CAPITAL CASE
EXECUTION SCHEDULED – JANUARY 12, 2021

No. 20A122

IN THE
Supreme Court of the United States

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

v.

LISA MARIE MONTGOMERY.
Respondent.

OPPOSITION TO APPLICATION TO VACATE STAY OF EXECUTION PENDING APPEAL

The Government seeks to execute Lisa Montgomery today, **January 12, 2021 at 6:00 PM Eastern**. Yesterday, the en banc D.C. Circuit issued a brief stay of Mrs. Montgomery's execution to permit "highly expedited initial hearing *en banc* … on the important question of the meaning" of the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 3596(a). In granting that stay, the en banc court found that Mrs. Montgomery "has satisfied the stringent requirements for a stay pending appeal" set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009)—meaning that she made a strong showing of likelihood of success on the merits, irreparable injury absent a stay, and that the equitable factors favored a stay. App. 1a. The en banc court also set a "highly expedited" briefing schedule—to be completed before the end of this month—in light of the "acute urgency of prompt resolution." App. 1a.

The D.C. Circuit's entry of a brief stay to consider the important issues raised by Mrs. Montgomery was demonstrably correct. Mrs. Montgomery is likely to succeed on the merits of her FDPA claim, under both the D.C. Circuit's own precedent—from which the panel's opinion clearly departed—and the plain language of the statute. The FDPA directs that a federal death sentence must be "implement[ed] … in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). Mrs. Montgomery was sentenced to death in federal court in Missouri. Under Missouri law, Mrs. Montgomery is entitled to 90 days' notice of her execution. *See* Mo. Sup. Ct. R. 30.30(f). The Government indisputably failed to provide Mrs. Montgomery notice of her January 12, 2021 execution date 90 days in advance, and Mrs. Montgomery promptly—over a month ago—filed the APA claim that arose as a result. If permitted to carry out Mrs. Montgomery's execution today, the Government will have failed to "implement[]" her sentence "in the manner prescribed by" Missouri law. 18 U.S.C. § 3596(a).

The other stay factors equally favor a stay. Without a stay, Mrs. Montgomery will suffer irreparable harm: There will be no meaningful consideration or careful determination of the legal question she timely raised. She will lose valuable time to seek relief from her sentence, through clemency or otherwise. Her life will be irrevocably cut short. On the other side of the ledger, there is only the inconvenience that comes with compliance with the law: The

Government will have to designate the execution date in conformity with Missouri's scheduling requirements.

Further, the proper interpretation of the FDPA is an important question of federal law on which the courts of appeals are fractured. In the last twelve months, the D.C. Circuit has issued a series of divided decisions on the issue, both in a three-judge panel and as an en banc court. In fact, the D.C. Circuit has produced so many individual opinions addressing how federal courts should implement death sentences in accordance with state law, as the FDPA requires, that outsiders debate which, if any, opinion controls. Performing far more cursory review, panels in other circuits have departed from the D.C. Circuit's precedent. *See United States v. Vialva*, 976 F.3d 458 (5th Cir. 2020); *United States v. Mitchell*, 971 F.3d 993, 996 (9th Cir. 2020). In light of that confusion, the D.C. Circuit's entry of a stay to permit considered en banc review of this important recurring question was particularly appropriate.

Rather than permit the orderly course of the appellate process to play out, however, the Government has come to this Court, seeking to vacate the stay entered by the en banc D.C. Circuit. The Government's only justification for doing so is so it can execute Mrs. Montgomery on the arbitrary date it has selected—today—before her claims can be fully adjudicated. The Government comes nowhere close to meeting the high bar for this extraordinary relief to permit its rush to execution. The rule of law is of paramount importance in implementing a final judgment of death. The Government's request should be denied.

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, 2020. Dkt. 33 at 172.[1] 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 Mrs. Montgomery's claims, the district court issued a stay of execution lasting until December 31, 2020. *See* Dkt. 19.

While the stay remained in effect, on November 23, the Government rescheduled Mrs. Montgomery's execution for January 12, 2021. Dkt. 33 at 173, 175. In response, Mrs. Montgomery filed a supplemental complaint asserting two claims under the APA. Dkt. 29-1. As relevant here, Mrs. Montgomery asserted that the Government's designation violated the FDPA by failing to comply with the Missouri requirement that a prisoner receive at least 90 days' notice of an execution date, Mo. Sup. Ct. R. 30.30(f); *see* Dkt. 29-1 at 4, 6-7.

