**CAPITAL CASE**
**EXECUTION SCHEDULED – JANUARY 12, 2021**

No. 20A__

IN THE
# Supreme Court of the United States

LISA MARIE MONTGOMERY
*Petitioner*,
v.

JEFFREY ROSEN, ACTING ATTORNEY GENERAL
OF THE UNITED STATES IN HIS OFFICIAL CAPACITY, ET AL.,
*Respondents.*

## APPLICATION FOR STAY OF EXECUTION

To the Honorable John Roberts, Chief Justice of the Supreme Court of the United States and Circuit Justice for the District of Columbia:

Lisa Montgomery is scheduled to be executed on **January 12, 2021**. Mrs. Montgomery respectfully requests a stay of her execution pending this Court's disposition of her petition for writ of certiorari.

As set forth below and in the petition for certiorari, the district court stayed Mrs. Montgomery's original execution date, December 8, 2020, to permit her counsel sufficient time to prepare a clemency petition after they contracted COVID-19 while visiting her in prison. The Director of the Bureau of Prisons (the "Director") designated a new execution date while the court's stay was in place. That mid-stay designation contravened 28 C.F.R. § 26.3(a)(1): "If the date designated for execution passes by reason of a stay of execution," then the Director "shall" designate a new execution date "*when the stay is lifted*," *id.* (emphasis added), not while the stay is

in effect. The district court therefore properly vacated the improper designation under the Administrative Procedure Act ("APA").

Within days of that ruling, a panel of the U.S. Court of Appeals for the D.C. Circuit took the extraordinary step of summarily reversing the district court, in a per curiam order and without full briefing on the merits. The panel's order is not just the first appellate decision to address the meaning of § 26.3(a)(1). It is also the first and only judicial authority of which we are aware to authorize the rescheduling of an execution during a stay of the execution.

The D.C. Circuit's decision presents two important questions on which this Court is likely to grant certiorari and reverse.

*First*, whether the Director may designate a new execution date during the pendency of a stay is a question of first impression on which the panel clearly erred. Every interpretive signal, from the regulation's text to its structure and purpose, confirms that the Director must forbear scheduling an execution while a stay is pending. The D.C. Circuit's conclusion contradicts that regulation, the background principle it respects—that a court's stay of execution temporarily suspends the Government's authority to designate a new execution date—and this Court's precedent. *See* Sup. Ct. R. 10(c).

*Second*, whether a federal court of appeals may summarily reverse a district court order on a question of first impression, on a motion and without full briefing, is an important and now unsettled question of federal appellate procedure. The panel's decision to summarily vacate the district court here "so far departed from

the accepted and usual course of judicial proceedings" that it "call[s] for [the] exercise" of the Supreme Court's "supervisory power." Sup. Ct. R. 10(a).

The Court should grant a stay of Mrs. Montgomery's execution so it can consider the important questions raised by her petition for certiorari.

## JURISDICTION

The court of appeals entered judgment on January 1, 2021. Mrs. Montgomery's petition for a writ of certiorari was filed on January 9, 2021. The Government set Mrs. Montgomery's execution for January 12, 2021. Pursuant to Supreme Court Rule 23.3, Mrs. Montgomery sought a stay of execution from the court of appeals, which denied Mrs. Montgomery's request. This Court has jurisdiction to entertain Mrs. Montgomery's petition for certiorari and application for a stay of execution under 28 U.S.C. § 1651(a).

## BACKGROUND

Mrs. Montgomery was sentenced to death in April 2008. *See United States v. Montgomery*, 635 F.3d 1074, 1079 (8th Cir. 2011).

On October 16, 2020, the Government scheduled Mrs. Montgomery's execution for December 8 pursuant to 28 C.F.R. § 26.3. After visiting their client, Mrs. Montgomery's capital attorneys contracted COVID-19, rendering them incapable of filing her clemency petition. On November 12, Mrs. Montgomery filed a complaint asserting claims stemming from her lawyers' inability to assist her in the clemency process. Finding merit in the claims, the district court issued a stay of execution lasting "until December 31, 2020." Minute Order I, *Montgomery v. Barr*

*et al.*, No. 1:20-cv-03261 (D.D.C. Nov. 25, 2020); *see* Mem. Op., *Montgomery v. Barr et al.*, No. 1:20-cv-03261 (D.D.C. Nov. 19, 2020). The Government did not appeal the court's stay.

