OCTOBER TERM, 2020

IN THE SUPREME COURT OF THE UNITED STATES
CASE NO. 20-927

UNITED STATES OF AMERICA,
Petitioner,

v.

DUSTIN JOHN HIGGS,
Respondent.

On Petition for Writ of Certiorari Before Judgment to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI/MANDAMUS

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

In 2001, the district court entered a written sentencing judgment and order that was drafted by the Government in accord with regulations issued by the Department of Justice. The judgment directed that Mr. Higgs's death sentence on the nine capital counts was imposed "as provided on pages 3-6 of this judgment" and also "imposed pursuant to Title 18, United States Code, Sections 3591 through 3597, including particularly Sections 3594 at 3596." App. 21a. Nearly twenty years later, the Government moved to amend the sentencing judgment. Before obtaining a ruling from the district court, the Government set a date for Mr. Higgs's execution. The district court denied the Government's motion, ruling that it had no authority to amend a judgment of sentence. App. 1a–17a. The Government appealed to the Fourth Circuit, and in the alternative asked for a writ of mandamus. After reviewing the briefs, the Fourth Circuit set oral argument on the appeal for January 27, 2021, in order to address "the novel legal issues presented." App. 29a. The Government has now requested that this Court grant either a petition for writ of certiorari before judgment or a writ of mandamus, and summarily order the district court to amend the sentencing judgment. The question presented is:

Has the Government shown any reason why this Court should abrogate the normal appellate process and summarily order relief on behalf of the Government, without allowing the Fourth Circuit to address the merits of the case?

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INTRODUCTION

The Government admits that it does not now have the authority to execute Mr. Higgs: "[T]he execution of Dustin John Higgs is scheduled for Friday, January 15, 2021[,] but currently cannot go forward on that date because the district court has refused to designate a State to supply the law governing the manner of implementing the sentence, *see* 18 U.S.C. § 3596(a)." Gov't Mot. to Dispense With, or Alternatively Expedite, Oral Arg. 1, *United States v. Higgs*, No. 20-18 (4th Cir. Jan. 8, 2021), ECF No. 18 (hereinafter Mot. to Expedite). It has apparently recognized that fact since at least August, when it moved to amend the sentencing judgment and order in Mr. Higgs's case, requesting that the district court designate Indiana as the state whose law would govern. JA59–60.[1]

Mr. Higgs opposed the Government's motion for leave to amend, and the parties briefed the issue. Without waiting for a decision from the district court, on November 20, 2020, the Government scheduled Mr. Higgs's execution for January 15, 2021. The Government's actions since then have apparently been driven by the desire to execute Mr. Higgs before President-elect Joseph Biden is inaugurated on January 20, 2021. *See* App. 8a.

In late December, the district court denied the Government's motion to amend the sentencing judgment and order. App. 1a–17a. The Government both appealed and

[1] We cite to documents contained in the joint appendix filed by the parties in the Fourth Circuit as "JA." *See* Joint App., *United States v. Higgs*, No. 20-18 (4th Cir. Dec. 31, 2020), ECF No. 7.

asked, in the alternative, for mandamus. The parties briefed the appeal. The Fourth Circuit then set the case for oral argument on January 27. Order, App. 27a–28a. The Government moved to expedite or dispense with oral argument, and demanded that the Fourth Circuit rule by January 12. Mot. to Expedite 1. The Fourth Circuit denied that motion "in light of the novel legal issues presented." App. 29a.

Without waiting for the Fourth Circuit to review its appeal, the Government has now come to this Court, asking it to grant certiorari before judgment or mandamus and summarily direct the district court to amend its judgment before the execution date chosen by the Government. This request should be denied, both because there is no emergency, and because there is no basis for a grant of mandamus or certiorari before judgment.

First, there is no emergency. Assuming that it ultimately finds it has jurisdiction—a matter that is currently under dispute—the Fourth Circuit will hear the merits of the Government's appeal and mandamus petition. It will hear oral argument on January 27, and likely will issue a decision on the merits, and/or on jurisdiction, shortly thereafter. Both Mr. Higgs and the Government will thus know their legal position within a matter of weeks, and if the Government's appeal is successful, it will then be able to set a new execution date. If the Government's appeal is unsuccessful, it can seek relief from this Court in the normal course.

Second, the Government cannot show it is entitled to either of the extraordinary remedies it has requested.

Certiorari before judgment is to be granted "only upon a showing that the case is of such public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. The Government has not even attempted to make such a showing. The underlying legal issue about whether a trial court can amend a sentencing order to change the designation of state law contained in that order appears to be present in a grand total of three cases. *See* App. 14a. But in two of those cases, federal post-conviction proceedings are underway and will almost certainly not conclude before the Fourth Circuit renders a decision here. *See id.* So in reality the only justification for seeking certiorari before judgment is for this Court to forthwith require Judge Messitte to issue an order authorizing Mr. Higgs's execution this week. The Government's desire to execute Mr. Higgs as soon as possible is a far cry from the interests at stake in the very limited number of cases in which this Court has allowed certiorari before judgment. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 686–87 (1974) (granting petitions for certiorari before judgment to decide discoverability of Watergate tapes). Because certiorari before judgment in this case would have no broader significance—and because the Fourth Circuit in the normal course will address the legal issues within a matter of weeks—this case does not present any issue of overwhelming public importance.

The writ of mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey,* 332 U.S. 258, 259–60 (1947). "[O]nly exceptional circumstances amounting to a judicial usurpation of power," *Will v. United States*, 389 U.S. 90, 95 (1967) (citation and internal quotation marks omitted),

or a "clear abuse of discretion," *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S. at 95.

The first requirement for issuance of a writ of mandamus is that "the party seeking issuance of the writ have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004) (citations and internal quotation marks omitted; alteration in *Cheney*). The Government cannot meet that condition because it can obtain the relief it seeks through the regular appeals process in the Fourth Circuit. The second requirement is that the petitioner must satisfy its "burden of showing that the right to issuance of the writ is 'clear and indisputable.'" *Bankers Life*, 346 U.S. at 384 (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)). The Government cannot meet that condition "in light of the novel legal issues presented." App. 29a. The third requirement is that, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, . . . be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381 (citations omitted). The Government cannot meet that condition because it cannot show any overarching need to disrupt the normal appellate process and have this Court insert itself to decide the merits of an appeal already pending in the court below.