[1]"Dkt." refers to the district court's docket. *See Montgomery v. Rosen, et al.*, No. 20-cv-3261 (D.D.C.).

Mrs. Montgomery subsequently moved for partial summary judgment and requested that the January 12 execution date be vacated.[2] On January 8, the district court denied Mrs. Montgomery's motion, construed the Government's opposition to Mrs. Montgomery's motion as a cross-motion for summary judgment, and entered partial final judgment in the Government's favor on Mrs. Montgomery's FDPA claim.

As an initial matter, the district court concluded that the FDPA's requirement that the United States marshal supervise "implementation" of a death sentence "in the manner prescribed by the law of the State in which the sentence is imposed" requires adherence not only to the relevant state's top-line method of execution, but also to the state's "administrative process that leads from the end of a prisoner's judicial appeals to the final carrying out of the sentence, including both preparatory steps and the attendant safeguards that surround an execution." App. 29a. The district court ruled, however, that those preparatory steps did *not* include state laws concerning execution scheduling—reasoning that the FDPA was not indented to displace the background rule that sentencing courts, not the marshal,

[2] On December 24, 2020, the district court granted summary judgment as to Mrs. Montgomery's first claim in the supplemental complaint—that the Government's designation of a new execution date while a stay of execution was in place contravened 28 C.F.R. § 26.3(a)(1)—and vacated the improper designation under the APA. At that time, the district court declined to reach Mrs. Montgomery's claim grounded in the FDPA. On January 1, 2021, a panel of the D.C. Circuit summarily reversed the district court and denied rehearing en banc. Mrs. Montgomery subsequently filed a petition for writ of certiorari and an application for stay of execution to this Court, which remain pending. *See Montgomery v. Rosen, et al.*, Nos. 20-922, 20A121 (U.S.).

set execution dates. App. 45a. For that reason, the district court held that "setting an execution date is not part of the 'implementation' of the death sentence that the U.S. marshals have responsibility for supervising" under the statute, and accordingly, the Government did not violate the FDPA by failing to provide the notice required by Missouri law. App. 33a.

That day, Mrs. Montgomery filed a notice of appeal in the D.C. Circuit and moved the district court for a stay pending appeal, which was denied. The next day, January 9, 2021, Mrs. Montgomery filed a motion for a stay pending appeal in the D.C. Circuit, which a divided panel denied on January 12. Judge Katsas, joined by Judge Walker, agreed with the district court that the FDPA does not cover "scheduling decisions," but endorsed an even narrower construction of the statute that "encompasses at most the steps supervised by a marshal after he acquires custody over the prisoner." App. 8a. Judge Millett dissented, reasoning that the FDPA "requires that the date on which an execution is carried out comply with state law timing requirements," regardless of whether a marshal was "historically charged with 'the setting of execution dates.'" App. 9a. "Indeed," Judge Millett wrote, "it is hard to imagine anything more integral to the implementation of a death sentence than when the government starts it and carries it out." App. 10a.

Hours later, on its own motion but after Mrs. Montgomery filed a petition for rehearing en banc, the en banc D.C. Circuit granted reconsideration of the panel's decision and entered a stay of execution—explaining that "[a] majority of the en banc court has determined that [Mrs. Montgomery] has satisfied the stringent

requirements for a stay pending appeal," and citing *Nken v. Holder*, 556 U.S. 418 (2009). App 1a. The en banc court further ordered "that the merits of [the] appeal will be heard *en banc* on a highly expedited basis," with briefing to be completed by January 29. App. 1a.

The Government filed an application in this Court to vacate the en banc stay shortly after 10 a.m. this morning, January 12.

ARGUMENT

The standard of review on an application to vacate a stay of execution is highly deferential. A stay of execution is an equitable remedy that lies within a court's discretion. *See Kemp v. Smith*, 463 U.S. 1321 (1983) (Powell, J., in chambers). Where, as here, the court of appeals has granted a stay of execution, "this Court generally places considerable weight on the decision reached by the courts of appeals." *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983). "Only when the lower courts have clearly abused their discretion in granting a stay should [this Court] take the extraordinary step of overturning such a decision." *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting); *see also Doe v. Gonzales*, 546 U.S. 1301, 1307, 1309 (2005) (Ginsburg, J., in chambers) (denying application to vacate stay entered by court of appeals because "the applicants have not shown cause so extraordinary as to justify this Court's intervention in advance of the expeditious determination of the merits toward which the Second Circuit is swiftly proceeding" (internal quotation marks omitted)).

