No. 19A615

IN THE

Supreme Court of the United States

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

v.

JAMES H. ROANE, *et al.*,
Respondents.

RESPONSE TO APPLICATION TO STAY OR VACATE PRELIMINARY INJUNCTION ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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INTRODUCTION[1]

This is an administrative-procedure case in which the Government seeks the extraordinary relief of a stay pending appeal. The usual rigorous standard applicable to such motions applies to this Application. And the standard is not met.

The District Court enjoined the Government from conducting executions under a lethal-injection protocol, the "2019 Protocol," that the court found to be without authority and unlawfully issued. The Government appealed and sought a stay of that injunction. When the District Court denied that motion, the Government took the same request to the D.C. Circuit, and also sought summary vacatur of the District Court's preliminary injunction. Judges Rogers, Griffith, and Rao denied those requests in a *per curiam* order. There was no dissent. The Solicitor General now brings that same request to this Court. Its appeal of the preliminary-injunction ruling remains pending.

The four judges who have already considered this request were right: The Government's arguments do not come close to satisfying the exacting standard for a stay pending appeal. The subject matter of this case may be eye-catching, but the stringent stay standard remains the same as in any other appeal, and the Government simply has not met it. In that respect, the Application is not unusual.

What *is* unusual is the inexorable consequence of granting the Application. As the Solicitor General concedes, a "stay" of the District Court's injunction—to call it what it actually is, *a lifting of the injunction*—would permit certain scheduled

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[1] We will refer to the Applicants collectively as the "Government." The Respondents here are Daniel Lewis Lee, Wesley Ira Purkey, Alfred Bourgeois and Dustin Lee Honken.

federal executions to go forward pending the Government's appeal. That is not in any sense of the phrase maintaining the *status quo* while an appeal runs its course. It is in fact mooting the underlying action by executing the men who are bringing it.

The underlying action involves an attempt by the Department of Justice ("DOJ") and the Federal Bureau of Prisons ("BOP") to circumvent, via the unlawful 2019 Protocol, a 1994 statute governing federal executions with which they disagree and repeatedly have lobbied to amend, without success. Finding that the 2019 Protocol was both unauthorized by and contrary to the terms of the Federal Death Penalty Act ("FDPA"), the District Court preliminarily enjoined the Government from executing the Respondents under that protocol. *See* App., 7a-14a. The District Court's finding is amply supported by the FDPA's language, the federal government's past custom and practice, extrinsic evidence and the relevant case law. *See infra*, 16-30. In addition, the equities strongly favor the Respondents, who—in the event that the District Court's injunction is stayed or vacated—would otherwise be executed pursuant to the very policy they are challenging.

Rather than delaying the Respondents' executions (the first of which is Mr. Lee's, scheduled for 8:00 am on December 9, 2019) and appealing the District Court's injunction on a reasonable schedule and full record, the Government has now filed two motions for emergency stays and a motion for summary vacatur. They all failed. The Application provides no reason for this Court to reach a different conclusion by granting the extraordinary remedy of a stay pending appeal. The Government has not made the requisite "strong showing" that it is likely to

prevail on the merits of its appeal; it has not shown that it will suffer any irreparable injury in the absence of a stay; and the public interest would not be served by allowing unlawful executions to proceed. *See Nken* v. *Holder*, 556 U.S. 418, 434 (2009).

With regard to the merits: The 2019 Protocol clearly violates the APA in at least two ways that relevant to the Application. *First*, the FDPA vests authority over federal executions solely in the United States Marshals Service ("USMS"). The 2019 Protocol improperly arrogates that authority to the BOP. The Government does not even confront this argument in its Application. *Second*, the 2019 Protocol sets forth federal procedures for executions under the FDPA, even though the statute's plain language provides that executions will be implemented in accordance with *State* law, which includes State procedures.

The balance of harms also tips decidedly against the Government. In the absence of an injunction, the imminent harm to the Respondents is self-evident and incapable of remediation: They will be executed over the next six weeks pursuant to an unlawful protocol that they were deprived of a full opportunity to challenge on the merits. The Respondents' executions would result in the Government winning its appeal—without a full briefing—on mootness grounds.

The Government, for its part, cannot demonstrate irreparable injury absent a stay of the preliminary injunction. Any unnecessary expense or additional effort is the result of the Government's choice to announce, at the same time it announced the new protocol, that the executions would begin in early December 2019. The

Government's self-inflicted harm is also not irreparable because the Respondents are only seeking to delay their executions while their claims are being adjudicated, not halt them entirely.

The Government's public interest arguments rest on the interest of the Government and the victims' families in finality. Those arguments are invalid. It took the Government in excess of eight years to develop the new protocol; a temporary injunction simply delays institution of a protocol a bit longer. And the family of the victims for the first prisoner scheduled to be executed, Respondent Lee, in fact *opposes* the execution and has supported clemency for Mr. Lee. The Government is by now well aware of the family's wishes, yet continues to mischaracterize their interests in its submissions. The public interest here is best served by ensuring that the procedures for any federal executions are lawful.

The bottom line: Most of the Government's substantive contentions in support of the Application consist of complaints about the FDPA, not the District Court's ruling. If the Government finds fault with the statute, it must seek an amendment rather than trying to create law through agency fiat. And in no event should the Government be awarded a "stay" pending its appeal that will in practical effect extinguish the Respondents' cases. The Government's unsupported request for "summary vacatur," which is an add-on to an application otherwise completely built around the stay standards, should be denied as well, just as it was below.

STATEMENT

1. Until 1937, federal law mandated that the USMS carry out federal executions by hanging. *See* 1 Stat. 112, 119 (1790). In 1937, however, Congress recognized that hanging had become an antiquated practice, and so it looked to the States. H.R. Rep. No. 75-164, at 1 (1937). Congress replaced the federal execution procedure with a decentralized system to ensure that federal executions would mirror State executions. The 1937 law stated that "[t]he manner of inflicting the punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed." 18 U.S.C. § 542 (1937). As discussed below, the 1937 statute's reference to "laws of the State" was an intentional limitation on the federal government's implementation of executions. *See infra*, 23-24.

At the same time, however, Congress retained the singular role of the USMS in implementing federal executions. The 1937 law provided that "the United States marshal" was "charged with the execution of the sentence" and that he "may use available State or local facilities and the services of an appropriate State or local official or employ some other person for such purpose." 18 U.S.C. § 542 (1937).