The Government makes only a half-hearted attempt to justify issuance of a writ of mandamus in the circumstances of this case. Pet. 31. It makes no attempt at all to justify grant of a petition for writ of certiorari before judgment pursuant to Sup.

Ct. R. 11. It has not even requested expedited briefing, though normally Respondent would have thirty days to respond to a petition for writ of certiorari (even before judgment) or a mandamus petition. Nor has it given any reason why the Fourth Circuit is incapable of resolving the issues in this case. Because the Government has shown no reason for the extraordinary intervention it has requested from this Court, its Petition should be denied.

JURISDICTION

The Government invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) or alternatively under 28 U.S.C. § 1651. Pet. 2. Section 1254(1) grants jurisdiction over cases that are "in" the courts of appeals. This means at least that the district court order appealed from was a final appealable order. *Nixon*, 418 U.S. at 690–92. At a minimum, this Court would have to answer that "threshold question," *id.* at 690, before determining that it has jurisdiction under § 1254(1). This jurisdictional issue—which like the merits will soon be addressed by the Fourth Circuit—is another reason why the Court should decline to take the extraordinary measures urged by the Government.

COUNTERSTATEMENT OF THE CASE

A. Trial and Sentencing

During the early-morning hours of January 27, 1996, Tanji Jackson, Tamika Black, and Mishann Chinn were found dead of gunshot wounds along Route 197 in the Patuxent National Wildlife Refuge in Prince George's County, Maryland. Willis Haynes, Victor Gloria, and Mr. Higgs were all eventually charged in the killings. Mr.

Haynes's and Mr. Higgs's cases were severed for trial; Mr. Gloria pleaded guilty and was the Government's key witness at both trials. Mr. Haynes was tried first; although the Government sought the death penalty against him, he received a life sentence. *See United States v. Haynes*, 26 F. App'x 123, 126 (4th Cir. 2001).

Mr. Higgs was tried next. The case against him was based primarily on the testimony of Mr. Gloria. *See United States v. Higgs*, 353 F.3d 281, 289 n.1 (4th Cir. 2003) ("Most of the facts surrounding the murders of the three women were obtained from [Mr. Gloria's] eyewitness testimony."). Mr. Gloria testified that during an evening of socializing at Mr. Higgs's apartment, an argument took place between Mr. Higgs and Ms. Jackson. *Id.* at 289. According to Mr. Gloria, this argument led Mr. Higgs to want to have the victims killed. *Id.* at 289–90. Mr. Gloria testified that after the three women left the apartment following the fight, Mr. Higgs retrieved a gun and told Mr. Haynes to get the three women into Mr. Higgs's vehicle. *Id.* at 290. Mr. Gloria testified that he then got in the back seat of Mr. Higgs's vehicle and observed Mr. Higgs drive the three women to a secluded location along Route 197 while having whispered conversations with Mr. Haynes, pull over, and hand Mr. Haynes the gun with which to carry out the killings. *Id.* While other evidence supported Mr. Higgs's presence at the scene, the allegation that Mr. Higgs aided, abetted, or caused Mr. Haynes to commit the killings was unsupported by any evidence other than Mr. Gloria's testimony.

On October 11, 2000, Mr. Higgs was found guilty of three counts each of first-degree premeditated murder, first-degree murder committed during a kidnapping,

and kidnapping resulting in death, along with firearms charges. *See Higgs*, 353 F.3d at 289. Following a sentencing hearing, the jury recommended death sentences on the nine death-eligible counts. *Id.*

Formal sentencing was held on January 3, 2001. The district court filed its written judgment on January 9, 2001. App. 18a–26a. The written judgment was drafted by the Government, pursuant to internal Department of Justice regulations then in force. *See* JA120–21; *see also* 28 C.F.R. § 26.2 (effective to Dec. 27, 2020; superseded by new regulations originally published at 85 Fed. Reg. 75,846 (Nov. 27, 2020)). Mr. Higgs objected to the Government's proposed judgment as going "beyond what is required by Rule 32 of the Federal Rules of Criminal Procedure or by the relevant statute." JA121–22. Counsel for Mr. Higgs explained that the proposed judgment constituted an effort "to incorporate the current C.F.R. administrative regulations of the Department of Justice into the judgment and commitment" and would thus "be essentially arbitrary, capricious, to be cruel and unusual. It is an improper delegation of executive function, a violation of separation of powers and could also be a violation of due process." JA122. The Government responded that there was "ample authority for [the district court] to enter the order as drafted," JA123, which the district court did, JA123–24.

The judgment directed that Mr. Higgs's sentence on the nine capital counts was imposed "as provided on pages 3-6 of this judgment" and also "imposed pursuant to Title 18, United States Code, Sections 3591 through 3597, including particularly Sections 3594 at 3596." App. 20a.

B. Direct Appeal and Post-Conviction Proceedings

The Fourth Circuit upheld the convictions and sentences on direct appeal. *Higgs*, 353 F.3d at 289. While the direct appeal was pending, Mr. Higgs filed a motion for a new trial, alleging that the Government had improperly withheld exculpatory material relating to two witnesses. The district court denied the motion for new trial, and the Fourth Circuit again affirmed. *United States v. Higgs*, 95 F. App'x 37, 38 (4th Cir. 2004).

Mr. Higgs filed motions for post-conviction relief under 28 U.S.C. § 2255 and 28 U.S.C. §2241, but did not receive relief. *United States v. Higgs*, 711 F. Supp. 2d 479, 557 (D. Md. 2010), *aff'd*, *United States v. Higgs*, 663 F.3d 726, 730 (4th Cir. 2011); *United States v. Higgs*, 193 F. Supp. 3d 495, 496 (D. Md. 2016), *certificate of appealability denied*, Order, *Higgs v. United States*, No. 16-15 (4th Cir. Feb. 23, 2017), ECF No. 14; Order, *In re Higgs*, No. 16-8 (4th Cir. June 27, 2016), ECF No. 14; *Higgs v. Watson*, No. 20-2129, 2021 WL 81380, at *1 (7th Cir. Jan. 11, 2021).

