No. 19-1348

IN THE
Supreme Court of the United States

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

ALFRED BOURGEOIS, et al.,
Petitioners,

v.

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

CAPITAL CASE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Government's Brief in Opposition agrees that the D.C. Circuit's controlling opinion is wrong about how federal executions must be conducted. It offers assorted rationales for its own interpretation of the FDPA—an interpretation the panel rejected. And it provides alternative bases for the panel's flawed administrative law holdings, signaling that those, too, are indefensible. Far from counseling against

certiorari, the Government's arguments collectively favor it.

Despite all this, the Government asks this Court to reject the petition. Never mind that the parties agree the controlling opinion is wrong. Never mind that the differences among the positions taken by Petitioners, the Government, and the panel dictate whether a prisoner may choose to die in a manner other than lethal injection, whether a physician is present during the execution, or whether the prisoner will receive a sedative.

Instead, the Solicitor General's arguments reduce to two refrains: "We've done this before," and "We've waited long enough."

Wrong and wrong. Over the Government's repeated objections, *see* Pet. 7, Congress created a federalist scheme; it entrusted the States, which have far greater experience conducting executions, to determine how to implement the "most extreme sanction available." *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002). And any delay attending Petitioners' executions is attributable to the Government, which spent years "finalizing" the Protocol and then set execution dates simultaneous with its announcement.

This case asks what the law requires when executing every federal death-row prisoner. On top of that, as the amici Administrative Law Scholars observe, the decision below will have seismic administrative-procedure impacts. These issues deserve plenary consideration before the Government conducts the first federal executions in nearly twenty years. Certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW IS MANIFESTLY INCORRECT.

A. The Decision Below Does Not Adhere to the Text of the FDPA.

1. Although the Government cannot dispute that Judge Rao's opinion controls, it argues at length that her opinion is *wrong* about the meaning of the FDPA. But its alternative reading—that "manner" means "method"—cannot be reconciled with the text of the statute, as Judges Rao and Tatel correctly held below.

a. Statutory interpretation "start[s] with the text." *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1172 (2020). In 1994, Congress instructed the U.S. Marshals Service to "supervise implementation of [a death] sentence in the manner prescribed by the law of the State in which [it] is imposed." 18 U.S.C. § 3596(a). Implementation "refer[s] to a range of procedures and safeguards surrounding executions, not just the top-line method of execution." Pet. App. 59a (citing Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4,898 (Jan. 19, 1993)). Prescribe means "to lay down as a guide, direction, or rule of action." *Prescribe*, Merriam-Webster's Collegiate Dictionary 921 (10th ed. 1994). So to *implement* a death sentence in the *manner prescribed* by the law of the State means to follow those procedures and safeguards that the State has directed its officials, by law, to establish. *See Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) ("we construe language *** in light of the terms surrounding it").

The Government urges this Court to forget all those other words and just focus on "manner"—which, it says, means "method." BIO 21. But Congress did not instruct the federal government to "execute a federal prisoner using the method of execution utilized by a State." "[T]his Court is not free to rewrite the statute to the Government's liking." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 629 (2018) (internal quotation marks omitted).

b. Although "it is not necessary to go any further," history and practice reinforce Petitioners' interpretation. *Babb*, 140 S. Ct. at 1172.

First, both the 1937 Act and the FDPA reflect a decision to defer to the States' experience conducting executions. To be sure, States lacked formal execution protocols in the 1930s. Instead, they had veteran executioners—like the "Illinois hangman" and New York "electricians"—who developed unique procedures based on their expertise. *See, e.g.*, Bruce Cline, *More History, Mystery, and Hauntings of Southern Illinois* 104 (2012); *New York's "State Electricians"*, Sword and Scale, https://bit.ly/2AJLiK5 (Apr. 14, 2016). When called on by the federal government, they used those same procedures to execute federal prisoners. *See* Stay Reply 4-5. By the 1990s, States had formalized the collection of this expertise in distinct execution protocols. *See Campbell* v. *Wood*, 114 S. Ct. 2125, 2127 (1994) (mem.) (Blackmun, J., dissenting from denial of certiorari) (discussing Washington's hanging protocol, which the State claimed "reduced" the risk of a botched execution by detailing key procedures); *see also, e.g.*,

Jackson v. *Danberg*, 594 F.3d 210, 212 (3d Cir. 2010) (discussing 1992 Delaware lethal-injection protocol).