For several decades, the federal government adhered to state execution procedures pursuant to the 1937 law. More specifically, it was standard practice for the USMS to transport prisoners to State prisons where they were executed in accordance with State law. In 1953, Julius and Ethel Rosenberg were executed at Sing-Sing Prison in Ossining, New York. *Rosenberg* v. *Carroll*, 99 F. Supp. 630, 633 (S.D.N.Y. 1951). Ten years later, Victor Feguer was transported to Iowa where he

was hanged in the state prison. *See* The Smoking Gun*, The Last Man Uncle Sam Executed*, (May 7, 2001), https://bit.ly/2DN73Xi; *Feguer* v. *United States*, 302 F.2d 214, 216 (8th Cir. 1962). According to a July 21, 1992 USMS memorandum entitled "Historic Procedures for Federal Executions," a U.S. Marshal arranged for the executions of the Rosenbergs and Feguer in the New York and Iowa facilities, with the Marshal acting as the executioner in the latter.[2]

In all, the BOP identifies twenty-three non-military executions taking place between 1937 and the enactment of the FDPA in 1994. *See* Fed. Bureau of Prisons, *Capital Punishment*, https://bit.ly/3829SkZ (last visited Dec. 4, 2019). Seventeen occurred at State facilities. Of the remaining six executions, three were conducted at a federal facility in Alaska before Alaska became a State, and the remaining three occurred in Michigan and Kansas at a time when those States were not conducting executions (despite having death penalty statutes). *See id.*

2. In 1984, Congress repealed the 1937 law as part of the Sentencing Reform Act, leaving the federal government without a mechanism for carrying out executions. *See* Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1987 (1984). In the ensuing years, Congress considered, but did not enact, various bills that would have provided such an implementation mechanism. *See, e.g.*, S. Rep. No. 101-170, at 12-13 (1989); H.R. Rep. No. 102-405, at 9-10 (1991) (Conf. Rep.).

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[2] Memo. from Ted Calhoun to Director Hudson at 6 (July 21, 1992). This USMS memorandum was produced in response to a request under the Freedom of Information Act ("FOIA"). This memorandum and the other documents produced in response to the FOIA request are available at: https://bit.ly/2ONTgpG (last visited Dec. 4, 2019) ("FOIA Files"). The pagination for the FOIA Files refers to the page number of the PDF, so that, for example, "6" is page 6 of page 56.

In the meantime, the DOJ issued a final rule in 1993 to fill the gap created by the repeal of the 1937 law and "establish[] procedures" for carrying out federal executions. Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898, 4898 (Jan. 19, 1993) (codified at 28 C.F.R. pt. 26). 28 C.F.R. Part 26 required executions to take place by lethal injection, but left the specific drugs to be used and other key decisions regarding the implementation of the death sentence to the discretion of the BOP Director. *Id.* at 4902. Thus, in issuing 28 C.F.R. Part 26, the DOJ created distinct federal execution procedures for the first time since 1937.

3. The next year, however, Congress enacted the FDPA. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). With the FDPA, Congress returned to the historical approach of (a) having the USMS implement federal death sentences; and (b) requiring the USMS to use State procedures for executions, thereby displacing the implementation provisions in 28 C.F.R. Part 26. Specifically, the FDPA states that a U.S. Marshal "shall supervise the 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). The FDPA—like the 1937 law—also permits the USMS to "use appropriate State or local facilities" and "the services of an appropriate State or local official" to carry out executions. 18 U.S.C. § 3597(a). Nowhere does the FDPA sanction implementation of the death sentence by the BOP (or any entity other than the USMS), and nowhere does it sanction implementation in any manner aside from the one provided for by the relevant State.

4. When Congress enacted the FDPA, the DOJ understood that it significantly constrained the federal government in implementing the death penalty. *See* H.R. Rep. No. 104-23, at 22 (1995) ("The proposed procedures contemplate a return to an earlier system in which the Federal Government does not directly carry out executions[.]"). The DOJ also knew that the FDPA conflicted with the implementation provisions in 28 C.F.R. Part 26. Then-Attorney General Janet Reno expressed concern that the bill "contemplate[s] a return to an earlier system in which the Federal Government does not directly carry out executions, but makes arrangements with states to carry out capital sentences in Federal cases." *Id.* (1995) (quoting Letter from Attorney General Janet Reno to Hon. Joseph R. Biden, Jr., 3–4 (June 13. 1994)). The DOJ therefore "recommend[ed] amendment of the legislation to perpetuate the current approach, under which the execution of capital sentences * * * is carried out * * * pursuant to uniform regulations issued by the Attorney General." *Id.* But Congress declined to adopt such an amendment or otherwise reverse its long-standing practice of looking to the States to determine the manner of implementing the death penalty. Thus, Congress rejected the uniform implementation of death sentences sought by the DOJ.

The USMS also understood that the FDPA conflicted with the DOJ's implementation regulations in 28 C.F.R. Part 26. The USMS's General Counsel wrote that, under the FDPA, "implementation of the death sentence is dependent on state, not Federal law." Memo. from Deborah Westbrook, General Counsel to Director Gonzalez et al. (Sept. 9, 2014), FOIA Files at 20 ("Westbrook Memo., FOIA

Files"). Ms. Westbrook expressed concern that the "death penalty implementation established by the [FDPA] is in conflict with [the DOJ's] regulations * * * which established uniform implementation procedures." *Id.* at n.2; *see also Matters Relating to the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 14 (1995) (statement of Kathleen Hawk, Director, BOP) (referring to the FDPA as a "little-noted provision" that put the DOJ's implementation regulations "in question" and encouraging an amendment that would allow for "a uniform system for implementing Federal death sentences").

5. The DOJ has, on several occasions, asked Congress to amend the FDPA to grant the BOP authority to perform executions "pursuant to *uniform* regulations." H.R. Rep. No. 104-23, at 22 (emphasis added). For example, a 1995 bill would have amended Section 3596 to allow a death sentence to be "implemented pursuant to regulations prescribed by the Attorney General," which the bill's sponsor explained "was the law prior to the passage of [the FDPA]." *Hearing on H.R. 2359 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 2, 10 (1995) (statement of Rep. McCollum); *see also* H.R. 2359, 104th Cong. (1995). That bill was never enacted, and Congress thereafter failed to pass another eight bills that would have allowed the DOJ to develop its own manner of implementing the death penalty and granted the BOP authority to carry out executions. *See, e.g.*, H.R. 1087, 105th Cong. (1997); H.R. 851, 110th Cong. (2007). In connection with the proposed 2006 amendment, the DOJ noted the former "practice and expectation" of housing federal

death-sentenced inmates in state facilities and executing them under state procedures was still "reflect[ed]" in the FDPA. *Death Penalty Reform Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 16 (2006) (statement of Margaret P. Griffey, Chief, Capital Case Unit, Criminal Division, DOJ).