In deciding whether to grant the stay of execution, the en banc D.C. Circuit considered four factors: "(1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). The court did not abuse its discretion in holding that these factors weighed in favor of a stay. Mrs. Montgomery has made a strong showing that she is likely to succeed on the merits of her appeal, and the remaining stay factors are satisfied as well.

I. The En Banc D.C. Circuit Correctly Concluded That Mrs. Montgomery Is Likely To Succeed On The Merits

The en banc D.C. Circuit was justified in entering a brief stay of Mrs. Montgomery's execution because she is likely to succeed in establishing that the Government violated the FDPA in setting her execution date.

Under the plain terms of the FDPA, federal officials are bound to adhere to state law governing the procedures by which a death sentence is implemented. In designating a January 12 execution date, the Government indisputably failed to comply with Missouri Supreme Court Rule 30.30(f), which requires 90 days' notice of an execution. Under that provision, the earliest execution date that the Director could have designated was February 21, 2021—more than five weeks later than the date the Director chose.

The text and purpose of the FDPA dictate that the state procedures like Rule 30.30(f) governing execution timing are part of the "manner" by which a federal death sentence must be "implement[ed]." 18 U.S.C. § 3596(a). Indeed, as Judge Millett explained below, "'setting the date for the execution to take place' [is] a 'fundamental part' of the forum state's implementation of the execution procedure governed by Section 3596(a)." App. 10a. For that reason, Mrs. Montgomery is likely to succeed on the merits.

A. The FDPA Mandates Compliance With State Notice And Date-Setting Requirements

1. The FDPA provides that, when a federal death sentence is to be carried out, "a United States marshal … shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a).

By using the words "manner" and "implementation," the statute on its face requires the Government to do more than merely follow the relevant state's "method of execution," such as by hanging or lethal injection—as the Government contends (at 21-25). Rather, "the statute is most naturally read as encompassing the administrative process that leads from the end of a prisoner's judicial appeals to the final carrying out of the sentence, including both preparatory steps and the attendant safeguards that surround an execution." App. 29a.

"[T]he word 'manner' is used frequently in the execution context as a broad term that may encompass any level of detail." *In re Fed. Bureau of Prisons'*

Execution Protocol Cases (Execution Protocols I), 955 F.3d 106, 130-31 (D.C. Cir. 2020) (Rao, J., concurring). The word "implementation" is similarly broad, and, "[i]n the death penalty context, … is commonly used to refer to a range of procedures and safeguards surrounding executions, not just the top-line method of execution" but also even "very minute aspects of executions, including the '[d]ate, time, place, and method.'" *Id*. at 133-34 (second alteration in original); *see also In re Fed. Bureau of Prisons' Execution Protocol Cases (Execution Protocols II)*, No. 20-5361, slip op. at 4 (D.C. Cir. Dec. 10, 2020) (en banc) (Wilkins, J., dissenting) ("[S]etting the date for the execution to take place is such a fundamental part of its implementation that it is reasonable to hold that it must be incorporated" under the FDPA).

The ordinary meaning of these key statutory terms confirms this construction. At the time the FDPA was enacted, "manner" was defined as "[t]he way in which something is done or takes place; method of action;" or "mode of procedure," Oxford English Dictionary (2d ed. 1989), indicating that the word encompasses not only the top-line method of execution, but also more "granular details," *Execution Protocols I*, 955 F.3d at 130 (Rao, J., concurring); *see also* 18 U.S.C. § 3592(c)(6) (separate provision of the FDPA requiring jury to consider whether offense was committed "in an especially heinous, cruel, or depraved manner," meaning not just the method of killing but also the precise details). During the same time period, "implement" was defined as "to carry out: accomplish, fulfill," Webster's Third New International Dictionary (3d ed. 1993), or "[t]o

complete, perform, carry into effect (a contract, agreement, etc); to fulfill (an engagement or promise)" or "[t]o carry out, execute (a piece of work), Oxford English Dictionary (2d ed. 1989).