C. The Proceedings Below

On August 4, 2020, the Government moved to amend Mr. Higgs's final judgment in the District of Maryland, requesting that the district court amend Mr. Higgs's judgment to designate Indiana as the state implementing his death sentence, pursuant to 18 U.S.C. § 3596. JA59–60. As the Government conceded in its motion, because Maryland had abolished the death penalty following Mr. Higgs's sentencing, *see, e.g.*, *Bellard v. State*, 157 A.3d 272, 274–75 (Md. 2017), Mr. Higgs's death

sentence was no longer enforceable pursuant to the existing judgment. JA60. ("The U.S. Marshal cannot implement sentence based on a non-existent statute.").

Mr. Higgs filed a response in opposition to the motion to amend. JA70–77. He argued that criminal judgments may be modified only in certain limited circumstances and that the Government had neither acknowledged this prohibition nor suggested that it was inapplicable. JA70–73. He requested in the alternative that, should the district court believe it possessed the authority to amend Mr. Higgs's judgment to designate a state for implementation of his death sentence, it choose Virginia instead of Indiana. JA73–77.

The Government then filed a nineteen-page reply in support of its one-and-a-half-page motion. JA79–97. In the reply, the Government stated that it "agrees that this case does not present circumstances that would permit the Court to alter Higgs's criminal judgment," despite the relief expressly requested in its original motion to amend. JA84. The Government instead suggested two alternative forms of relief, both for the first time in reply.

It first suggested that the district court could "supplement" Mr. Higgs's "Judgment and Order" because the directives regarding the implementation of the death sentence contained therein "reside in the Court's order, not the judgment." JA84. In the Government's view, the "general rule that a criminal sentence may not be modified once imposed therefore does not prevent this Court from modifying those directives." JA86. Although the Government was asking the district court to "modify[] those directives," it asserted in the next sentence that the district court "need not

change or rescind any directives in its Judgment and Order regarding the procedures for implementing Higgs's execution." *Id.* This was so, according to the Government, because its proposed supplement was consistent with the judgment. JA86–87. The second new form of relief requested by the Government differed in form, but not function: for the district court to enter a separate order designating Indiana as the implementing state. JA87.

The district court granted permission for Mr. Higgs to file a surreply, which completed the briefing. On November 20, 2020, without waiting for the district court to rule on the motion to amend, the Government informed Mr. Higgs that it had scheduled his execution for January 15, 2021. JA152.

On December 29, 2020, the district court denied the Government's motion. App. 1a–17a. It determined that "[t]he Government's initial, extraordinary request that the Court amend its original judgment and sentence is something that the Court plainly cannot do." App. 8a. It observed that while the Government "abruptly changed its stance" between its motion and its reply to request supplementation rather than amendment of the judgment, "[t]his avails the Government not at all." App. 10a. It rejected the Government's reply contention that the directives for implementing Mr. Higgs's death sentence were not in fact contained in the judgment as "wholly unpersuasive." App. 10a n.8. And it concluded that "a supplemental order designating a different state for Higgs's execution would constitute an amendment of the original judgment in all but name." App. 12a.

The district court then rejected the Government's argument that it could designate a new state by entering a separate order. The district court described the Government's second reply proposal as "an alternative of questionable distinction," App. 12a, and ultimately concluded that "any order it might issue designating a state other than Maryland for the implementation of Higgs's death sentence—whether labeled an amendment, a supplement, or a new order—would necessarily modify its 2001 Judgment and Order and therefore would be beyond the authority of the Court," App. 16a. In rejecting this alternative argument, the district court rejected the Government's textual argument as to what 18 U.S.C. § 3596 requires. App. 12a–14a. It held that "[i]n no sense does section 3596 grant the Court authority and jurisdiction it does not otherwise possess, i.e., to amend or supplement its judgment well after the fact." App. 14a.

On December 30, 2020, the Government appealed the district court's ruling to the Fourth Circuit. App. 31a. The Government styled its appellate proceeding as a brief and alternative petition for writ of mandamus. The parties briefed the merits of the appeal and mandamus request, and the Fourth Circuit's jurisdiction over the appeal.

On January 7, 2021, a panel of the court of appeals issued an order scheduling oral argument for January 27, 2021, over a dissent from Judge Richardson. App. 27a–28a. The Government moved to expedite or dispense with oral argument. The Fourth Circuit denied that request "in light of the novel legal issues presented." Judge

Richardson again dissented. App. 29a–30a. The Government then sought from this Court certiorari before judgment or the issuance of a writ of mandamus.

REASONS FOR DENYING CERTIORARI REVIEW

I. THE GOVERNMENT CANNOT JUSTIFY THE EXTRAORDINARY RELIEF IT SEEKS.

Two weeks after the presidential election was called for President-elect Biden, while its motion to amend judgment was pending in the district court, the Government scheduled Mr. Higgs's execution for the final week of President Trump's term. The extraordinary timing of the Government's actions does not justify its request for extraordinary relief. Granting the Government's request to deviate from "normal appellate practice," Sup. Ct. R. 11, would place the Court's imprimatur on the outgoing administration's hurried agenda at the expense of the Court's role as a neutral arbiter. The Court should accordingly deny the Government's requests for certiorari before judgment and for mandamus.

A. There is no basis for certiorari before judgment.

The Government has not shown any reason why this Court should abrogate the normal appellate process and summarily rule in favor of the Government without allowing the court of appeals to address the merits of the case. Rule 11 provides that a petition for writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. The Government's Petition neither cites Rule 11 nor shows any

"imperative public importance" for circumventing normal appellate review here. The Petition should be denied on that ground alone.