6. The federal government conducted two executions in 2001 and one in 2003. *See* Appl. 9. Those executions are discussed below. *See infra*, 24-25. In 2004, after six bills seeking to amend the FDPA had failed to pass, the BOP adopted a protocol that detailed procedures for carrying out federal executions. App. 5a-6a. Congress repealed the death penalty portions of the Anti-Drug Abuse Act ("ADAA") in 2006, thus "effectively rendering the FDPA applicable to all federal death-eligible offenses," as the Government conceded below. *See United States* v. *Barrett*, 496 F.3d 1079, 1106 (10th Cir. 2007); App. 11a. In 2008, the BOP issued an addendum amending the earlier protocol and stating that federal executions would be carried out using three drugs. *Id.* In 2011, however, the DOJ announced that it lacked the drugs necessary to implement the 2008 addendum and that it was in the process of considering revisions to it. *Id.* No executions took place pursuant to the 2008 addendum.

7. On July 25, 2019, after more than eight years of purported review of the then-existing protocol, the BOP issued another addendum. App. 6a. The 2019 addendum replaces the three drugs specified by the 2008 addendum with a single drug, pentobarbital sodium, and it makes other material changes relating to the

administration of the lethal substance (such as the selection, training and oversight of the execution team). *Id.* At the same time, the BOP replaced the 2004 protocol with a 2019 main protocol (which, together with the 2019 addendum, makes up the 2019 Protocol). *Id.* The BOP has stated that it studied the protocols of several States and claims that it based the 2019 Protocol on those procedures, *see* AR 2-3; AR 858 (although, as discussed below, there are several critical differences between the 2019 Protocol and the protocols of the four States that are at issue here).[3]

8. The first of the consolidated cases challenging the federal execution procedures was filed in 2005. App. 5a. The cases were stayed in 2011, following the DOJ's announcement that it was revising its lethal injection protocol. App. 5a-6a. On July 25, 2019, simultaneously with the announcement of the 2019 addendum, the Government identified five individuals to be executed under the new protocol: Daniel Lee on December 9, 2019; Lezmond Mitchell on December 11, 2019; Wesley Purkey on December 13, 2019; Alfred Bourgeois on January 13, 2020; and Dustin Honken on January 15, 2020.[4]

The pending cases were subsequently reopened, and the Respondents challenged the 2019 Protocol and sought preliminary injunctions (the "PI Motions"). Among other things, the Respondents argued in support of the PI Motions that the 2019 Protocol violates the APA because (1) it is the result of the BOP's *ultra vires*

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[3] References to "AR" are to the Administrative Record, which the Government filed with the District Court as a public document on November 13, 2019. *See* Dist. Ct. Dkt. #39-1.

[4] Mr. Mitchell has not filed a complaint in the proceedings before the District Court, App. 2a n.1, and, in an unrelated case, the Ninth Circuit stayed his execution pending appeal. *See* Order, *Mitchell* v. *United States*, No. 18-17031 (9th Cir. Oct. 4, 2019), *available at* https://bit.ly/2PgPFPZ.

agency action; and (2) it is contrary to the FDPA in that it creates distinct federal lethal injection procedures rather than requiring that executions be implemented "in the manner prescribed" by State law.[5]

9. On November 20, 2019, the District Court granted a preliminary injunction. The court found that the Respondents are likely to succeed on their claim that the 2019 Protocol violates the APA because it is outside the authority conferred by the FDPA, and thus found it unnecessary to reach any other claims.[6] The District Court explained that the statute does not permit BOP "to decide procedures without reference to state policy." App. 8a. In so holding, the court rejected the argument that "Congress only gave the states the authority to decide the 'method' of execution, e.g., whether to use lethal injection or an alternative, not the authority to decide additional procedural details such as the substance to be injected or the safeguards taken during the injection." App. 9a-10a.

The District Court also found that, absent preliminary injunctive relief, the Respondents "would be unable to pursue their claims, … and would therefore be

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[5] The Government states several times in the Application that the Respondents do not dispute that they may be executed by lethal injection. *See* Appl. 2, 5. To be clear, each Respondent has challenged the lethal-injection procedures set forth in the 2019 Protocol. Those challenges are not relevant on appeal because the District Court did not reach those issues in deciding the PI Motions.

[6] In deciding whether the Respondents had a likelihood of success on the merits, the District Court properly restricted its inquiry to one of the Respondents' claims under the APA; having found grounds for relief on that first claim, the court did not need to consider the other APA claims, nor the constitutional challenges to the lethal injection procedures in the 2019 Protocol. *See, e.g.*, *Escambia Cty.* v. *McMillan*, 466 U.S. 48, 51 (1984) (*per curiam*) (noting the "well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"); *Council on American–Islamic Relations Action Network, Inc.* v. *Gaubatz*, 31 F. Supp. 3d 237, 256 n.7 (D.D.C. 2014) (same). It is misleading for the Government to state that the District Court "did not *hold* that the federal protocol violates the Eighth Amendment," Appl. 17 (emphasis added), when the District Court saw no reason to go beyond the threshold issue.

executed under a procedure that may well be unlawful." App. 14a. "This harm," the court stated, "is manifestly irreparable." *Id.* The District Court rejected the Government's argument that it would suffer harm if the executions were enjoined, explaining that "the eight years that [the Government] waited to establish a new protocol undermines its arguments regarding the urgency and weight of [its] interest" in the finality of criminal proceedings. App. 15a. Finally, the court found that "[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." *Id*.

10. On November 22, 2019, the District Court denied the Government's motion to stay the preliminary injunction. The Government thereafter moved before the D.C. Circuit for a stay or vacatur of the preliminary injunction granted by the District Court. On December 2, 2019, the D.C. Circuit denied the Government's motion in a *per curiam* order, finding that the Government "[has] not satisfied the stringent requirements for a stay pending appeal." App. 1a (citing *Nken*, 556 U.S. at 434).

ARGUMENT

A stay pending appeal is available "only under extraordinary circumstances." *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). Accordingly, "[w]hen a matter is pending before a court of appeals, it long has been the practice of members of this Court to grant stay applications only 'upon the weightiest considerations.'" *Fargo Women's Health Org.* v. *Schafer*, 113 S.

Ct. 1668, 1669 (1993) (O'Connor, J, concurring) (quoting *O'Rourke* v. *Levine,* 80 S. Ct. 623, 624 (1960)). The Government has an "especially heavy" burden on this application. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers). In determining a stay pending appeal, this Court considers the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (internal quotation marks omitted). As the D.C. Circuit held, the Government has not satisfied these "stringent requirements" for a stay pending appeal. App. 1a.

