

No. 20A-

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA, APPLICANT

v.

DUSTIN JOHN HIGGS

(CAPITAL CASE)

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APPLICATION TO VACATE STAY OF EXECUTION ISSUED BY  
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RELATED PROCEEDINGS

United States District Court (D. Md.):

United States v. Higgs, 98-cr-520 (Jan. 9, 2001)  
(conviction and sentence)

United States v. Higgs, 05-cv-3180 (Apr. 7, 2010)  
(order denying motion under 18 U.S.C. 2255)

United States v. Higgs, 05-cv-3180 (June 29, 2016)  
(order denying motion under Fed. R. Civ. P. 60(d))

United States v. Higgs, 98-cr-520 (Dec. 29, 2020)  
(order denying alternate-State designation under 18  
U.S.C. 3596(a))

United States District Court (S.D. Ind.):

Higgs v. Daniels, 16-cv-321 (Apr. 30, 2020)

Hall v. Watson, 20-cv-665 (filed Dec. 14, 2020)

United States Court of Appeals (4th Cir.):

United States v. Higgs, No. 01-3 (Dec. 22, 2003)

United States v. Higgs, No. 03-19 (Apr. 20, 2004)

United States v. Higgs, No. 10-7 (Nov. 23, 2011)

In re: Dustin Higgs, No. 16-8 (June 27, 2016)

United States v. Higgs, No. 16-15 (Apr. 21, 2017)

In re: Dustin Higgs, No. 20-2 (Feb. 6, 2020)

United States v. Higgs, No. 20-18 (filed Dec. 30, 2020)

United States Court of Appeals (7th Cir.):

Higgs v. Watson, No. 20-2129 (Jan. 11, 2021)

Supreme Court of the United States:

Higgs v. United States, No. 03-10498 (Nov. 29, 2004)

Higgs v. United States, No. 04-5526 (Nov. 29, 2004)

Higgs v. United States, No. 12-5075 (Dec. 10, 2012)

Higgs v. United States, No. 17-6085 (May 29, 2018)

United States v. Higgs, No. 20-927 (Jan. 11, 2021)

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On January 13, 2021, the United States Court of Appeals for the Fourth Circuit sua sponte entered a stay barring respondent's scheduled execution, which is set for January 15 at 6 p.m. Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicant the United States of America, respectfully applies for an order vacating that stay.

On January 11, 2021, the United States filed a petition for a writ of certiorari before judgment seeking review of the district court's December 29, 2020 order in this case, which refused to designate an alternate State whose law shall prescribe the manner of implementing respondent's execution under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. See United States v. Higgs, 20-927 (Jan. 11, 2021). That petition was

necessary because the court of appeals declined to decide the case prior to the scheduled January 15, 2021 execution date, and the government cannot carry out respondent's execution unless an alternate State is designated.

Nevertheless, on January 13, 2021, a divided panel of the court of appeals entered an unreasoned sua sponte order granting a stay of execution. See App., infra, 1a. That stay was entirely gratuitous at the time it was entered: unless this Court grants the government relief on its petition, the government cannot proceed with the execution as scheduled and will need to wait for the court of appeals to resolve the appeal below. If this Court grants the government's petition, however, the stay will become the only impediment to carrying out the execution yet will have no plausible legal basis. The Court thus should vacate the court of appeals' stay for the same reasons that the Court would necessarily accept if it grants relief on the government's petition, and also for the additional reason that the court of appeals' order contains none of the findings necessary to support a stay of execution. See Dunn v. McNabb, 138 S. Ct. 369 (2017).

#### STATEMENT

In 2001, respondent received nine sentences of death in connection with the cold-blooded murder of three women on federal land near the Baltimore-Washington Parkway in 1996. 353 F.3d 281, 289-295. The present application, like the government's related