While the stay remained in effect, on November 23, the Government rescheduled Mrs. Montgomery's execution for January 12, 2021. In response, Mrs. Montgomery promptly filed a supplemental complaint asserting claims under the APA. She alleged, *inter alia*, that in rescheduling her execution, the Government violated federal regulations providing that "[i]f the date designated for execution passes by reason of a stay of execution," then the Director "shall" designate a new execution date "when the stay is lifted." 28 C.F.R. § 26.3(a)(1). Mrs. Montgomery moved for partial summary judgment and sought vacatur of her January 12 execution date.

After full briefing and oral argument, the district court granted partial summary judgment for Mrs. Montgomery, holding that "when an execution is postponed in light of a stay, the governing regulation, 28 C.F.R. § 26.3(a), prevents the Director from setting a new execution date until after the stay is lifted." Pet. App. 5a. As the court reasoned, when a regulation "'limits a thing to be done in a particular mode, it includes a negative of any other mode.'" Pet. App. 25a (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000)). Here, "the 'thing to be done' is rescheduling after an execution date lapses by reason of a stay, and the 'particular mode' is 'promptly … when the stay is lifted,'" meaning that rescheduling an execution during a stay is precluded. Pet. App. 25a.

The court considered and rejected the Government's argument that the regulation was not triggered because, at the time they set a new execution date, Mrs. Montgomery's original date had not yet passed. "[T]he phrase 'date designated for execution,'" the court reasoned, "refers to the date of execution subject to the Court's stay, not whatever date the Director subsequently sets." Pet. App. 29a. Indeed, the Government "never suggest[ed]—nor could they suggest—that the December 8, 2020 execution date would have passed had the Court not issued its stay or that the date passed for some other 'reason.'" Pet. App. 29a.

Next, the court held that the Government's contrary interpretation was not entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997), because the regulation is unambiguous and the Government advanced only "post-hoc rationalizations" to support its position. Pet. App. 30a-34a. The court also concluded that the Government's violation of the regulation caused Mrs. Montgomery prejudice sufficient to sustain her APA claim, by depriving her of time to seek legal relief, including through clemency, and to prepare for her death. Pet. App. 35a. Accordingly, the court vacated the January 12 execution date—the "'default remedy' under the APA." Pet. App. 34a-36a.

On December 28, the Government filed a notice of appeal and moved for a stay pending appeal in the district court. The district court denied the Government's request, finding that it satisfied none of the stay factors, and observing that the execution could be scheduled for shortly after the unlawfully designated date. Pet. App. 41a-44a (discussing 28 C.F.R. § 26.4).

The Government then moved the D.C. Circuit for a stay pending appeal or vacatur of the district court's opinion. On January 1, 2021, a panel of the D.C. Circuit construed the Government's motion as one "for summary reversal," concluded that the merits were "so clear as to warrant summary action," and summarily reversed the district court's ruling. Pet. App. 1a. The panel's reasoning was contained in a single sentence: § 26.3(a)(1) "did not prohibit the Director from making that designation [of a new execution date on November 23] … because, at that time, the 'date designated for execution' had not yet 'passe[d].'" Pet. App. 1a-2a.

On January 5, the D.C. Circuit denied Mrs. Montgomery's request for rehearing *en banc*.[1] On January 7, D.C. Circuit denied Mrs. Montgomery's request for a stay pending the disposition of a petition for writ of certiorari.

**REASONS FOR GRANTING THE STAY**

Under *Barefoot v. Estelle*, 463 U.S. 880 (1983), a stay of execution is warranted where there are "substantial grounds upon which relief might be granted." *Id.* at 895. In determining whether to grant a stay, the Court considers whether there is: (1) "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction"; (2) "a significant possibility of

[1] Circuit Judges Garland and Pillard did not participate in consideration of the petition for rehearing *en banc*. App. 45a.

reversal of the lower court's decision"; and (3) "a likelihood that irreparable harm will result if the execution is not stayed." *Id.* (internal quotation marks omitted).