The Government attempts to avoid the *Nken* standard by citing to cases where the Court granted stays pending appeals. *See* Appl. 16-17. While one of the cited cases, *San Diegans for the Mt. Soledad National War Memorial* v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers), added preliminary questions regarding the potential granting of certiorari and the result after such a grant, the Court has not dispensed with the four-factor test set forth above in stay applications. To the contrary, in several of the cases cited by the Government, the Court specifically referred to the four-factor standard for stays. *See Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987); *Trump* v. *Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., concurring in part, dissenting in part).

The Government also points to capital cases where this Court summarily vacated a lower court's preliminary injunction, but all of those orders were based on a lower court's failure to make the requisite finding that the petitioner was likely to succeed on the merits. *See* Appl. 37 (citing *Dunn* v. *McNabb*, 138 S.Ct. 369, 369 (2017) (setting aside lower court order because it failed to find "a significant possibility of success on the merits" as required by *Hill* v. *McDonough*, 547 U.S. 573 (2016)); *Brewer* v. *Landrigan*, 562 U.S. 996 (2010) (setting aside lower court order because it failed to make the requisite finding that the execution is "sure or very likely to cause serious illness and needless suffering" as required by *Baze* v. *Rees*, 553 U.S. 35 (2008)); *Sizer* v. *Oken*, 542 U.S. 916 (2004) (summarily vacating stay where lower court did not determine whether there was a significant possibility of success on the merits)); *see also Oken* v. *Sizer*, 321 F. Supp. 2d 658, 667 (D. Md. 2004) ("This Court is not prepared to say that Oken is likely to prevail [on the merits of his claim.]"). Here, of course, the District Court found a likelihood of success on the merits.

As demonstrated below, the Government has not satisfied its "especially heavy" burden of showing likelihood of success on the merits or irreparable harm absent a stay; on the other hand, a stay would alter the *status quo*, with a direct, severe impact on the Respondents. Therefore, like the District Court and the D.C Circuit, this Court should find that no stay is warranted, and that the District Court did not abuse its discretion by ordering the preliminary injunction at issue.

I. THE GOVERNMENT HAS NOT MADE A *STRONG SHOWING* THAT IT IS LIKELY TO SUCCEED ON THE MERITS

In granting the PI Motions, the District Court held that Respondents are likely to prevail on their claim that the 2019 Protocol is unlawful and must be set aside as it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). *See* App. 7a-14a. On this Application, the burden is reversed and the Government must make a "strong showing" that it will prevail on the merits of the APA claim.

The Government cannot satisfy this exacting standard because the 2019 Protocol presents a clear-cut example of an agency exceeding its statutory authority in violation of the APA. The 2019 Protocol is contrary to the mandatory provisions of the FDPA in two ways. *First*, the 2019 Protocol was issued by the BOP, rather than the USMS, and it gives the BOP the power to implement death sentences. *Second*, the 2019 Protocol creates a federal execution protocol that does not implement death sentences in the manner prescribed by State law.[7]

A. The BOP's Issuance of the 2019 Protocol Was *Ultra Vires*.

The BOP lacked authority to issue the 2019 Protocol. Section 3596 of the FDPA, which is entitled "Implementation of a sentence of death," states as follows: "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

[7] In the Application, the Government does not discuss the threshold issue of whether the BOP had the authority to promulgate the 2019 Protocol, even though this question was before the District Court and was fully briefed in the stay proceedings before the D.C. Circuit.

the State in which the sentence is imposed." *Id.* Section 3597 also refers to the USMS's role in implementing death sentences. 18 U.S.C. § 3597(a). Neither section refers to the BOP, nor does the FDPA elsewhere grant any authority to that entity with respect to implementing death sentences. Thus, Congress vested the USMS with the sole authority to carry out sentences under the FDPA.

The Government has repeatedly recognized what the USMS's role should be in implementing death sentences under the FDPA. In a 1994 memo concerning the recently passed FDPA, the USMS General Counsel wrote that, under the statute, "U.S. Marshals will be responsible for the implementation of death sentences." Westbrook Memo., FOIA Files at 19; *see also id.* at 20 ("[T]he most notable aspect [of the FDPA] for the Marshals Services is our responsibility in implementing the Federal sentence.").

Despite the unequivocal language of the FDPA and the Government's recognition that (in accordance with long-standing practice) the USMS implements federal executions under the statute, the 2019 Protocol gives the BOP the primary role in carrying out death sentences. For example, the main protocol is entitled "BOP Execution Protocol," AR 1016, and it states that the procedures in the protocol may be changed *only* by the Director of the BOP or the Warden. AR 1019. Throughout the main protocol, the BOP (including the Warden of USP-Terre Haute)

is identified as the party providing the direction for executions, and the USMS has, at most, a secondary role. *See, e.g.*, AR 1023-24; AR 1029; AR 1031; AR 1033-34.[8]

Other documents from the Government's Administrative Record further establish the BOP's attempted assertion of primacy through the 2019 Protocol. In a summary describing the 2019 Protocol, the BOP makes no mention of the USMS and instead states that the BOP "is responsible for implementing federal death sentences." AR 1 (citing 28 C.F.R. Part 26). A July 24, 2019 memorandum from the BOP (the "July 24 Memo") cites the FDPA and similarly states that "[t]hese provisions require BOP to carry out death sentences." AR 870. While the July 24 Memo states that the BOP will implement death sentences "along with" the USMS, AR 869, it is clear that the 2019 Protocol seeks to put the BOP in charge of executions because the same document also notes that the BOP obtained the USMS's "*deference* to BOP on all matters related to the time, place, and manner of carrying out federal executions." AR 872 (emphasis added).

The Government may contend that it does not matter whether the BOP or the USMS directs the implementation of death sentences because they both are components of the DOJ, controlled by the Attorney General. But Section 3596 does not delegate the authority to implement sentences to the Attorney General.

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[8] The DOJ's announcement of the 2019 Protocol on July 25, 2019 states that the BOP has scheduled the executions pursuant to 28 C.F.R. Part 26. The DOJ announcement omits any reference to Section 3596 of the FDPA or the USMS. *See* Press Release, DOJ, *Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse* (July 25, 2019), https://bit.ly/33RYFQK. In the proceedings below, the Government similarly argued that 28 C.F.R. Part 26 provides the authority for the 2019 Protocol and that the District Court should sever the problematic aspects of the regulation. It appears that the Government has abandoned that argument because the Application relies only on the FDPA as the source of the BOP's authority.