1. This Court has traditionally granted certiorari before judgment sparingly and only when substantial national interests are at stake. *See, e.g.*, *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (certiorari before judgment granted to review district court judgment enjoining Secretary from including citizenship question in decennial national census); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (certiorari before judgment granted to review challenge to international agreement ending the Iran hostage crisis); *United States v. Nixon*, 418 U.S. 683, 686–87 (1974) (certiorari before judgment granted to review subpoena directing President Nixon to disclose Watergate tapes); *Ex parte Quirin*, 317 U.S. 1, 6 (1942) (certiorari before judgment granted to review military commission prosecutions of German saboteurs captured during World War II). In 2019, when the Court granted certiorari before judgment in *Department of Commerce*, it was the first time it had done so in fifteen years. *See United States v. Fanfan*, 542 U.S. 956 (2004) (granting certiorari before judgment in companion case to *United States v. Booker*, 543 U.S. 220 (2005)). The Government here does not suggest any national interests or other imperative public concern that would justify resort to this exceptional procedure.[2]

[2] Indeed, this Court has historically denied the great majority of pre-judgment certiorari petitions, so that the issues may receive the benefit of full appellate airing. *See, e.g.*, *Qassim v. Bush*, 547 U.S. 1092 (2006) (denying petition for certiorari before judgment presenting novel question about separation of powers and the judiciary's

2. Nor does the Government establish that this case "require[s] immediate determination in this Court," Sup. Ct. R. 11, for any reason other than the impending change in presidential administrations. The Government alleges "delays . . . by the courts below to obstruct" Mr. Higgs's execution and "passive obstruction of the capital-punishment system," Pet. 12, 27, but the record belies this charge. The Government filed its motion to amend judgment on August 4, 2020—seven years after Maryland repealed the death penalty and more than one year after the Government issued an execution protocol and announced that federal executions would resume. The Government first raised its alternative request to supplement, rather than amend, the judgment in a reply brief filed on September 1, 2020. The Government scheduled Mr. Higgs's execution despite the fact that its authority to do so was in doubt because its motion to amend was still pending in the district court. Only then did the Government begin to claim urgency. The district court issued its decision on December 29, 2020, and the Fourth Circuit subsequently ordered expedited briefing and scheduled argument for January 27, 2021.

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power to grant habeas relief to prisoners held at Guantánamo Bay, Cuba); *Padilla v. Hanft*, 545 U.S. 1123 (2005) (denying petition for certiorari before judgment presenting novel question whether the President has power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial); *Hamdan v. Rumsfeld*, 543 U.S. 1096 (2005) (denying petition for certiorari before judgment presenting novel questions related to military commissions at Guantánamo Bay, Cuba). As in those cases, this Court would benefit from having a fairly considered and fully developed opinion from the court of appeals before deciding whether certiorari is appropriate. *See, e.g.*, *Taylor v. McKeithan*, 407 U.S. 191, 194 (1972) (remanding case to court of appeals because this Court wanted the benefit of that court's insight as to the issues raised).

The district court's decision was timely and on the merits, not on the viability of any last minute stay. The Fourth Circuit is considering both the merits of the Government's appeal and its request for mandamus relief. The lower courts have not delayed or obstructed timely resolution of this case.

The Fourth Circuit's scheduling here is consistent with that of recent lethal-injection litigation, where this Court stated its "expect[ation] that the Court of Appeals will render its decision with appropriate dispatch." *Barr v. Roane*, 140 S. Ct. 353, 353 (2019). Justice Alito, joined by Justices Gorsuch and Kavanaugh, expressed his belief that the important questions in that case could be resolved by the court of appeals within sixty days. *Id.* On remand from this Court, the D.C. Circuit met this Court's expectation (though falling short somewhat of Justice Alito's hopes) by "order[ing] expedited briefing and argument" on December 9, 2019, holding oral argument on January 15, 2020, and issuing its decision on April 7, 2020. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 106, 111 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois v. Barr*, 141 S. Ct. 180 (2020). The Fourth Circuit is following a similarly expedited schedule that will allow this case to be fully considered on the merits with dispatch.

3. The Government's request is doubly extraordinary because it not only seeks to bypass review in the court of appeals, it also asks the Court to summarily decide the merits of an issue of first impression without full briefing, oral argument, or time for deliberate review. *See* Pet. 1, 14, 32. But this Court utilizes Rule 11 to facilitate merits review, not to bypass it. *See Dep't of Commerce*, 139 S. Ct. at 2565

(granting certiorari before judgment and deciding merits after briefing and argument); *Dames & Moore*, 453 U.S. at 668 (same); *Nixon*, 418 U.S. at 686–87.[3] Even where urgent national concerns require immediate decision, the Court has still ordered merits briefing and argument. *See Quirin*, 317 U.S. at 18 ("conven[ing] a special Term to hear the case and expedite[] our review"); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) ("Deeming it best that the issues raised be promptly decided by this Court, we granted certiorari on May 3 and set the cause for argument on May 12," then issued decision on June 2, 1952). The Government does not and cannot justify its extraordinary request to forgo merits review here.

4. Granting certiorari before judgment and summarily disposing of this case would be especially unwarranted because the jurisdictional basis for the Government's appeal is uncertain at best. Government appeals in criminal cases are prohibited absent an explicit congressional authorization. *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981); *Di Bella v. United States*, 369 U.S. 121, 130 (1962). The

[3] To undersigned counsel's knowledge, the Court has summarily disposed of cases by granting certiorari before judgment only to remand for reconsideration in light of a new decision of the Court. *See Robinson v. Murphy*, No. 20A95, 2020 WL 7346601, at *1 (U.S. Dec. 15, 2020) (vacating and remanding "for further consideration in light of *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. —— (2020)"); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (same); *Harvest Rock Church v. Newsom, Gov. of CA*, No. 20A94, 2020 WL 7061630, at *1 (U.S. Dec. 3, 2020) (same); *Ross v. California*, 139 S. Ct. 2778 (2019) (vacating and remanding in light of *Department of Commerce*, 139 S. Ct. 2551); *Clark v. Roemer*, 501 U.S. 1246 (1991) (vacating and remanding in light of *Chisom v. Roemer*, 501 U.S. 380 (1991)).

Government has not contended that any of those express provisions apply. *Cf.* 18 U.S.C. § 3742(b) (granting jurisdiction to review Government appeals of an otherwise final criminal judgment in four circumstances not presented here). Instead, continuing its strategy of raising new arguments in reply, the Government belatedly asserted in its response to Mr. Higgs's motion to dismiss in the Fourth Circuit that the collateral order doctrine establishes jurisdiction over this appeal. Gov't Resp. to Mot. to Dismiss 2, *United States v. Higgs*, No. 20-18 (4th Cir. Jan. 8, 2021), ECF No. 29. The Government obliquely references the collateral order doctrine in its Petition to this Court as well. *See* Pet. 11.