Here, at least four Justices will likely vote to grant certiorari, and at least five Justices are likely to ultimately reverse, with respect to two independent questions: (1) whether 28 C.F.R. § 26.3(a)(1) permits the Director to designate a new execution while the execution is stayed; and (2) whether summary reversal is available for issues of first impression. Further, if Mrs. Montgomery's execution is not stayed pending the Court's review of these questions, she will suffer irreparable harm.

## I. The Court Of Appeals' Interpretation Of § 26.3(a)(1) Is Worthy Of This Court's Review And Likely To Be Reversed

The D.C. Circuit held that the Director may designate a new execution date during the pendency of a stay, notwithstanding the plain language of § 26.3(a)(1). The Court is likely to grant certiorari and reverse because the panel's conclusion contradicts the regulation's unambiguous text, conflicts with the settled principle that a stay of execution temporarily suspends the Government's authority to designate a new execution date, and is inconsistent with this Court's precedent. *See* Sup. Ct. R. 10(c).

1. Section 26.3(a)(1) provides that "[i]f the date designated for execution passes by reason of a stay of execution, then a new date *shall* be designated promptly by the Director of the Federal Bureau of Prisons *when* the stay is lifted." 28 C.F.R. § 26.3(a)(1) (emphases added). The regulation on its face directs the Director—using the mandatory term "shall"—to designate a new execution date

only once "the stay is lifted." The regulation is unambiguous; the Court should therefore presume it "says … what it means and means … what it says." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005)).

Basic "rules of grammar" confirm this reading of § 26.3(a)(1). *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019). "[W]hen the stay is lifted" is an adverbial clause and so necessarily modifies the verb "designated." *See id.* at 964. Moreover, "ordinarily, and within reason, modifiers and qualifying phrases attach to the terms that are nearest." *Grecian Magnesite Mining, Indus. & Shipping Co., SA v. Comm'r*, 926 F.3d 819, 824 (D.C. Cir. 2019). Thus, "when the stay is lifted" should be read to modify "designate[]"—the "nearest possible referent." *Id.*; *see also, e.g.*, *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (applying the "rule of the last antecedent") (quotation omitted). The "new date shall be designated," then, only "when the stay is lifted."

Common canons of construction further support this interpretation. *First*, when a statute or regulation "limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen*, 529 U.S. at 583 (quoting *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871)); *see also* 2A Sutherland, Statutes and Statutory Construction § 47.23 (Norman J. Singer ed., 7th ed. 2020). As the district court explained, "[h]ere, the 'thing to be done' is rescheduling after an execution date lapses by reason of a stay, and the 'particular mode' is 'promptly … when the stay is lifted.'" Pet. App. 25a. By specifying how

and when an execution date "shall" be rescheduled, the regulation necessarily implies that the Director may not designate a new date in other ways, at other times.

*Second*, when a "general permission … is contradicted by a specific prohibition," the interpretive question is "eas[y] to deal with": "the specific provision prevails." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 183 (1st ed. 2012); *see, e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[T]he specific provision is construed as an exception to the general one."). Here, when it comes to rescheduling an execution date that "passes by reason of a stay," the specific limits set out in § 26.3(a)(1) apply—and the Director may not rely on his general power to designate an execution date in other circumstances.

2. The meaning of § 26.3(a)(1) is, on its face, clear. But when combined with the background rule that a stay of execution suspends the Government's authority to designate a new execution date, the point is scarcely contestable. The panel decision not only contravenes well-established interpretive canons, it also erodes a fundamental principle—embodied in judicial authority and the Government's past practice—that the Government may not set a new execution date during the pendency of a stay.

a. In commanding that the Director designate a new date only upon expiration of a stay, federal regulations simply make explicit what is already implicit in a stay of execution. A stay of execution—like any stay—"temporarily

suspend[s]" the Government's "authority to act." *Nken v. Holder*, 556 U.S. 418, 428-29 (2009). As a result, a stay of execution temporarily sets aside the Government's authority to designate a new execution date during the pendency of a stay. All relevant judicial authority, the Government's own past practice, and its prior interpretations have all recognized as much, adhering to the foundational principle that the Government cannot schedule a new execution date during a pending stay.