Even if following state procedures was not already mandatory under the 1937 Act, Congress made it so in the FDPA by replacing "inflicting" with "implementation." "The [former] refers to the immediate action of execution, whereas 'implementation of the sentence' suggests additional procedures involved in carrying out the sentence of death." Pet. App. 59a.

Second, the Government admits that the States have far more expertise in this area, and that the bulk of their experience is reflected in state execution protocols. *See* BIO 5-6. The Government does not dispute that this experience—and the choices it informs—matters. Instead, it alleges that because it has not necessarily followed state procedures in the past, it cannot be compelled to follow them now. But "[p]ast practice does not, by itself, create power." *Medellín* v. *Texas*, 552 U.S. 491, 532 (2008) (internal quotation marks omitted). Nor does the Government's 1942 manual—which has surfaced only at this stage in the litigation—shed light on what Congress intended in 1937, much less 1994. Still less illuminating are executions carried out nearly two decades ago without relevant objection, *see Jones* v. *United States*, 527 U.S. 373 (1999) (raising only unrelated FDPA issues); Stay Reply 6 n.4—especially when at least one federal court held during the same time period that state procedures "take precedence over any inconsistent regulations promulgated by the Attorney General." *United States* v. *Hammer*, 121 F. Supp. 2d 794, 800 (M.D. Pa. 2000) (interpreting Section 3596(a)).

c. "Unable to find sure footing in the statutory text," the Government appeals to "practical concerns. These *** are meritless and do not justify departing from the statute's clear text." *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2118 (2018).

The Government claims that state protocols are per se "less safe" and senselessly detailed. BIO 20 (internal quotation marks omitted). But state protocols contain meaningful IV-insertion procedures, training requirements, and drug potency and quality checks not contained in the Protocol. These additional protections are far from "pointless[]." *Id.* (internal quotation marks omitted); *cf., e.g.*, *Baze* v. *Rees*, 553 U.S. 35, 55 (2008) (plurality op.) ("[t]he most significant" safeguard is the requirement that "members of the IV team" have sufficient experience).

The Government also speculates that a State could thwart the implementation of a death sentence by refusing to cooperate. It offers no support for that idea—other than Judge Katsas's own unsupported speculation. In any event, Section 3596(a) contemplates that possibility and provides a remedy: If state "law" no longer provides for "implementation of a sentence of death," the sentencing court must designate an alternate State.

2. Rather than defend Judge Rao's controlling decision on the merits, the Government attacks Petitioners' critiques of it. But the key problem is not that Judge Rao focused on "binding law" but *how* she defined that term and the significant uncertainty

and practical issues that will result. Pet. 14-18.[1] The Government has no response to those points. Instead, it conflates two distinct conceptions of "binding": carrying the force of law; and mandatory. BIO 24. Whether a regulation is part of a State's "binding law" is different from whether it allows officials any discretion. *See* Pet. App. 78a (acknowledging that a statute affording discretion, like Ark. Code Ann. § 5-4-617, is part of "the law of the State").

B. The Decision Below Violates *Chenery*.

The Government made it clear in the Protocol, in the Administrative Record, and throughout this litigation that its Protocol does not bow to state law—any of it—other than the top-line "method" of execution: lethal injection. Pet. 27-28. Because that would have doomed the Protocol, the panel majority took the liberty of substituting a different policy. As this Court just reaffirmed, post-hoc reformation of an agency's policy undermines "important values of administrative law," including "agency accountability." *Dep't of Homeland Sec.* v. *Regents of Univ. of Cal.*, No.18-587, 2020 WL 3271746, at *10 (2020) (internal quotation marks omitted). That is especially true where, as here, the "after-the-fact explanation[]" is advanced "by judges," rather than the

[1] Judges Katsas and Rao expressly left open whether state execution protocols are "part of the law of the State." Pet. App. 37a n.10, 80a n.15 (internal quotation marks omitted). Petitioner Lee has raised a separate challenge on this basis in District Court based on Arkansas law. *See* Dist. Dkt. #103.

agency itself. *See id.* at *31 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

The proviso allowing the BOP "Director or his/her designee" to "modif[y]" the Protocol "as may be required by other circumstances" cannot salvage the panel's ruling. Pet. App. 210a. For one thing, the exception applies only when the BOP Director or his designee affirmatively acts to "modif[y]" the Protocol. *Id.* The Government pointedly does not argue that the Director has done so, despite the fact that it intends to use the Protocol to conduct executions in three weeks.