As relevant here, a "critical part of the process of *carrying out* the death sentence is notifying everyone involved when the execution is going to take place." *Execution Protocols II*, slip op. at 4 (Wilkins, J., dissenting) (emphasis added). "Indeed, it is hard to imagine anything more integral to the implementation of a death sentence than when the government starts it." App. 10a. In other words, in ordinary speech, there is little doubt that "implementation" of the "manner" of execution includes *when* it will be carried out, not just *how*.[3]

Finally, the Government (at 21-25) is wrong that the FDPA's history suggests that the statute was designed to address only top-line method. Both the 1937 Act that preceded the FDPA and the FDPA itself defer to the States' overall experience conducting executions—experience that the federal government traditionally lacked. Indeed, "almost all federal executions pursuant to the 1937 Act" were actually "carried out by state officials," who did so using the same procedures they used "to execute their own" prisoners. *Execution Protocols I*, 955 F.3d at 171 (Tatel, J., dissenting). Thus, although the Government is correct (at 24) that the 1937 Act

[3] When the Government promulgated its own timing and notice regulations to govern federal executions, *see* 28 C.F.R. §§ 26.3-.4, it understood that the term "implementation" encompasses such scheduling rules: "DOJ's 1993 execution protocol bears the title, 'Implementation of Death Sentences in Federal Cases.'" *Execution Protocols I*, 955 F.3d at 133-34 (Rao, J., concurring) (citing 58 Fed. Reg. 4,898 (Jan. 19, 1993)).

required compliance with "general method of execution," the historical practice was to follow far more specific attendant procedures as well.[4] And in any event, even if following state procedures was not already mandatory under the 1937 Act, when Congress passed the FDPA, it replaced the 1937 Act's use of the word "inflicting" with "implementation." "The [former] refers to the immediate action of execution, whereas 'implementation of the sentence' suggests additional procedures involved in carrying out the sentence of death." *Execution Protocols I*, 955 F.3d at 158 (Rao, J., concurring).

The Government also ignores the specific historical circumstances surrounding the passage of the FDPA: It was enacted "because then-extant procedures to carry out [federal] death sentences were insufficient to meet modern requirements" following a series of decisions by this Court in the 1970s and 80s that scrutinized "both … top-line method of execution and … more specific details of execution procedures." App. 36a; *see also* S. Rep. No. 101-170, at 3 (1989) ("[T]hese sentences have been unenforceable because they fail to incorporate a set of procedures to govern the determination whether a sentence of death is warranted in a particular case."). To comply with those decisions, it would have been "daunting" for Congress to create a new "separate statutory execution protocol," and doing so

[4] *Andres v. United States*, 333 U.S. 740 (1948), is not to the contrary. The aspect of the opinion cited by the Government (at 22-23) comes in a brief footnote and is dicta. *Andres*, 33 U.S. at 745 n.6. The question before the Court in *Andres* was whether the 1937 Act was limited in application "to the forty-eight states," such that a death sentence could not be effected in the Territory of Hawaii. *Id.* at 745.

"could have delayed the resumption of the federal death penalty." App. 37a. Through passage of the FDPA, Congress instead opted to "piggyback[] on state execution protocols that courts had already approved." *Id.* By using *both* top-line methods and "administrative process[es]" that had already been tested in court by the states, Congress "avoided the potential for protracted litigation." *Id.*

2. The Government argues (at 25) that "[e]ven assuming the FDPA extends beyond a State's top-line choice of execution method," it still would not apply in this case because the statute is "limited to state 'procedures effectuating death.'" But the Government offers no linguistic reason why the words "manner" and "implementation" should be read in such an idiosyncratic and narrow fashion, notwithstanding the ordinary meaning of those words. *See supra* 10-11. Instead, the Government simply asserts that the statute is limited to death-effectuating procedures, citing courts of appeals decisions purportedly supporting the proposition. But those decisions are wholly unpersuasive. Indeed, only one, *United States v. Vialva*, 976 F.3d 458 (5th Cir. 2020), squarely holds that the FDPA does not incorporate state laws concerning the timing of executions. The conclusory reasoning of that decision—that the phrase "'implementation of the sentence' … simply does not extend to pre-execution date-setting and warrants"—is simply *ipse dixit*. *Id.* at 462.