*First*, every court to consider the issue has concluded that a stay of execution temporarily suspends the Government's authority to designate a new execution date. The Eighth Circuit, for example, has held that when "an order of court staying [an] execution is in full force and effect," the Government may not "resume any preparations for [the] execution" until the "stay of execution [is] finally dissolved." *Smith v. Armontrout*, 825 F.2d 182, 184 (8th Cir. 1987). The Nebraska Supreme Court has noted that such preparations "clearly" include the "setting of execution dates in anticipation of the termination of a stay." *State v. Joubert*, 518 N.W.2d 887, 898 (Neb. 1994); *see also Smith v. State*, 145 So. 2d 688, 690 (Miss. 1962) (federal stay of execution "precludes" request "that a new date be set for the execution of the death sentence").

*Second*, the Government has consistently adhered to this view in setting other federal executions. Dating back to at least 1830, the Executive Branch has "determined to leave the execution of sentences of the law in all cases to the direction of the courts, in full confidence that they will give a reasonable time for the exercise of executive clemency in cases where it ought to be interposed." Death

Warrants, 2 Op. Att'y Gen. 344, 345 (1830), 1830 WL 856. The Government has, until now, consistently respected this judicial role: For every execution scheduled since the Government resumed capital punishment in 2019, when the prisoner has obtained a stay of execution, the Government has waited until the expiration of the stay to set a new execution date. Indeed, Mrs. Montgomery's case is the only instance we could find since the regulations went into effect in 1993 in which the Government has designated a new execution date while a court's stay of execution was in place. *See* Declaration of Zohra Ahmed in Support of Plaintiff Lisa Montgomery's Motion for Partial Summary Judgment, Ex. 1, *Montgomery v. Barr et al.*, No. 1:20-cv-03261 (D.D.C. Dec. 15, 2020).

*Third*, the Government's own written interpretations are consistent with this understanding. The Government explicitly acknowledged, in promulgating the subject regulations in 1993, that its authority to set execution dates derives from that of the courts. *See* Implementation of Death Sentences in Federal Cases, 58. Fed. Reg. 4,898, 4,899 (Jan. 19, 1993) ("The Department is authorized to rely on the authority of the federal courts, acting pursuant to the All Writs Act, 28 U.S.C. [§] 1651(a), to order that … sentences be implemented."). Section 26.3 extends that authority to the Director under certain circumstances, subject to a court's superior authority to order otherwise. *See* 28 C.F.R. § 26.3(a). The Government's description in the promulgating commentary of § 26.3's purpose makes plain its understanding that when a court has issued a stay, the Government will forbear action in furtherance of the execution. The Government explained that vesting the Director

with the power to designate an execution date "will obviate the practice, which is a pointless source of delay in state cases, of seeking a new execution date from the sentencing court each time a higher court lifts a stay of execution that caused an earlier execution date to pass." Notice of Proposed Rulemaking, Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992). The implication of that statement is that, when § 26.3 was written, the Government understood that it could seek a "new execution date" only after a "court lifts a stay of execution." *Id.* The regulations do not break with the background principle that a judicial stay suspends the Executive's authority to act; they reaffirm it, by stating that the Director would have the power to designate a new date "when the stay is lifted." *Id.* Nothing in those regulations even hints that the Government thought the Director would be permitted to reschedule an execution while a stay remained in effect. *See Meyer v. Holley*, 537 U.S. 280, 287 (2003) (when a text "has not expressed a contrary intent, the Court has drawn the inference that it intended ordinary rules to apply").