Instead, the statute explicitly requires the Attorney General to release the prisoner to the custody of "a United States marshal" and specifically requires the USMS, not the Attorney General, to supervise the implementation of the sentence. 18 U.S.C. § 3596(a). Nor could the USMS delegate that authority to the BOP consistent with federal regulations, which permit the Director of the USMS to redelegate his powers and functions only to "subordinates," which the BOP is not. 28 C.F.R. § 0.113.

In any event, Section 3596 does not refer to the Attorney General implementing the sentence, just as there is no mention of the DOJ or BOP doing so. To the contrary, the statute states the Attorney General *shall* release the prisoner to the custody of "a United States marshal" and specifically requires the Marshal, not the Attorney General, to supervise the implementation of the sentence. 18 U.S.C. § 3596(a). Congress could have chosen to vest the implementation power with the Attorney General, DOJ or BOP, but instead it went back to the 1937 law (and long-standing practice) by selecting the USMS as the sole implementing entity.

A federal agency "'literally has no power to act * * *unless and until Congress confers power upon it.'" *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986); *see also Manhattan Gen. Equip. Co.* v. *Comm'nr of Internal Revenue*, 297 U.S. 129, 134 (1936) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."). If an agency lacks statutory authorization and instead arrogates to itself

the authority to act, the resulting action must be set aside as *ultra vires*. *Manhattan General*, 297 U.S. at 134 (an *ultra vires* rule "is a mere nullity"); *Catholic Health Initiatives* v. *Sebelius*, 617 F.3d 490, 497 (D.C. Cir. 2010) (Brown, J., concurring) ("When an agency has acted beyond its delegated authority, a reviewing court will hold such action *ultra vires* * * *or a violation of the [APA], 5 U.S.C. § 706(2)(C)."); *Brown & Williamson Tobacco Corp.* v. *Food & Drug Admin.*, 153 F.3d 155, 176 (4th Cir. 1998) (voiding as *ultra vires* an agency rule that conflicted with the governing statute because the agency "exceeded the authority granted to it by Congress"), *aff'd*, 529 U.S. 120 (2000). Accordingly, the BOP's actions in formulating the 2019 Protocol were *ultra vires*, and it is likely that the protocol will be set aside.

B. The 2019 Protocol Would Not "Implement" Death Sentences in the "Manner" Used by the States.

Even assuming the BOP had the authority to issue the 2019 Protocol, the District Court found that the protocol unlawfully seeks to create distinct federal lethal injection procedures without regard to the manner of execution used by the States, as the FDPA requires. The Government characterizes the District Court's ruling as hinging solely on the distinction between a "method" and a "manner" of execution, Appl. 20, but the District Court's analysis was not nearly so cramped. Consistent with this Court's guidance "to give effect, if possible, to every clause and word of a statute," *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1659 (2017) (internal quotation omitted), the District Court looked to § 3596(a) as a whole, and particularly the requirement that a United States Marshal "*shall*

supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." App. 8a (quoting 18 U.S.C. § 3596(a)) (emphasis by District Court). As the District Court correctly recognized, the 2019 Protocol runs afoul of this provision because it delegates "the authority to decide procedures without reference to state policy." *Id*.

The District Court then considered and rejected the Government's argument that the 2019 Protocol is consistent with the FDPA on the basis that the word "manner" in Section 3596 means the "method" of execution, and the States at issue use the same method—lethal injection—that is set forth in the 2019 Protocol. The District Court correctly held that the requirement that the USMS implement the death penalty in accordance with the "manner" used by the State where the prisoner was sentenced broadly refers to more than just the method of execution—it also includes the State's choice of drug(s) and other key procedures. *See* App. 8a-11a.

First, the plain meaning of the word "manner" refers to the *procedures* used by the States—not just the *type* of execution. "Manner" means "a mode of procedure or way of acting." *Merriam Webster's Collegiate Dictionary* 708 (10th ed. 1993). Thus, Section 3596 requires the USMS to implement the federal death penalty using the same "mode of procedure" as the States.

The Government argues that "manner" means "method," and that the "method" of execution refers only to the type of execution in the sense of hanging, lethal injection, or electrocution. *See* Appl. 18-25. But as the District Court

explained, Congress's "use of the word 'manner'" *instead of* "method" indicates that Congress was referring "not just [to] execution method but also [to] execution *procedure*." App. 9a; *see Advocate Health*, 137 S. Ct. at 1659 (when Congress "did not adopt 'obvious alternative' language, 'the natural implication is that [it] did not intend' the alternative").

There is no doubt that the "manner" of execution includes the "method" of execution, but that does not suggest that their meanings are coterminous. Rather, "manner"—consistent with its definition—is broader and includes execution *procedures*. The Government's citations to instances where "manner" has been used to mean the type of execution are thus unavailing. Moreover, contrary to the Government's assertion, "manner" and "method" are not used interchangeably in the legislative history or, in particular, in the 1937 House Report that the Government relies rely on. There, both the Committee on the Judiciary and the Attorney General consistently used the word "method" to refer to the type of execution (e.g., hanging, electrocution, or gas). H.R. Rep. No. 75-164, at 1-2 (1937). But the text of the 1937 law was crafted to require that executions be carried out in the "manner" used by the States, not the "method." Congress' selection of the word "manner" rather than the word "method" was an intentional reflection of the desire to encompass more than just the "method" of execution.

The Government claims that "method" and "manner," as used in the legislative history and text of the 1937 law, are synonymous. *See* Appl. 22-23. If that were the case, however, the federal government would have conducted

executions at *federal facilities* using the State method. It did not. As discussed above, the federal government (with a few exceptions) conducted executions under the 1937 law at State facilities to facilitate compliance with State execution procedures. *See supra*, 5-6.

Notably, the District Court's construction of the statute is consistent with the understanding of USMS at the time the FDPA was enacted, which was that a State's prescribed "manner" of execution involves something more than the "method" of execution. *See supra*, 7-8. Moreover, the legislative history of the FDPA and subsequent attempts to amend it are rife with evidence that the execution *type* is commonly referred to as the "method" of execution, not the "manner" of execution. *See, e.g.*, H.R. Rep. No. 75-164, at 1-2 (letter from the Attorney General and House Report referring to hanging, execution, and gas as "methods" of execution).

The District Court's construction is also consistent with the legislative history, which makes clear that Congress intended the 1937 law to constrain the federal government's authority to create execution procedures and required USMS to defer to the States' decisions about the appropriate manner of execution. *See* H.R. Rep. No. 75-164, at 1; *see also Andres* v. *United States*, 333 U.S. 740, 748 (1948) (referring to the limitations imposed by the 1937 law). That constraint on the federal government's authority is equally applicable to the method of execution and the manner of carrying out the execution, *both* of which have substantial consequences for the inmate. The Government argues that the federal government

should have authority to craft lethal-injection procedures. Indeed, it was the restrictive nature of Section 3596 that drove the repeated efforts from 1995 onwards to amend the FDPA and establish uniform procedures for all federal executions. *See supra* 9-10; *see also United States* v. *Hammer*, 121 F. Supp. 2d 794, 798 (M.D. Pa. 2000) (noting that the federal government's desire for "uniformity in the implementation of federal death sentences" was "contrary to the process which Congress devised"). But that is an argument for Congress to amend the law; it does not permit the Government to ignore the law.