Moreover, this "other circumstances" language, *id.*, is precisely the sort of "generalit[y]" that cannot cure a *Chenery* problem. *Fed. Power Comm'n* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974). On the Government's understanding of *Chenery*, a vaguely worded catch-all becomes a free pass for the judiciary to fundamentally revise the policy under review. The Government does not dispute this conclusion. Nor does it attempt to supply a limiting principle. Nor is there even a hint in the Administrative Record that this broad catch-all was intended to embrace that result: Despite exhaustively surveying other state laws in the Administrative Record, BOP never once mentioned that the Protocol might yield in the face of conflicting state requirements.[2]

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[2] Petitioners agree that statements from counsel cannot "substitute" for an agency explanation, *NLRB* v. *Metro. Life Ins. Co.*, 380 U.S. 438, 444 (1965)—but they certainly can *confirm* it. *See* Gov't C.A. Reply 13; Gov't C.A. Br. 27 (following state procedures would "hamstring" BOP and "defy common sense"). If

So the Government points this Court to a second proviso on which the panel below did not rely: The BOP Director may also modify the Protocol to "comply with specific judicial orders." BIO 27 (quoting Pet. App. 210a). In other words, because the court below unlawfully reinterpreted the Protocol based on its own policy judgment, the Government can now implement that unlawful interpretation because it is a "judicial order[]." Quite the Catch-22. And, in any event, a sweeping reinterpretation of the Protocol's requirements that applies to all future executions is not a "*specific* judicial order[]." *Id.* (emphasis added).

Having concluded that the Protocol violated the statute, the proper course was to remand to the agency for any necessary revision. *See* Amicus Br. 21-22. By taking up that task itself, the panel violated *Chenery*, simultaneously undermining the separation of powers, *Regents*, 2020 WL 3271746, at *10, and "the principle of party presentation" at the foundation of "our adversarial system of adjudication." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

C. Notice and Comment Was Required.

The Protocol does not remotely resemble any of the rules deemed "procedural" in the cases cited by the Government (at 30-32), all of which concern how the Government internally processes applications for various benefits. *See Nat'l Mining Ass'n* v. *McCar-*

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anything, it is the Government that "turn[s] *Chenery* on its head" by attempting to rehabilitate the Protocol with musings about the agency's thought processes. BIO 28-29.

thy, 758 F.3d 243, 246, 249 n.1 (D.C. Cir. 2014) (responsibilities for screening permit applications); *Am. Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1047-48, 1050-52, (D.C. Cir. 1987) ("peer review" for Medicare reimbursement payments); *James V. Hurson Assocs.* v. *Glickman*, 229 F.3d 277, 279, 281 (D.C. Cir. 2000) (delivery options for food-labeling application).

The Government selectively describes some of the Protocol in a way that minimizes and masks substantial requirements. BIO 31. The "checklists," for example, specify mandatory events that take place during a prisoner's final days and hours, along with the training and experience required of certain personnel carrying out the execution, and the name and dosages of the lethal agent. Pet. App. 211a-213a. These details, which determine the means for extinguishing a human life, are not mere housekeeping niceties. And the Government cannot evade notice and comment by appending housekeeping provisions to substantive rules. *See Mendoza* v. *Perez*, 754 F.3d 1002, 1024 (D.C. Cir. 2014).[3]

With no real argument to offer that this rule is procedural, the Government claims that requiring the Protocol to go through notice and comment would

[3] The Government also argues the Protocol is a general statement of policy. BIO 33. Because only one judge addressed this issue, Pet. App. 12a, 41a-42a, it is at most an issue for remand. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). In any event, the exception applies to "tentative intentions," *Pacific Gas & Elec. Co.* v. *Fed. Power Comm'n*, 506 F.2d 33, 39 (D.C. Cir. 1974), and "[t]here is nothing tentative about the Protocol." Amicus Br. 12 n.3.

paralyze its ability to alter it later. But the APA affords the government considerable latitude to supplement and clarify rules adopted through notice and comment without repeating that procedure. *See Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015). Nor is there anything to the Government's concern that requiring notice and comment for the Protocol—a comprehensive document governing all aspects of an execution—would require notice and comment for *every* death-penalty related policy. For example, it is difficult to see how a rule concerning how the media applies for access to an execution would be substantive. *Cf.* Pet. App. 188a-189a.