This understanding has continued through the years: The Government's authority to schedule executions yields to the power of the Judicial Branch over the same matter. As the Government explained when promulgating amendments to related regulations, "Section 26.3(a)'s prefatory language … authoriz[es] BOP's Director to set an execution date and time '[e]xcept to the extent a court orders otherwise,'" and "nothing" in the regulations "alters the courts' power to set aside or postpone execution dates pursuant to their authority to issue stays and

injunctions." Manner of Federal Executions, 85 Fed. Reg. 75,846-01, 75,850 (Nov. 27, 2020).

Similarly, the Government's lethal-injection execution protocols, adopted in 2004, and revised in 2019 and 2020, have always explained that "[i]f the date designated passes by reason of a stay of execution, then a new date will be promptly designated by the Director of the BOP *when the stay is lifted*." Administrative Record at 53, 111, 165, *Montgomery* v. *Barr et al.*, No. 1:20-cv-03261 (D.D.C. Dec. 13, 2020) (emphasis added).

And last, the Government has described § 26.3, in at least one prior court filing, as specifying that the Government's authority to reschedule an execution arises after a stay is lifted. *See, e.g.*, Brief for the United States in Opp'n to Appl. for Stay of Executions and to Pet. for Cert., *O'Keefe v. Barr*, Nos. 20A11, 20-23, 2020 WL 4015846 at *21 (July, 2020) (explaining that the "execution date was stayed until June 12, 2020," and that "once the stay was lifted, BOP promptly re-scheduled the executions, consistent with the applicable regulation" (emphases added) (citing 28 C.F.R. § 26.3(a)(1))).

The Government has never cited a single authority, in case law or otherwise, suggesting it may designate a new execution date during a stay. Every available authority contemplates, to the contrary, that the Director will designate a new execution date only after a court's stay has expired, just as the plain text of the regulation commands. Construing the regulation to permit the Director to act de-

spite the existence of a stay thus conflicts with the long-recognized allocation of authority between the Judiciary and the Executive Branch.

b. The panel's ruling is the first ever to depart from this understanding and approve the scheduling of an execution during a stay. The novelty of the rule created below confirms its error.

This Court has long cautioned against interpretations that cast aside background norms, emphasizing that legal rules "are to be read with a presumption favoring the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, (1952). The rationale for that presumption is straightforward: Absent evidence to the contrary, courts can fairly assume that laws are enacted against the background of established principles and with an intention to preserve them. *See Neder v. United States*, 527 U.S. 1, 21-22 (1999) ("It is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)) (brackets and alteration in *Neder*)); *see also, e.g.*, *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1016 (2020); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911).

Regulatory "language cannot be considered in a vacuum." *E.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). There is no indication that the Attorney General sought to jettison the usual rule here. As explained (*supra* 7-9),

every interpretive tool confirms that the Director must wait until the stay is lifted before designating a new date. The regulation does not explicitly authorize the Director to reschedule an execution despite an order by an Article III court staying that execution—and the Attorney General did not hide that authority in a mousehole.

3. Without the regulatory text, structure, or any prior authority on its side, the panel's holding rests entirely on the conclusion that the original "'date designated for execution' had not yet 'passe[d]'" when the Director rescheduled Mrs. Montgomery's execution for January 12. Pet. App. 2a. That interpretation cannot be squared with the regulation's text or common sense. The regulation refers to the execution date subject to the stay. That date passes by reason of a stay regardless of whether the Director purports to schedule a new date beforehand. When a stay of execution renders an execution date inoperable, the "date designated for execution passes by reason of a stay of execution." 28 C.F.R. § 26.3(a)(1).

The panel holding implausibly suggests that the date that was stayed does not pass "by reason of a stay" so long as the Director designates a subsequent date in view of the stay. That is like saying a barbeque was rescheduled to avoid rain in the forecast, but not because of rain. Mrs. Montgomery's reading "makes sense of the overall provision, which, in the first sentence instructs the Director to set a date for execution, and in the second, permits the Director to set a subsequent date 'when the stay is lifted." Pet. App. 29a. The panel's reading of the second sentence, by contrast, deprives half of the first clause of meaning: It asks whether the initial

"date designated for execution passe[d]," but not (as the rest of the clause demands) whether the "reason" the initial execution date could not go forward was a stay. 28 C.F.R. § 26.3(a)(1). As the district court found, a date designated for execution passes "by reason of a stay" regardless whether the Government purports to designate a second date beforehand. Pet. App. 28a-29a.