The Government contends that the proposed amendments to the FDPA should not be considered by this Court, *see* Appl. 31-32, but they are highly relevant because they demonstrate the federal government's keen and consistent awareness that the FDPA does not provide for uniformity in the implementation of death sentences, and that it could achieve such uniformity only through legislation. The Government also urges that the post-1994 legislative efforts arose out of a desire to have a uniform method of execution rather than uniform procedures. Appl. 32. This argument, however, does not explain why the DOJ and BOP officials repeatedly referred to the need for uniform procedures, not just uniform methods, in advocating for the amendments. Moreover, the attempts to amend the FDPA continued until 2007, well after all but one State had adopted lethal injection as the method of execution—mooting any need for the federal government to seek authorization to adopt lethal injection as a uniform type of execution.

The Government also suggests that 2001 executions of Timothy McVeigh and Juan Garza, and the 2003 execution of Louis Jones, somehow establish that the Government's new protocol complies with the FDPA. *See* Appl. 26-27. But those executions do not support the idea that the BOP may enact a one-size-fits-all execution method, rather than following the state-prescribed mechanisms required by the FDPA. McVeigh had dropped his appeals by the time of his execution, so it is unsurprising that he did not challenge the method as conflicting with the FDPA's decentralized approach. *See* Jo Thomas, *McVeigh Ends Appeal of His Death Sentence*, N.Y. Times (Dec. 13, 2000); https://nyti.ms/360Mti; R. Willing, *McVeigh's Own Decision Doomed Last Appeal*, U.S.A. Today (June 20, 2001). Jones made no challenges to the execution process, and Garza was convicted and sentenced under the ADAA instead of the FDPA and was executed before the relevant portions of the ADAA were repealed in 2006.

Second, the Government ignores the fact that the FDPA differs from previous statutes in that it mandates "*implementation* of the [death] sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596 (emphasis added). The inclusion of the word "implementation" in Section 3596 is further evidence that "manner" generally refers to the procedures for execution. "Implementation" means "the process of making something active or effective." https://www.merriam-webster.com/dictionary/implementation. In *Hammer*, the court cited a similar definition of "implementation" and concluded: "The implementation of the death sentence [under Section 3596] involves a process

which includes *more than* just the method of execution utilized." 121 F. Supp. 2d at 798 (emphasis added). The *Hammer* court, therefore, held that "the sentence of death must be implemented in a manner consistent with the law of the Commonwealth of Pennsylvania." *Id.* at 797; *see also id.* at 800 ("The implementation of Mr. Hammer's sentence of death is required to be consistent with the procedures set forth in [the Pennsylvania statutes].").[9]

The Government's own use of the term "implementation" supports the District Court's interpretation of Section 3596(a). For example, 28 C.F.R. Part 26 contains a Subpart A entitled "Implementation of Death Sentences in Federal Cases," and it is not limited to the method of execution. *See* 28 C.F.R. § 26.1 *et seq*. Instead, Subpart A includes sections with specific instructions regarding the date, time and place of executions and "other execution procedures." *See id.* Similarly, the 2019 addendum is entitled "Federal Death Sentence Implementation Procedures." As with 28 C.F.R. Part 26, Subpart A, the 2019 addendum does not

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[9] In the submissions below, the Government also relied on several cases in support of its argument that it is not required to follow State execution procedures. The Government has apparently abandoned its reliance on those cases and it does not cite them in the Application. In any event, the cases are inapplicable. For example, in *United States* v. *Bourgeois*, 423 F.3d 501 (5th Cir. 2005), the Fifth Circuit held that the district court in Texas did not violate the FDPA when it ordered that Bourgeois be executed by lethal injection at a place and with drugs to be determined by the BOP and Attorney General. *See id.* at 509. But there was no argument that the Texas procedures could be ignored and no showing that they would be, as the Government seeks to do now. Indeed, the court noted that the federal protocol must be implemented " 'in the manner prescribed by the law of the State in which the sentence is imposed.' " *Id.* The FDPA discussion in *Higgs* v. *United States*, 711 F. Supp. 2d 479, 555 (D. Md. 2010), is *dicta*, since the plaintiff's claim was "not yet ripe for review." In addition, the *Higgs* court's reasoning is unpersuasive. The court stated that the FDPA "speaks to the 'manner' of implementing the sentence without reference to 'procedure,' " *id.* at 556, but failed to recognize that "manner" is defined to include "procedure." And in *United States* v. *Fell*, 2018 WL 7270622, at *4 (D. Vt. Aug. 7, 2018), the court upheld the creation of a federal death chamber in Indiana because Indiana law provides for lethal injection. The court, however, did not sanction the use of that chamber to execute prisoners in a manner different than that prescribed by the relevant States.

simply identify the method of execution; it sets forth "[t]he procedures utilized by the BOP to implement federal death sentences." AR 1069; *see also* AR 1070 ("One of the sets of syringes is used in the implementation of the death sentence and two sets are available as backup.").

Third, the District Court's construction of Section 3596 is consistent with the understanding at the time the FDPA was enacted. As discussed above, the USMS, BOP, and DOJ all recognized that the FDPA required the federal government to carry out executions in accordance with State law. *See supra*, 7-9. The word "law" in Section 3596 includes State "procedures," as the Westbrook Memo noted. *See* Westbrook Memo., FOIA Files at 20 ("[Section 3596] establishes the *procedures* for the implementation of the Federal death penalty.") (emphasis added).

Even now, the federal government has the authority to "use appropriate State or local facilities" and "the services of an appropriate State or local official" or employee to carry out executions—which makes it easier for the USMS to implement the death sentence using all of the State's procedures. 18 U.S.C. § 3597(a). The Government argues that the District Court's interpretation of Section 3596 conflicts with Section 3597. *See* Appl. 26-27. However, nothing in Section 3597 changes that the fact that—whatever the facilities or personnel used—the USMS must implement death sentences and such implementation must be in accordance with State procedures.

When Congress enacted the FDPA, the DOJ understood that it significantly constrained the federal government's authority in implementing the death penalty.