The collateral order doctrine is a "narrow" jurisdictional ground subject to "stringent" requirements. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). Here, the Government does not meet the second requirement of the collateral order doctrine: that the appealed order "resolve an important issue completely separate from the merits of the action." *Will v. Hallock*, 546 U.S. 345, 349 (2006). The district court order denying the Government's motion to amend or supplement the judgment is not collateral to the merits at all. It is fundamental that, to be "completely separate" from the merits, an order can "not be merged in final judgment." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As this Court has "often stated," a "criminal judgment necessarily includes the sentence imposed upon the defendant." *Teague v. Lane*, 489 U.S. 288, 314 n.2 (1989) (plurality opinion). And the Federal Rules of Criminal Procedure define "[a] judgment of conviction" as the integrated document filed at the conclusion of trial, containing "the

plea, the verdict or findings, the adjudication, and the sentence." Fed. R. Crim. P. 32(d)(1) (2002) (emphasis added); *accord* Fed. R. Crim. P. 32(b)(1) (adopted 1944, amended 1994). Here, that integrated document, i.e., the district court's judgment as drafted by the Government, required Mr. Higgs's execution to be conducted under Maryland law, as the Government has conceded. Because that requirement is "merged in [the] final judgment," it is not "completely separate" from the merits, and the collateral order doctrine does not apply. *See Dillon v. United States*, 560 U.S. 817, 831 (2010) (declining to address requested modifications to criminal sentence that were beyond the scope of specific congressional authorization).[4]

B. There is no basis for mandamus.

The Government makes a half-hearted alternative argument for mandamus relief. Pet. 31–32. It is not entitled to such relief.

To begin with, the Government has not complied with this Court's rules governing mandamus relief. Under this Court's rules, a petition seeking a writ of mandamus "*shall* state the name and office of every person against whom relief is

[4] *See also Gov't of V.I. v. Douglas*, 812 F.2d 822, 831 (3d Cir. 1987) ("[W]e hold that sentencing orders do not display the characteristics of independence required to render orders appealable under § 1291 . . . ."); *United States v. Dean*, 752 F.2d 535, 540 (11th Cir. 1985) (because an "original sentencing order and [a] modification order are part of the sentencing process, . . . we reject the government's contention that the modification order is 'sufficiently independent' from the underlying criminal case to be appealable" under the collateral order doctrine); *United States v. Denson*, 588 F.2d 1112, 1126 (5th Cir.), *on reh'g*, 603 F.2d 1143 (5th Cir. 1979) ("The sentencing process is the inevitable culmination of a successful prosecution; it is an integral aspect of a conviction. Therefore, we hold that the orders of sentence and probation are not possessed of 'sufficient independence' from the criminal case to permit a Government appeal under 28 U.S.C.A. s 1291.") (citations omitted).

sought and *shall* set out *with particularity* why the relief sought is not available in any other court." Sup. Ct. R. 20.3(a) (emphasis supplied). The Petition does not state the name of every person against whom relief is sought. One could infer that the Government seeks relief against Judge Messitte, but does it also want relief against the panel of Fourth Circuit judges now considering the issues of jurisdiction and the merits? It does not say. Nor does the Government "set out with particularity" why it cannot get relief from the Fourth Circuit. For those reasons alone, the Government's alternative request for mandamus should be denied.

Questions of form aside, the Government also wholly fails to show that it is entitled to mandamus relief. Mandamus "is a drastic [remedy], to be invoked only in extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (citations omitted). To obtain mandamus, the Government must meet a three-prong test: (1) it must have no other adequate means to attain the relief it desires; (2) it must show that its right to issuance of the writ is clear and indisputable; and (3) even if it satisfies the first two criteria, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Cheney*, 542 U.S. at 380–81.

A court must not be "misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will*, 389 U.S. at 98 n.6; *see In re Trump,* 958 F.3d 274, 284 (4th Cir. 2020) (en banc) (noting this Court's rejection of contention that an "error of law amounts to an abuse of discretion entitling a petitioner to mandamus relief"). The

courts, through mandamus, "cannot and will not grant the Government a right of review which Congress has chosen to withhold." *Will*, 389 U.S. at 97 n.5; *see also United States v. Roberts*, 88 F.3d 872, 884 (10th Cir. 1996) ("Were we to accede to the government's request [for mandamus relief], we would be expanding the government's right to bring interlocutory criminal appeals beyond the terms of [18 U.S.C. § 3731]. We do not believe mandamus provides the appropriate avenue for such expansion.").

A review of the three factors set forth above shows that the Government is not entitled to the writ.

(1) The Government asks for mandamus to correct the district court's legal error. Pet. 32. But it has a remedy for any ostensible legal error committed by the district court—its pending appeal and request for mandamus in the Fourth Circuit. The Fourth Circuit will review that appeal and either grant the Government the relief it requests, deny that relief, or find that it has no jurisdiction over the appeal. In either of the latter two circumstances, the Government could then seek review by this Court. So there is no question that the Government has a remedy for any legal error without resort to the writ of mandamus.

What the Government appears to mean—without saying so—is that it has no means to obtain the remedy it wants before January 15, 2021. But it does not cite *any* case in which this Court has removed a case from the jurisdiction of an appellate court that was considering the merits of an appeal and granted the extraordinary writ of mandamus, solely in order to facilitate execution by a particular date. It bears

reiterating that this is *not* a case in which a court has granted a last minute stay of execution. Rather, it is a case in which the Government sought relief from the district court that was necessary—by the Government's own admission—for an execution to proceed, and then scheduled the execution without having first obtained the relief requested. That the Government hoped to obtain such relief before the execution date but that its request has been denied, and that its appeal of that denial has not yet been decided, are not reasons that have been suggested by this Court or any other court for granting mandamus relief.

(2) As demonstrated in section II below, the Government does not have a clear and indisputable right to the relief it seeks. To the contrary, the Government is entitled to no relief whatsoever. Despite this being an appeal from denial of its "Motion to Amend Judgment and Order," the Government acknowledged in the district court that "this case does not present circumstances that would permit the Court to alter Higgs's criminal judgment." *See* Gov't's Reply 6, *United States v. Higgs*, No. 98-cr-520 (D. Md. Sept. 1, 2020), ECF No. 644-3. And its present argument about what the FDPA requires depends on its novel characterizations of the "temporal flow and structure" of the statute. Pet. 17. Clear and indisputable rights do not turn on a statute's "flow." Even if there were an error of law—and there is none—"a naked error of law" does not entitle a petitioner to mandamus. *Trump*, 958 F.3d. at 284.