Furthermore, under the panel's contrary construction, the Director would have unfettered discretion to reschedule an execution date whenever he chooses, even during a stay, up until the moment of the original date. Such a reading renders the phrase "when the stay is lifted" superfluous. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668-69 (2007) (rejecting regulatory interpretation that rendered language "mere surplusage"). If the Director can reschedule an execution date notwithstanding a stay, there is no need for the regulation to specify that a new date be designated only once "the stay is lifted." 28 C.F.R. § 26.3(a)(1). The Government's reading is also illogical. Under its interpretation, if a stay is in effect, then up until the date passes, the Director can reschedule an execution date whenever he chooses; once the date passes, however, the Director's authority is frozen until the stay is lifted. That makes no sense.

Reading § 26.3(a)(1) as the district court did, to preclude the designation of a new execution date when a stay is in place, comports with the regulation's purpose of "ensur[ing] [the] orderly implementation of death sentences." 57 Fed. Reg. at 56,536. Section 26.3—together with § 26.4, which specifies that a prisoner must receive 20 days' notice of a new execution date after a lengthy postponement—

ensures that a substantial stay of execution will be followed by a definite period before execution. That 20-day period gives an individual facing execution the opportunity to consider and pursue appropriate then-ripe legal remedies in the wake of a decision dissolving a stay and ensures adequate time for appellate review.

Under the panel's view, in contrast, the Government could reschedule an execution for the minute after a lengthy stay is vacated. That rule would frustrate judicial review of orders vacating a stay and impede the ability to pursue legal remedies after a stay is vacated. It would also generate efforts to pursue emergency relief and might promote otherwise-avoidable interlocutory appeals to forestall the possibility that a decision vacating a stay will lead to an immediate execution—chaos that the regulations on their own terms seek to avoid, by requiring the 20-day period between the expiration of the lengthy stay and the new execution date. 28 C.F.R. § 26.4.

4. The Director's ability to designate a new execution date during the pendency of a stay is a question of exceptional importance, not only to Mrs. Montgomery, but also to the more than 50 prisoners currently on federal death row.[2] As explained, the purpose of the federal regulations is to ensure the "orderly implementation of death sentences." 57 Fed. Reg. at 56,536. Section 26.3 and § 26.4 work together to advance that goal by guaranteeing that a substantial stay is

[2] Death Penalty Information Center, *List of Federal Death-Row Prisoners*, https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last visited Jan. 9, 2021).

followed by a definite 20-day period before execution—a period of time that allows executive and judicial officers to carry out their own responsibilities, gives an individual facing execution the opportunity to consider and pursue appropriate legal remedies in the wake of a decision dissolving a stay, and ensures that appellate courts have adequate time for meaningful review.

If § 26.3(a)(1) does not restrict the Government's ability to set an execution date for any of these prisoners while a stay is lawfully in effect, federal inmates will be denied time to which they are legally entitled to submit clemency petitions and have those petitions duly considered. Federal law recognizes that prisoners have a legally cognizable interest in "meaningful access" to clemency proceedings—the "'fail-safe' of our [criminal] justice system." *Harbison v. Bell*, 556 U.S. 180, 194 (2009). Further, prisoners condemned to death will be deprived of guidance on the timing of their executions, meaning they and their families will not have the clarity needed to "prepare, mentally and spiritually, for their death[s]." *Ford v. Wainwright*, 477 U.S. 399, 421 (1986) (Powell, J., concurring). The execution regulations themselves recognize the importance of having such time to prepare. *See* 57 Fed. Reg. at 56,536 (regulations "enable the prisoner and his immediate family to prepare themselves for the execution").