See H.R. Rep. No. 104-23, at 22 ("The proposed procedures contemplate a return to an earlier system in which the Federal Government does not directly carry out executions[.]"). Indeed, it was that understanding that led the DOJ to unsuccessfully lobby Congress to amend the FDPA in 2006, noting that the former "practice and expectation" of housing federal death-sentenced inmates in state facilities and executing them under state procedures was still "reflect[ed]" in the FDPA. *Death Penalty Reform Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 16 (2006) (statement of Margaret Griffey, Chief, Capital Case Unit, DOJ). Accordingly, there is nothing unusual about the FDPA requiring adherence to state procedures; it is consistent with long-standing practice. And if the federal government wants to change that practice, Congress must amend the law.

Fourth, the Government errs in suggesting that it would be too difficult to abide by State procedures for executions, given the variety of protocols and the need to understand them. *See* Appl. 27-28. As described above, Section 3597 allows the government to employ local facilities and expertise in implementing sentences, which would greatly lessen (or eliminate) any such burden. And Congress has already considered and rejected concerns about the attendant burdens on the states relating to carrying out federal executions. *See, e.g.*, *Appendix to Hearing on Minor and Miscellaneous Bills*, Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, 104 Cong., 1st Sess., at 149-51 (Sept. 28, 1995), Letter from Assistant Attorney General Andrew Fois to Honorable Bill McCollum,

Chairman (Oct. 18, 1995) (available on Lexis-Nexis). Should the federal government choose instead to carry out the executions in its own facilities, it has proven that it has no difficulty obtaining protocols it needs from public or other sources.

The Government is also wrong to suggest that the District Court's conclusion would permit States to block implementation of a federal death sentence. App. 28. There is no support for the proposition that a State with a death-penalty protocol would ever attempt to thwart the implementation of a federal death sentence pursuant to the State's own protocol. *Id.* Moreover, the FDPA anticipates situations where the implementation of a sentence cannot take place under the law of the State (including execution procedures) where the sentence was imposed: "If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law." 18 U.S.C. § 3596(a). The statute itself, therefore, provides a straightforward solution to the Government's stated concern and makes plain that the District Court's reading of the text would hardly "subordinat[e] federal law enforcement to states' approval" or "turn the Supremacy Clause on its head." Appl. 28-29. In any event, even if the statute did not provide adequate protection against a State "veto" of executions, that does not give Defendants license to rewrite the law—only Congress can do that.

A proposed amicus brief from several States argues (among other things) that the District Court's interpretation of Section 3596 would unfairly force them to use their limited resources to implement the federal death penalty. Br. of *Amici Curiae* in Supp. of Applicants at 7. There are two responses to this. *First*, to the extent the federal government uses State facilities or personnel, Section 3597(a) requires the USMS to pay such costs. *Second*, the DOJ raised this very issue in unsuccessfully seeking to amend the FDPA soon after its passage. For example, in 1995, the DOJ argued the States should not be burdened with any duties relating to carrying out federal executions, and it complained about the associated expense. *See, e.g.*, *Appendix to Hearing on Minor and Miscellaneous Bills*, Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives, 104 Cong., 1st Sess., at 149-51 (Sept. 28, 1995), Letter from Assistant Attorney General Andrew Fois to Honorable Bill McCollum, Chairman (Oct. 18, 1995). Whether or not the foregoing points on burden and expenses are legitimate, they must be addressed by Congress; agencies cannot resort to self-help when they are frustrated by the legislative process. *Cf. Hammer*, 121 F. Supp. 2d at 799 (noting that, while federal procedures for implementing executions might be preferable, it is not "the process which Congress devised" in the FDPA).[10]

[10] In their Motion for Leave, the States curiously assert that the D.C. Circuit already has "affirmed" the District Court's preliminary injunction and conclusion that the 2019 Protocol likely exceeds statutory authority. Mot. for Leave to File Br. of *Amici Curiae* in Supp. of Applicants, vi. That is incorrect. The Government's merits challenge to the District Court's preliminary injunction remains squarely before the D.C. Circuit, which merely denied the Government's request for a stay pending appeal.

In short, the 2019 Protocol is an attempt to obtain through regulation what the DOJ and BOP could not achieve through legislation. If the Government is unhappy with the FDPA, its sole recourse is to Congress.

C. The 2019 Protocol Differs in Significant Respects from State Procedures.

The Government claims that the 2019 Protocol does not violate the APA because there is no conflict between the federal protocol and the laws of the four relevant States. Appl. 32-33. Setting aside the Government's lack of authority to promulgate and enforce it, the 2019 Protocol *is* different from the relevant State procedures for executions in several material respects.

For example, the District Court examined certain State safeguards on the way in which intravenous lines are inserted. These policies are intended to minimize the risk of maladministration that would exacerbate and prolong a prisoner's suffering. App. 12a. And that is far from the only distinction: In fact, the State laws that govern the executions of two of the Respondents require the use of *different drugs*, which the Government entirely ignores. Additionally, Indiana (the State whose law is applicable to Mr. Honken) and Arkansas (where Mr. Lee's sentence was imposed) use a three-drug sequence, not the one-drug pentobarbital protocol that the 2019 Protocol prescribes. Dist. Ct. Dkt. #29-6 at 15.3. Indiana, Texas (where Mr. Bourgeois's sentence was imposed), and Missouri (where Mr. Purkey's sentence was imposed)—unlike the federal government—require a physician to be involved in executions. AR 70, 91; Dist. Ct. Dkt. #29-6 at 9-12. And

Missouri offers the prisoner a sedative prior to the execution, *see* Dist. Ct. Dkt. #47 at 7, whereas the federal protocol contains no such provision.

Thus, adherence to the 2019 Protocol would result in the Respondents being executed in a manner other than that used by the States where they were sentenced. That result is forbidden by the mandatory language of Section 3596.

II. THE GOVERNMENT WILL NOT BE IRREPARABLY HARMED BY THE PRELIMINARY INJUNCTION

In asserting that it will suffer irreparable harm, the Government cites the effort that has gone into developing the 2019 Protocol and the expense it might incur as a result of any delay in the executions. Appl. 35-36. The preliminary injunction, however, would not itself invalidate the 2019 Protocol. If the Government were to defeat the Respondents' claims in the underlying action, it would be able to proceed with executions (assuming there are no other impediments).