(3) Finally, this Court, in an exercise of its discretion, should decline to issue the writ. The Government does not contend that the district court denied its motion arbitrarily, for nonlegal reasons, or in bad faith. *See Ex parte Secombe*, 60 U.S. 9, 13–

15 565 (1856) (explaining that a writ of mandamus is not appropriate unless the lower court exercised its discretion in an "arbitrary and despotic" way or issued a decision "from passion, prejudice, or personal hostility"); *see also Ex parte Bradley*, 74 U.S. 364, 376–77 (1868) (mandamus should not issue unless lower court, motivated by "caprice, prejudice, or passion," exercises its discretion "with manifest injustice"). Still less does the Government allege any such misconduct on the part of the Fourth Circuit, which has not yet issued a decision but is prepared to do so within weeks.

Moreover, the Government *wrote* the judgment in this case, successfully persuading the sentencing court to incorporate Department of Justice regulations into Mr. Higgs's sentence. The Government sought in the district court to undo part of what it wrote, and then sought to appeal when the district court ruled that it had no authority to do so. But "[t]he Government's right to appeal in criminal cases has historically been severely limited," *United States v. Moussaoui*, 483 F.3d 220, 226 (4th Cir. 2007), and mandamus must not be used as an end run around the limits on Government appeals. *See Will*, 389 U.S. at 97. The yet-unanswered questions about whether the Fourth Circuit even has jurisdiction over the pending appeal are another reason why mandamus relief is unwarranted. In requesting immediate mandamus relief, the Government is seeking to make an "unwarranted impairment of another branch in the performance of its constitutional duties." *Cheney*, 542 U.S. at 390. Should it turn out that there is no jurisdiction over the underlying appeal, that would be a matter for Congress to address, not for this Court to short circuit through the

extraordinary writ of mandamus. *See Carroll v. United States*, 354 U.S. 394, 406–08 (1954).

II. The District Court Correctly Determined that It Lacked Authority to Designate a State to Implement Mr. Higgs's Death Sentence.

As shown above, even if the district court had erred, the Government would not be entitled to the relief that it seeks. In fact, however, the district court did not err. The Government's allegation of error focuses almost entirely on the text of 18 U.S.C. § 3596(a). *See* Pet. 9–23. Even if the Government were correct in its interpretation of § 3596 (it is not), this appeal turns on the sentencing judgment drafted by the Government, the district court's denial of the Government's motion to amend the judgment, and the bedrock rule against amending criminal judgments.

A. The district court's judgment cannot be modified.

In this case, the Government prepared and submitted to the trial court a proposed judgment and order, consistent with regulations the Department of Justice promulgated in 1993. *See* JA121–23; 28 C.F.R. §§ 26.1–26.4 (effective to Dec. 27, 2020, then superseded); *see also* JA80–81 (Government discussing the terms of the regulations in its reply below). Defense counsel objected to the provisions of the Government's proposed order. JA121–23; JA137–39. The district court adopted the judgment and order as proposed, which incorporated the provisions of 18 U.S.C. §§ 3591–3597, "including particularly Sections 3594 and 3596." App. 21a. Under § 3596, the implementation of a death sentence must occur "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). Hence, the

district court—at the Government's request—enshrined in the sentencing judgment its designation of the law of the State of Maryland as governing.

Many years later, the State of Maryland abolished capital punishment. *See* Pet. 5–6. At some point thereafter, the Government realized that it could no longer execute Mr. Higgs pursuant to Maryland law, *see* Mot. to Expedite 1, and moved the district court to amend the judgment to designate the law of Indiana as governing, JA59–60. The Government's explicit request placed front and center the authority of the district court to amend or modify a sentencing judgment that it had previously entered.

A "'judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. § 3582(b)) (alteration in original); *see also United States v. Chambers*, 956 F.3d 667, 671 (4th Cir. 2020) ("Generally, sentences may not be modified once imposed."). Specifically, "[a]fter sentence has been imposed, the district court may not alter the sentence except as authorized by Fed. R. Crim. P. 35 or 18 U.S.C.A. § 3582(c)." *United States v. Griffin*, 60 F.3d 826, 1995 WL 417628, at *2 (4th Cir. 1995) (Table); *accord United States v. Fraley*, 988 F.2d 4, 6 (4th Cir. 1993).

Neither Federal Rule of Criminal Procedure 35 nor § 3582(c) authorizes an amendment to Mr. Higgs's judgment in this circumstance, and the Government has never contended otherwise. Rule 35(a) allows courts to "correct a sentence that resulted from arithmetical, technical, or other clear error." And Rule 35(b) allows

courts to reduce a sentence if the defendant has provided substantial assistance to the Government in another prosecution. The rule is inapplicable.

Section 3582(c) is likewise inapplicable. It permits sentencing reductions for "extraordinary and compelling reasons," and for certain prisoners over seventy years of age. 18 U.S.C. §§ 3582(c)(1)(A)(i)–(ii). And it permits sentencing modifications to a "term of imprisonment" that are "otherwise expressly permitted by statute" or Rule 35, § 3582(c)(1)(B), and in certain circumstances where sentencing ranges have been lowered by the United States Sentencing Commission, § 3582(c)(2). As the Government conceded below, none of these circumstances are present here. *See* JA84 (acknowledging that "this case does not present circumstances that would permit the Court to alter Higgs's criminal judgment").

Title 18 U.S.C. § 3582(b) makes clear that the above-listed set of narrow circumstances are the exclusive exceptions to the prohibition on sentence modifications:

> (b) Effect of finality of judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—
>
> (1) modified pursuant to the provisions of subsection (c);
>
> (2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or
>
> (3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;
>
> a judgment of conviction that includes such a sentence constitutes a final judgment *for all other purposes*.