5. Though there is no circuit split on the specific interpretation of § 26.3(a)(1), the decision below is in grave tension with prior decisions. This Court routinely grants certiorari to address regulatory and statutory questions of "unusual importance," even in the absence of a conflict. *Massachusetts v. E.P.A.*,

549 U.S. 497, 506 (2007). Indeed, just this Term, the Government sought—and obtained—a writ of certiorari on a case that raised only claims of statutory interpretation and did not involve a circuit split. *See Trump v. Sierra Club*, No. 20-138, 2020 WL 6121565, at *1 (U.S. Oct. 19, 2020); *see also, e.g.*, *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1750 (2019) (interpreting the Class Action Fairness Act without circuit split); *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 938 (2017) (interpreting Federal Vacancies Reform Act of 1998 without circuit split); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 57–58 (2004) (granting certiorari to decide whether ability to "compel agency action unlawfully withheld or unreasonably delayed" under the APA extended to review of Bureau of Land Management's statutory obligations without mention of circuit split (quotations omitted)); *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) (interpreting Taylor Grazing Act and implementing regulations without circuit split).

## II. The Court Of Appeals' Use Of Summary Reversal On An Issue Of First Impression Is Worthy Of Review And Is Likely To Be Reversed

The Court is also likely to grant certiorari and reverse because the D.C. Circuits use of summary reversal in this case is a marked departure from the usual conduct of judicial proceedings and creates the possibility of confusion for the lower courts over when summary reversal is appropriate. *See* Sup. Ct. R. 10(a).

1. The practice of this Court and of every court of appeals is to give considered attention to novel questions of first impression.

This Court's own summary reversal precedent makes clear that "summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999); *see also CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 840 (2009) (summarily reversing where court of appeals committed "clear error" when applying a prior decision of the Supreme Court); *Allen v. Siebert*, 552 U.S. 3, 7 (2007) (summarily reversing where prior decision of Supreme Court "preclude[d]" the "Court of Appeals' approach"); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (summarily reversing because error was "obvious" in light of binding precedent); *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (summary disposition "usually reserved by th[e] Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error").

Decisions and rules of courts of appeals likewise state that summary reversal is not available on a new or unanswered question of law. *See, e.g.*, *Dunn v. Wells Fargo Bank, N.A.*, No. 20-1080, 2020 WL 1066008, at *1 (7th Cir. Feb. 25, 2020) (internal quotation marks omitted) (observing that summary disposition is appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists"); *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004) (noting that summary disposition is "used by appellate courts to resolve cases which do not raise novel or complex questions"); *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994)

(summary disposition appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists"); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) (summary disposition appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," or where "the appeal is frivolous"); 1st Cir. Handbook R. 27.0 ("[T]he court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious error the court may, similarly, reverse."); 3d Cir. R. 27.4 ("A party may move for summary action … reversing a judgment, decree or order, alleging that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action."); 10th Cir. R. 27.3(A)(1)(b) ("A party may file only the following dispositive motions … a motion for summary disposition because of a supervening change of law or mootness.").

Of course, exigent issues arise that require the immediate attention of the courts. This Court's own efforts to handle legal questions relating to the country's public health emergency are but one example. But this was no emergency. Summary reversal is inappropriate when the circumstances permit reasoned consideration, as they did here: Mrs. Montgomery asserted her claim promptly after her execution was improperly designated; the Government appealed nearly three weeks before the date it sought to secure; and a court may always ensure that

important issues receive due deliberation by using a stay to preserve the status quo, as this Court frequently does. *See, e.g.*, *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019); *Trump v. Sierra Club, et al.*, 140 S. Ct. 1 (2019). There was no practical impediment to plenary consideration of the opinion below and the claim it vindicated.

