenery* in interpreting the FDPA by upholding a version of the Protocol never *actually promulgated* by BOP. *See* Pet. App. 10a-11a. Under Judge Rao's approach, the only way the Protocol could be upheld was if BOP had shared in her interpretation of the FDPA—that the statute requires deference to state execution procedures that carry the force of law—at the time it promulgated the Protocol, and if the Protocol itself reflected that understanding. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, No. 18-857 (June 18, 2020), slip op. 16-17. To find the latter, Judge Rao took

catchall language in the Protocol—which granted BOP the ability to depart from the Protocol as "required by other circumstances"—to mean BOP understood that "the government must depart from the protocol as necessary" to comply with "the requirement that the government apply the manner of execution prescribed by state law." Pet. App. 81a.

Just one problem: the Protocol does not actually say what Judge Rao said it does—rather, Judge Rao claimed to divine that understanding by "[r]eading the protocol and addendum as a whole." *Id.* But nowhere in the Protocol "as a whole" does it say BOP intends to have the Protocol yield to state laws and procedures wherever there is a conflict. BOP may have developed the Protocol (specifically, the Addendum) by looking at the practices of several states, Pet. App. 137a, but there is not a hint of deference to state protocols, save for a stray reference to the FDPA, Pet. App. 133a. Judge Rao's reading of the Protocol is therefore the sort of judicial "guess[ing] at the theory underlying the agency's action" that *Chenery* forbids. *Chenery II*, 332 U.S. at 197. An agency action can be upheld only if the basis for doing so is stated *by the agency in the administrative proceedings* "with such clarity as to be understandable." *Id.* at 196.

This rule is a "foundational principle of administrative law," as this Court just reaffirmed: requiring contemporaneous explanation "promotes agency accountability," "instills confidence that the reasons given are not simply convenient litigating position[s]," and avoids "forcing both litigants and courts to chase a moving target." *Regents*, slip op. 16 (quotation marks omitted). This case therefore presents a straightforward application of *Chenery* gone wrong: BOP never

adopted Judge Rao's rationale, and thus, BOP's Protocol cannot be upheld on that basis. Indeed, the rationale behind *Chenery* is even more compelling in this case than in *Regents*: relying on *post hoc judge-provided* justifications not only disturbs agency accountability, it also usurps the agency's policymaking role.

Occasionally, a strict application of *Chenery* risks turning "judicial review of agency action into a ping-pong game," *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 545 (2008) (citation omitted), but this is not one of those occasions. If there is only *one* action that an agency can take under a certain interpretation of a statute, a *Chenery* remand can become an "idle and useless formality." *Id.* (citation omitted). But there is nothing here to suggest that BOP would have attempted to comply with the proper reading of the FDPA by using the catchall for "other circumstances." *See id.* at 542, 544-45 (remand would have resulted in "ping-pong" because FERC had already "held that the *Mobile-Sierra* presumption did apply to the contracts at issue," consistent with the Court's conclusion that "[t]he Commission was *required* . . . to apply the *Mobile-Sierra* presumption"). BOP might have addressed conflicts with state protocols by other means. It could have identified and responded to specific conflicts with state law—providing guidance, for example, on what to do if a state protocol allows an inmate to die by means other than lethal injection, Mo. Stat. § 546.720 (allowing death by lethal gas, in lieu of injection), or restricts those otherwise allowed by the Protocol from attending an execution, Ind. Code § 35-38-6-6(a) (excluding attorneys from those who "may be present at the execu-

tion"). Or BOP could have not issued the Protocol at all, instead maintaining the moratorium on executions because of the complexities associated with deferring to state protocols. Thus, to the extent that the panel majority relied on Judge Rao's reading of an altered Protocol, the majority impermissibly upheld the Protocol by what BOP "might have done," not "by what [it] did." *See Michigan*, 135 S. Ct. at 2711 (citation omitted).

This Court should grant certiorari to reverse the panel majority's quiet uprooting of *Chenery*'s bedrock principle of administrative law. Working in tandem with arbitrary-or-capricious review, *Chenery* gives courts an opportunity to take a hard look at agency actions and force agencies to "specifically explain their policy choices, their consideration of important aspects of the problem, and their reasons for not pursuing viable alternatives." Stack, *supra*, at 972. For decades, the rule has been that courts cannot substitute these explanations on the agency's behalf. *See Regents*, slip op. 16 (*Chenery* prohibits "*post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker"). The panel majority did so here, and its decision must be corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAIME A. SANTOS
Counsel of Record
ANDREW KIM
STEPHEN R. SHAW
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, DC 20036
JSantos@goodwinlaw.com
(202) 346-4000

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APPENDIX: LIST OF AMICI CURIAE

(Affiliations are listed only
for purposes of identification.)

Eric Berger
Earl Dunlap Distinguished Professor of Law
University of Nebraska College of Law

Ashutosh Bhagwat
Martin Luther King, Jr. Professor of Law and
Boochever and Bird Endowed Chair for the Study
and Teaching of Freedom and Equality
University of California, Davis School of Law

Seth Davis
Professor of Law
University of California, Berkeley School of Law

Daniel Deacon
Lecturer
University of Michigan Law School

Blake Emerson
Assistant Professor of Law
UCLA School of Law

Cynthia R. Farina
William G. McRoberts Research Professor in
Administration of the Law, Emerita
Cornell Law School

Jon D. Michaels
Professor of Law
UCLA School of Law

Arnold Rochvarg
Professor Emeritus
University of Baltimore School of Law

Edward L. Rubin
University Professor of Law and Political Science
Vanderbilt Law School

Bijal Shah
Associate Professor of Law
Arizona State University Sandra Day O'Connor
College of Law

Peter M. Shane
Jacob E. Davis and Jacob E. Davis II Chair in Law
The Ohio State University Moritz College of Law

Sidney A. Shapiro
Frank U. Fletcher Chair in Law
Wake Forest University

Anna W. Shavers
Cline Williams Professor of Citizenship Law
University of Nebraska College of Law

Wendy Wagner
Richard Dale Endowed Chair
University of Texas School of Law

Daniel E. Walters
Assistant Professor of Law
Penn State Law