18 U.S.C. § 3582(b) (emphasis added).

In the absence of an applicable exception set forth in either Rule 35 or § 3582(c), the district court lacked authority to modify Mr. Higgs's sentence nearly two decades after it was imposed. As the district court observed, appellate courts have "taken a very narrow view of the authority of district courts to amend *any* aspect of a criminal sentence in the absence of an explicitly recognized exception authorizing such amendment." App. 9a (emphasis in original). In *United States v. Jones*, the Fourth Circuit explained that, "[a]lthough there are circumstances under which a district court may modify or correct a criminal judgment order, none of them authorize[s] the district court to [amend a judgment] based solely on a subsequent change in case law." *United States v. Jones*, 238 F.3d 271, 272 (4th Cir. 2001). *Jones* thus held that a district court lacked authority to amend the defendant's judgment to require immediate payment of the originally imposed fine to bring the sentence in compliance with subsequent legal developments. *Id.* at 272–73 & n.2.

The Government's present contentions about what the FDPA in theory requires do not matter if there was no mechanism for the district court to grant the Government's motion to amend judgment. As the district court correctly ruled: "In no sense does section 3596 grant the Court authority and jurisdiction it does not otherwise possess, i.e., to amend or supplement its judgment well after the fact." App. 14a. Other than repeatedly complaining that this would create an "absurd" result, Pet. 10, 14, 21, 28, the Government does little to suggest that the FDPA or any other

source actually confers authority and jurisdiction on the district court to do what the Government asked.[5]

The only real attempt the Government makes to overcome the prohibition on modification of criminal judgments is to claim that the "specific authorization" contained in § 3596(a) overrides the "general rule" against modifying criminal judgments. Pet. 25 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976)). But that "commonplace of statutory construction," *Morales*, 504 U.S. at 384, does not apply here. The critical language from *Radzanower* is: "*Where there is no clear intention*

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[5] In making its repeated "absurd result" complaint, the Government misrepresents the district court's opinion. The Government variously claims that the district court "recognized," Pet. 10, and "seemed to agree," *id.* at 21, that its ruling produced an absurd result. The Government cites App. 15a–17a for those propositions. What the district court actually said on those pages is:

> In the Government's view, not allowing the designation of a state other than Maryland "would be an absurd result and itself contrary to the sentence of death." Gov't Reply at 9. But *reductio ad absurdum* never fares well against *dura lex, sed lex*. This is especially true when it is a matter of life and death. A mere desire to avoid an unintended result cannot overcome a district court's lack of authority to amend a criminal judgment. Congress may not have intended for section 3596 to "provide a windfall to a defendant" in this rarest of circumstances, *id.* at 11, but that appears to be the outcome. Unless and until the Fourth Circuit or indeed the Supreme Court creates a relevant exception to the prohibition, such that *Jones* and *Lightner* would not be relevant or controlling here, the Court concludes that it lacks authority to amend or supplement its judgment to avoid a purportedly "absurd result."

App. 15a–16a. In no way did the district court "recognize" or "agree" that the Government's characterization of the result as "absurd" was apt.

otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower*, 426 U.S. at 153 (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)). Here, however, § 3582(b) makes clear that criminal judgments are final "for all other purposes" beyond the limited modification possibilities contained in Federal Rule of Criminal Procedure 35 and in § 3582(c). In other words, the "general" statute restricting sentencing modifications to a narrow set of exceptions affirmatively forecloses the prospect of sentencing modifications not contained within those exceptions. This is doubly so where the Government's suggestion that § 3596 permits the requested sentence modification is based on an unsupported inference that Congress intended such a result without saying so.[6] At a minimum, the request that this Court find that § 3596 partially repealed § 3582 without full merits briefing and oral argument is remarkable, and should be rejected.

The Government also argues, consistent with the argument it first raised in its reply brief in the district court, that designating another state under § 3596(a) would

[6] Nothing in *Morales* or *Radzanower* is to the contrary. In *Morales*, the issue was whether a "general 'remedies' saving clause" would "supersede [a] specific substantive pre-emption provision." 504 U.S. at 385. In *Radzanower*, the question was whether the "narrow venue provisions of the National Bank Act" were repealed by the "general venue provision" of the Securities Exchange Act. 426 U.S. at 153–54. Here, the law and statutes prohibiting modifying criminal judgments are longstanding. *See Berman v. United States*, 302 U.S. 211, 214 (1937) (district court could not modify sentence once it was final). No doubt, if Congress wanted to carve out an exception under § 3596 it could do so, but here, as in *Radzanower*, there is nothing to suggest Congress intended partial repeal of § 3582.

not modify the criminal judgment at all because it would only "facilitate[] the 'implementation' of the original sentence." Pet. 23–24. This is equally misplaced. *Berman* makes clear that "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman*, 302 U.S at 212; *accord Burton v. Stewart*, 549 U.S. 147, 156 (2007) (per curiam). The district court thus flatly rejected the Government's similar suggestion below that "the relevant portion of the written Judgment and Order, including the statutory references and procedural directives, is not in fact part of the sentence," finding it to be "wholly unpersuasive, both as a practical matter and in light of the Supreme Court and Fourth Circuit precedent described herein." App. 10a n.2 (citing *Berman*, 302 U.S. at 212). The Government does not address, let alone refute, the district court's ruling in this regard.

The Government's attempt to further its "mere implementation" argument by analogizing this circumstance to the Bureau of Prisons' authority to transfer a prisoner from one correctional institution to another, *see* Pet. 24, only highlights the weakness of the Government's position. As the Government correctly points out, in the context of incarceration, "Congress has provided that the Bureau of Prisons—not the sentencing court—'shall designate the place of the prisoner's imprisonment.'" *Id.* (quoting 18 U.S.C. § 3621). Congress has done exactly the opposite under the FDPA. *See* 18 U.S.C. § 3596(a) (designation of implementing state where state of conviction does not maintain the death penalty to be made by sentencing court). If sentencing courts were permitted to designate specific correctional institutions or other conditions of confinement relating to terms of incarceration in criminal judgments,

those dictates would likewise be binding on the Bureau of Prisons and not subject to later modification.

B. Section 3596 does not require the district court to designate an alternate state.

The Government's argument thus can succeed only if § 3596 repeals or overrides § 3582. Its argument for that outcome relies on a strained interpretation of § 3596(a), which provides as follows:

> [1] A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. [2] When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. [3] 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.

The Government argues that because the second sentence of § 3596(a) is introduced by the clause "When the sentence is to be implemented," and deals with the time of the execution, the third sentence must also be referring to the time of execution. Pet. 16–17.