2. The traditional standards delimiting summary reversal serve an important purpose in our judicial system. Summary dispositions are fundamentally unfair to the litigants, depriving them of the opportunity for full briefing and argument. *See Presley v. Georgia*, 558 U.S. 209, 217-18 (2010) (Thomas, J., dissenting) ("I am unwilling to decide this important question summarily without the benefit of full briefing and argument."); *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) ("I am sure that, if we are to decide this case, we should not do so without briefing and argument."); *Montana v. Hall*, 481 U.S. 400, 405-06 (1987) (Marshall, J., dissenting) (summary disposition "deprive[s] the litigants of a fair opportunity to be heard on the merits"). Summary reversal in particular fails to "accord proper respect for the judgments of the lower courts," when "[t]he judges below *have had* the benefit of full briefing on the merits and review of the entire record" but the court of appeals has not. *Hall*, 481 U.S. at 408-409 (Marshall, J., dissenting). Summary disposition likewise deprives courts of a decisional process that is designed to enable judges to reach the correct outcome across cases. *Cf.* Fed. R. Pet. App. P. 1, Advisory Committee Note (1979 Amendment) ("Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in

appeals to the courts of appeals, covering all steps in the appellate process."). This Court has itself recently recognized the importance of procedural regularity to the integrity and proper functioning of our judicial system. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) (reversing based on Court of Appeals' procedural error of appointing three amici to brief and argue legal issues not raised by the parties).

3. The panel's decision conflicts with this well-settled precedent and threatens to erode the ordinary procedures of appellate review.

Here, the question before the court of appeals concerning the construction of § 26.3(a) was concededly a novel one, *i.e.*, a "new or unanswered question of law." *See* Resp. to Pet. for Reh'g at 8, *Montgomery* v. *Rosen, et al.*, No. 20-5379 (D.C. Cir. Jan 4, 2021). Indeed, the decision below was the first ever to address the meaning of § 26.3(a)(1) and determine that an execution may be scheduled during a stay. The decision below thus necessarily did not depend on a "demonstrably erroneous application of federal law," *Dyson*, 527 U.S. at 467 n.1, that warrants summary reversal. Rather, all prior judicial authority concerning the broader question of whether the Government may schedule an execution during a stay indicated that the district court's decision was a *correct* application of law.

In summarily reversing the district court's well-reasoned, careful opinion on a matter of first impression, the panel "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Under the approach taken by the panel, any

case on which the panel disagrees with the merits can be summarily reversed without full briefing, thereby subverting the regular appellate process, inevitably reaching wrong, hasty results, and contradicting this Court's own practice regarding summary dispositions. The Court "has a significant interest in supervising the administration of the judicial system" and the "Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010).

Members of this Court have recognized that its own use of summary disposition amounts to "bitter medicine," *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting), to be dispensed infrequently, but this Court has provided only limited guidance to the lower courts regarding the standard governing the availability of summary reversals. This case provides the ideal opportunity for the Court to provide that guidance.

## III. Mrs. Montgomery Will Suffer Irreparable Harm Absent A Stay

Mrs. Montgomery will plainly suffer irreparable harm unless this Court stays her execution pending disposition of her petition for certiorari. Absent a stay, Mrs. Montgomery will be unlawfully executed and, as the Supreme Court has made clear, an "execution is the most irremediable and unfathomable of penalties." *Ford*, 477 U.S. at 411 (plurality op.).

Further, unless her execution is stayed, Mrs. Montgomery will have "diminish[ed] … time" "'to seek legal relief from her death sentence,' including

through the clemency process"—time to which she is lawfully entitled. Pet. App. 36; *see In re Fed. Bureau of Prisons Execution Protocol Cases*, No. 20-5361, Order at 5 (D.C. Cir. Dec. 10, 2020) (Wilkins, J., dissenting) ("[D]enial of time for … further consideration" of a "clemency petition[]" "is itself irreparable harm."); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("irreparable harm … necessarily present in capital cases"). Absent a stay, Mrs. Montgomery will also be deprived of time to "prepare, mentally and spiritually, for [her] death," *Ford*, 477 U.S. at 421 (Powell, J. concurring); *see also* 57 Fed. Reg. at 56,536 (regulations "enable the prisoner and his immediate family to prepare themselves for the execution").

## CONCLUSION AND PRAYER FOR RELIEF

Ms. Montgomery respectfully requests that the Court grant this application, stay her execution, and grant any other relief that the Court may find just.

Respectfully submitted this 9th day of January, 2021,

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