II. THIS CASE WARRANTS CERTIORARI.

1. The Government agrees that there is a significant problem with the controlling opinion below; indeed, it spends the bulk of its brief either elaborating on the problem or explaining it away. But it asks this Court to allow it to press forward, claiming that the end result will be the same.

That could not be more wrong. Executing someone in a manner that does not comply with the law is a grievous harm. And in both the Government's and Petitioners' views, conducting an execution under the controlling opinion below would be contrary to the FDPA. Judge Rao's opinion requires the Government to offer certain prisoners a choice between lethal injection and electrocution where state law provides the option. In the Government's view, requiring it to use anything but lethal injection is *unlawful*. *Compare, e.g.*, Mo. Rev. Stat. § 546.720(1), *and* Va. Code § 53.1-234, *with* 28 C.F.R. § 26.1. Under Petitioners' interpretation, failure to provide

certain prisoners a sedative in advance of the execution is unlawful. The Government has stated that it will not provide any pre-treatment options. *See, e.g.*, Chronological Sequence of Execution, *Ringo* v. *Lombardi*, No. 2:09-cv-4095-BP (W.D. Mo. Jan. 21, 2011), Dkt. #210-7; AR 12-13; *see also* Stay Reply 7 (collecting additional examples including the physician-presence requirement). These are not "procedural minutiae." Stay Opp'n 23; *see, e.g.*, *In re Ohio Execution Protocol*, 860 F.3d 881, 885 (6th Cir. 2017) (Kethledge, J.) (emphasizing the importance of safeguards in Ohio's protocol, including "guidelines for identifying viable IV sites" and training requirements).

In this context, the absence of a circuit split is no deterrent. In its only FDPA case thus far, this Court granted review of a "pathmarking" issue in the absence of a split to offer authoritative interpretation of the "complex regime applicable when the Government seeks the ultimate penalty for a defendant found guilty of an offense potentially punishable by death." *Jones*, 527 U.S. at 405 (Ginsburg, J., dissenting). Given the fractured decision below—a decision neither party defends—and the significant practical and legal consequences that will result, this Court should do the same here.

2. The Government also urges the Court to deny certiorari on the *Chenery* and notice-and-comment questions, using the familiar refrain that they involve "factbound applications of settled administrative-law principles." BIO 26.

Not in the least. The panel's departure from *Chenery* invites courts to rewrite agency policies

from top to bottom—so long as the agency's policy includes a broadly worded catch-all that could arguably accommodate the new approach. Now, once a court perceives some aspect of the policy that is unlawful, it may use that exception to make any post-hoc adjustments it finds appropriate. That eviscerates *Chenery*'s purpose, which is to ensure that policymaking remains in the hands of politically accountable actors. It also has significant implications in other areas of administrative law, Amicus Br. 18-19, particularly because of the D.C. Circuit's first-among-equals status on administrative-law issues.

As for the procedural-rule exception, the Government does not deny that confusion reigns in the lower courts about the proper test: As the amici explain, the D.C. Circuit's approach has shifted over time, producing a circuit split as other courts followed its lead at different points. *See id.* at 5-7. Instead, the Government resorts to claiming this is a poor vehicle based on the "exigencies of a capital" case. BIO 33. But the Government created any "exigencies" that exist by setting imminent execution dates.

This case is vitally important—as the Government itself recognized when it asked this Court for extraordinary relief last year. This Court should step in to prevent the panel's flawed administrative law holdings from taking root, and to provide an authoritative interpretation of Section 3596(a) in advance of the first federal executions in nearly twenty years.

CONCLUSION

The petition for a writ of certiorari should be granted.

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