The district court correctly rejected this argument. As the district court pointed out, "the third sentence could just as easily be read in relation to the last phrase of the second sentence, which refers to the original imposition of the sentence (i.e., "in the manner prescribed by the law of the State *in which the sentence is imposed*"). Mem. Op., App. 13a (emphasis in Mem. Op.). The district court preferred this reading

of the statute to the Government's, based on this analysis of the text, the rule of lenity, the consistent practice of district courts in designating (if necessary) another state at the time of sentencing, and the fact that very few people have received federal death sentences in states that later abolished the death penalty. App. 13a–15a & n.3. The Government's counterarguments are internally contradictory and unavailing.

The Government's primary argument is that the "temporal flow and structure" of § 3596(a) apply at the time of implementation rather than imposition of the sentence, i.e., that the third sentence of § 3596(a) applies only at the time of execution. Pet. 17. Below, the Government cited *United States v. Wilson*, 503 U.S. 329 (1992), for the principle that "Congress' use of a verb tense is significant in construing statutes." *Id.* at 333; *see* Br. of Appellant 19, *United States v. Higgs*, No. 20-18 (4th Cir. Dec. 31, 2020), ECF No. 6 (hereinafter Gov't's 4th Cir. Br.). Here, the Government has dropped the citation to *Wilson* with good reason; the Court's application of that principle in *Wilson* is *directly contrary* to the Government's argument.

In *Wilson*, the issue was whether the district court could give jail time credit under 18 U.S.C. § 3585(b) at the imposition of sentence. Section 3585(b) required that such credit be afforded, but courts differed about *when* such credit was due. The Court rejected the defendant's argument for credit at the time of sentencing:

> Section 3585(b) indicates that a defendant may receive credit against a sentence that "*was imposed*." It also specifies that the amount of the credit depends on the time that the defendant "*has spent*" in official detention "prior to the date the sentence commences." Congress' use of a verb tense is significant in construing statutes. By using these verbs in the past and present perfect tenses, Congress has indicated that computation of the credit must occur after the defendant begins his

> sentence. A district court, therefore, cannot apply § 3585(b) at sentencing.

503 U.S. at 333 (emphasis in *Wilson*).

The same principle applies here, but the verb tense used is the opposite. Here, immediately before the sentence in question, Congress spoke of the time at which the sentence "*is imposed*"—not "*was imposed*," as in *Wilson*. This opposite use of verb tense can lead only to the opposite result—here, the district court *must* apply § 3596(a) at sentencing.

The Government's argument is also contrary to the understanding of the trial court and the Government at the time of sentencing, and to the longstanding practice of the Department of Justice and the courts. As discussed above, the Government drafted the sentencing judgment and order in compliance with regulations issued by the Department of Justice, resulting in the designation of Maryland as the implementing state.

For the Government to come before the district court now and say that the judgment and order that it wrote, which explicitly referenced § 3596(a) *at the time sentence was imposed*, was all a mistake and was based on a misunderstanding of § 3596(a) is passing strange. That the understanding of § 3596(a) that the Government and the court had at the time sentence was imposed is now inconvenient for the Government is no reason to retroactively change that judgment and order.

In addition, any time that a district court has imposed the death sentence in a state that did not provide for the implementation of the death sentence, the

Government has requested designation of another state pursuant to § 3596 and the district court has done so, *at the time of sentencing*. *See* App. 14a–15a (citing cases); *see also United States v. Sampson*, 300 F. Supp. 2d 278, 279–80 (D. Mass. 2004) (designating New Hampshire as the state of execution at the time of sentencing, pursuant to § 3596); Judgment at 3, *United States v. Honken*, No. CR 01-3047 (N.D. Iowa Oct. 11, 2005), ECF No. 702-2 (designating Indiana "[p]ursuant to 18 U.S.C. § 3596"). Below, the Government argued that § 3596 did not even authorize courts to make such designations at the time of sentencing, although they may have had discretion to do so. Gov't's 4th Cir. Br. 19 n.2. Now, the Government appears to have abandoned that argument too, in favor of an argument that, whatever the court did at the time of sentencing, it must amend its sentencing order in circumstances like those presented here. Pet. 18–20. But this undermines the Government's entire "temporal flow and structure" argument.

The Government now effectively concedes that the statutory language is consistent with designation of the applicable state law at the time of sentencing. That is consistent with the Government's assertion, followed by the district court here and all of the other courts discussed above, that their actions were required by § 3596. This Court should remain faithful to that consistent understanding of the statute. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012) (The words of a law "mean what they conveyed to reasonable people at the time"). And once it is established that that reading of the statute is correct, the Government's argument that a district court can nevertheless amend what it

enshrined in the sentencing judgment runs headlong back into the prohibition against amending criminal judgments.

As a fallback to its textual argument, the Government contends that any other reading of the statute would lead to "absurd" results, Pet. 21, i.e., that the Government would have difficulty executing a handful (or less) of death-sentenced prisoners. *See* App. 14a–15a (citing *United States v. Lighty*, No. 03-cr-457 (D. Md. Mar. 10, 2006), and *United States v. Mikos*, No. 02-cr-137 (N.D. Ill. 2006), where the judgments specifically provided that the death sentence would be implemented pursuant to the law of a state that has since abolished the death penalty. This contention—that disruption in the Government's execution plans for a few prisoners is "absurd"—is remarkable. To the extent that the statute does not work perfectly from the Government's perspective, that is something for Congress to fix. Whether or not it would "have been a good idea for Congress to have written" § 3596 differently, the question is what "Congress actually wrote . . . . To answer that question, we need to examine the statute's text, context, and history." *United States v. Davis*, 139 S. Ct. 2319, 2327 (2019). As shown above, the "text, context, and history" of § 3596 compel the reading adopted by the district court.

At a minimum, if this Court is inclined to consider the Government's Petition, it should do so after full briefing and argument "in light of the novel legal issues presented." App. 29a. The Government castigates the district court's ruling as "unprecedented" and "novel," Pet. 9a, but the fact is that this is a case of first

impression. All the more reason to get the complex issues presented here right, rather than drastically curtail judicial examination of the merits of the issues involved.

CONCLUSION

For all of the reasons set forth herein, this Court should deny the Government's petition for writ of certiorari before judgment and its alternative request for mandamus. Should this Court decide to grant certiorari before judgment, however, it should set the case for full briefing and oral argument.

Respectfully submitted,

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