The Government could also mitigate any such harm by pausing its preparations for the executions now. And, even assuming that the Government has invested time and money in the scheduled executions, that is the result of the Government's own choice to schedule five executions on a compressed schedule (all within a five-week period) a mere few months after the July 25 announcement of the 2019 addendum. At the time, the Government knew that legal challenges to the earlier protocol were pending and would be revived when it issued the 2019 Protocol. Indeed, in two of the several cases below challenging the Government's execution protocols, the District Court's stay orders expressly contemplated that

litigation would resume after a new protocol was announced. *See Roane* v. *Barr*, No. 05-cv-2337, Minute Order (D.D.C. July 29, 2011); *Bourgeois* v. *United States Dep't of Justice*, No. 12-cv-782, Dkt. #15 (D.D.C. Jan. 23, 2013). Thus, the Government created this emergency and willfully incurred costs by scheduling execution dates on the same day that it announced the 2019 Protocol, even though it was fully aware that the ongoing challenges would resume immediately. Under the circumstances, the Government cannot now say that the burden of delaying the executions constitutes irreparable harm.

Similarly misguided is the Government's defense of the timetable that it created for the prisoners' executions. The Government argues that the four months between the Government's announcement of its new execution protocol and the execution dates is sufficient time to review the new regulations. The issue, however, is not just the length of time between the announcement and the execution dates, but the fact that the Government, by unilaterally announcing a new protocol on the same morning that it unilaterally scheduled five execution dates, created an "emergency" situation from which it now seeks relief. Indeed, the Government took such action with the full understanding that the new protocol "would be subject to vigorous litigation." AR 872. When balancing the harm to the parties, it is unfair for the Government to invoke a harm that it voluntarily brought upon itself.

III. THE RESPONDENTS WILL BE IRREPARABLY HARMED BY A STAY OR VACATUR OF THE PRELIMINARY INJUNCTION

In contrast to the Government, the Respondents would suffer irreparable harm of the highest order if the preliminary injunction is stayed or vacated. The Respondents would be executed without the opportunity to test the legality of the 2019 Protocol under the APA and before they have had a chance to litigate their other claims of illegality (which are the subject of ongoing discovery). As the District Court found, "[t]his harm is manifestly irreparable." App. 14a.

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 U.S.* v. *Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks omitted). Further, such harm is clearly "beyond remediation" absent continued injunctive relief. *Id.* at 8.

The Government is wrong to assert that Respondents' injuries are "purely procedural." Appl. 36-37. Unlike in *Winter* v. *Natural Defense Council, Inc.*, 555 U.S. 7 (2008), the Respondents do not claim that the Government has merely skipped an intermediary procedural step before taking a lawful action; rather, the threatened agency action itself—execution of the Respondents pursuant to the 2019 Protocol—is itself unlawful. That is no mere procedural violation.

Nor is there any basis to invoke Eighth Amendment case law requiring prisoners to prove a substantial likelihood of unnecessary suffering pursuant to *Baze* v. *Rees*, 553, U.S. 35, 50 (2008). *See* Appl. 36-37 (citing, *e.g., Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1118-19 (2019); *Brewer* v. *Landrigan*, 562 U.S. 996, 997

(2010)). There is no requirement for the Respondents to make such a showing as part of the irreparable harm analysis, and the Government's conjectural briefing on the comparative pain of various lethal injections, Appl. 36, is entirely inapposite.

Finally, the validity of the Respondents' sentences and whether the Government could execute them under a lawful policy in the future, *see* Appl. 36, has no bearing on whether the Respondents will be irreparably harmed by executions under an unlawful policy now. *See, e.g.*, *California* v. *Azar*, 911 F.3d 558, 580-81 (9th Cir. 2018) (irreparable harm present even though agency could in the future reinstate a rule in conformity with the APA). For all of the reasons that the District Court recognized, such injuries will be "manifestly irreparable," App. 14a, and it will not matter whether the Government might have carried out the executions in compliance with their legal obligations at a later date.

IV. A STAY IS NOT IN THE PUBLIC INTEREST

As the District Court explained, "[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." App. 15a. Instead, the public interest lies in ensuring that agencies act in accordance with law. *See Newby*, 838 F.3d at 12. These concerns are only heightened in the context of executions. The public would be ill served if the Respondents were executed pursuant to a procedure without being given a full opportunity to test its legality.

The Government claims that a preliminary injunction is inappropriate given the public's interest in "finality." *See* Appl. 33. A stay, however, would not

undermine the finality of the Respondents' convictions. As the Government recognizes, Appl. 36, the Respondents do not challenge their convictions or their sentences of death here; both will be undisturbed if this Court affirms the preliminary injunction. Furthermore, as noted by the District Court, *see* App. 15a, the Government's suggestion that a stay would undermine finality strains credulity when the Government itself has for so long declined to schedule an execution. The Government not only spent eight years developing an execution method, but spent the last six of those years in the "final phases of finalizing the protocol." *See* Defendant's Status Report of July 3, 2013, *Roane* v. *Gonzalez*, Case No. 1:05–cv–02337–TSC (D.D.C), Dkt. #323. Nowhere does the Government explain or justify the sudden urgency to execute prisoners *now*. *See Osorio-Martinez* v. *Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018) ("[T]he fact that the Government has not—until now—sought to remove SIJ [Special Immigration Juvenile] applicants, much less designees, undermines any urgency surrounding Petitioners' removal.").

Nor does the Government explain why the public interest demands that it proceed with the Respondents' executions before the completion of their merits challenge to the 2019 Protocol. The Government itself suggests, at most, that "*unduly* delaying executions can frustrate the death penalty," Appl. 34 (emphasis added)—not that all delay in executions is categorically contrary to the public interest. Preserving the District Court's injunction while the Respondents litigate the merits of their claims against an unlawful policy will not create any delay that

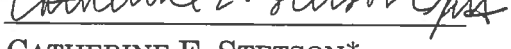
is "undue" or foreclose the "timely enforcement" of their death sentences. Appl. 33 (quoting *Bucklew*, 139 S. Ct. at 1133). It will merely ensure that those sentences are carried out after the Respondents receive the process that they are due.

The Government is also wrong in suggesting that victims' families would be harmed absent a stay. *See* Appl. 33-34. It is the Government that unilaterally scheduled the executions before the legality of the execution procedures could be determined, and therefore created any resulting disappointment for the families. In any event, the Government's argument is belied by the fact that the family members of the victims in Respondent Lee's case have told the DOJ multiple times that they oppose Mr. Lee's execution, as have the trial judge and the prosecutor. Far from being injured by any delay, they have all requested clemency for Mr. Lee from the DOJ. *See* Campbell Robertson, *She Doesn't Want Her Daughter's Killer To Be Put To Death. Should the Government Listen?*, N.Y. Times (Oct. 29, 2019), https://nyti.ms/2DHIX03. Moreover, the public interest as a whole favors ensuring that "statutes enacted by [our] representatives" are not imperiled by Executive fiat. *Maryland* v. *King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers).

CONCLUSION

The Application should be denied.

Respectfully submitted,



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