petition for a writ of certiorari before judgment in United States v. Higgs, No. 20-927 (Jan. 11, 2021) (20-927 Pet.), arises from the government's scheduling of respondent's execution for January 15, 2021. As the petition explains at greater length (20-927 Pet. at 3-9), because the law of Maryland "does not provide for implementation of a sentence of death" following the State's repeal of its death penalty, 18 U.S.C. 3596(a), the United States asked the district court to enter an order under the FDPA designating Indiana -- where the federal death chamber is located -- as the alternate State whose laws shall govern the manner of implementation of respondent's death sentence. See ibid. On December 29, 2020, the district court denied the government's motion, disclaiming the authority to designate an alternate State after the sentence became final. See 20-927 Pet. at 7-8 (describing district court decision). The government immediately appealed, but in orders entered on January 8 and 9, 2021, the court of appeals (over Judge Richardson's dissent) indicated that it would not even hear argument on the government's appeal until January 27, nearly two weeks after the scheduled execution date. See id. at 8-9 (describing court of appeals orders).

On Monday, January 11, 2021, unable to obtain relief in the court of appeals, the government filed a petition for a writ of certiorari before judgment in this Court, requesting that the Court summarily reverse the district court's denial of the requested

alternate-State designation or, alternatively, issue a writ of mandamus directing the district court to issue such a designation. See 20-927 Pet. at 32. That petition is now fully briefed and ready for this Court's decision.

On January 13, 2021, however, the court of appeals sua sponte entered a one-page order that provides, without further elaboration: "For reasons appearing to the court, the court grants a stay of execution pending further order of the court." App., infra, 1a. The order was "[e]ntered at the direction of Judge Keenan with the concurrence of Judge Floyd. Judge Richardson voted to deny a stay of execution." Ibid.

Because respondent had not moved for such a stay in the court of appeals, and the panel majority offered no explanation for entering one, it is impossible to know for certain what the court understood to be the basis for its stay or why the court felt it necessary to enter one. The government presumes, however, that the court's entry of a stay reflected its view that the government may not lawfully proceed with the scheduled execution at this time in light of the district court's December 29 order refusing to make an alternate-State designation under the FDPA.

#### ARGUMENT

As the government made clear in its petition to this Court, see 20-927 Pet. at 9-10, and in filings in the court of appeals, see 20-18 C.A. Doc. 18, at 1 (Jan. 8, 2021), the government

acknowledges that in light of the district court's order it cannot now proceed with respondent's execution as scheduled, and it thus will not do so absent an order by this Court holding that the district court must direct an alternate State under the FDPA. If this Court denies the government's pending petition in United States v. Higgs, No. 20-927, therefore, the court of appeals' stay would have no material effect (though it would still be legally improper). If, however, this Court grants the government's petition in order to allow the execution to go forward, then the court of appeals' stay would become the only impediment to carrying out the execution, yet would have no legal basis supporting it. Accordingly, the Court should vacate the stay at the same time it rules on the government's petition.

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the [government's] strong interest in enforcing its criminal judgments." Hill v. McDonough, 547 U.S. 573, 584 (2006). As with stays in other contexts, therefore, a stay of execution may only be entered where, inter alia, it is supported by "a strong showing that [the beneficiary of the stay] is likely to succeed on the merits" and "the public interest" supports entry of the stay. Nken v. Holder, 556 U.S. 418, 434 (2009) (citation omitted). Where courts have "enjoined [an] execution without" making those necessary findings, this Court has set aside the stays of execution

summarily, observing that “[t]he All Writs Act does not excuse a court from making these findings.” Dunn v. McNabb, 138 S. Ct. 369 (2017).

That course is warranted here. The unreasoned stay order contains none of the findings required to support a stay, see App., infra, 1a, and is thus subject to summary vacatur under Dunn, supra. See, e.g., Order, United States v. Montgomery, No. 20A15 (Jan. 12, 2021) (order vacating, without recorded dissent, a similarly unreasoned stay of execution entered by the Eighth Circuit). An order from this Court granting the government’s petition, moreover, would negate the only legal ground on which the court of appeals could possibly have intended to grant a stay -- the district court’s erroneous interpretation of the FDPA. And if this Court grants that relief, it would plainly not be in “the public interest” to prevent the execution from going forward. Nken, 556 U.S. at 418.

#### CONCLUSION

This Court should vacate the court of appeals’ stay of execution in order to allow respondent’s execution to proceed as scheduled on January 15, 2021.

Respectfully submitted.

JEFFREY B. WALL  
Acting Solicitor General

JANUARY 2021