In any event, even under the Government's narrower interpretation, "it seems clear that prescribing the date and time for the execution to occur is a necessary element of effectuating the death sentence." *Execution Protocols II*, slip

op. at 4 (Wilkins, J., dissenting). After all, it is that designation that "informs the condemned prisoner, his counsel, the warden, the victims, the public, as well as the President who has pardon and clemency power, and the courts which have power to enjoin, when the execution is actually going to occur." *Id.*

3. The Government next contends (at 25-28) that the FDPA must exclude state law concerning execution timing because the statute encompasses at most the steps supervised by a marshal after he acquires custody over the prisoner. And execution scheduling, the Government says, happens before the marshal acquires custody. This reading fails for several reasons.

First, the interpretation "leave[s] a significant lacuna in the statutory scheme." App. 32a. "If implementation does not begin until the period immediately preceding the execution, what is supposed to happen to the prisoner after 'exhaustion of the procedures for appeal,' when the Attorney General's custody expires, but before transfer to the marshal?" App. 33a. (quoting 18 U.S.C. § 3596(a)). By contrast, "[t]he statutory scheme comes together … if 'implementation' of the sentence includes the preparatory steps and attendant safeguards that surround an execution" and "a United States marshal is responsible for supervising the various steps leading from the end of the judicial process (*i.e.*, 'appeal of the judgment of conviction and … review of the sentence,') to the carrying out of the execution." *Id.* (quoting 18 U.S.C. § 3596(a)).

Second, if this interpretation were adopted, then the Government would be excused from following even death-effectuation procedures. *See* Dkt. 59 at 6. State

law, for example, often sets out how and where chemicals used in lethal injections should be obtained. *See, e.g.*, Ind. Code Ann. § 35-38-6-1 (state must obtain needed drugs from regulated pharmacies or wholesale drug distributors). And because those chemicals are obtained in advance of when the punishment itself is inflicted, the Government's interpretation would excuse it from following state law concerning the safety and provenance of the very chemicals that will be used to effectuate death. The Government's response below has been to concede that the FDPA must incorporate so-called "death-effectuation" procedures, like chemical compounding rules, that govern conduct that precedes transfer to the marshal. But if that is true, then the Government's entire contextual point is a zero, as even under the Government's conception of the statute, transfer to the marshal is not determinative of what procedures the FDPA incorporates.

Third, that interpretation would enable the Government to avoid the FDPA's mandate by gaming the timing of the transfer to the marshal. As this Court has explained, government agencies "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit [their] discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001). Under the Government's reading, the marshal's duty to supervise implementation of the execution is triggered only when there is a formal transfer of the prisoner to the marshal. But Congress's decision in the FDPA to incorporate state law cannot turn on the Department of Justice's own determination as to when it is appropriate to transfer "custody" of the prisoner to the marshal. If it did, then the Government

could evade the FDPA altogether simply by providing that a prisoner is formally "release[d]" to the marshal at the moment just before death. 18 U.S.C. § 3596(a). Congress surely did not intend to give the Government unfettered discretion over whether to follow state law. Nor did it intend to hide that authority in a mousehole.

This is particularly troubling because the Government refuses to take a position as to *when* transfer of custody occurs, in this case, or any other. The Government has cited no law governing the transfer of custody, nor even an informal protocol outlining when such a transfer would typically occur. If the substance of the FDPA's mandate hinges on the timing of transfer, the Government must be able to explain either what neutral principles determine the transfer of custody, or why Congress would have bound the law to a moving target within the Government's control.

4. Contrary to the Government's assertions (at 27), "historical practice" does not compel its interpretation, either. As Judge Millett explained, the fact that "the marshal was not historically charged with the setting of execution dates … answers the wrong question." App. 10a. Indeed, the inquiry for purposes of the FDPA is *not* whether the marshal is authorized to *set* an execution date. Rather, the question is whether the marshal's "supervision" of the sentence's "implementation" includes the responsibility to ensure that the execution takes place when it is supposed to under the law. And the answer to that question is plainly yes: We are aware of no "historical" evidence that the marshal could simply disregard applicable legal parameters concerning execution timing and permit an

execution to take place earlier. And there is certainly no *textual* basis for engrafting an amorphous "historical role of the marshal" limitation onto the language of § 3596(a).

To the extent there are lingering doubts about this reasoning, take another example: The marshal has not historically been responsible for choosing the top-line method of execution, either. Hanging was prescribed by federal law starting with the First Congress. *See* Crimes Act of 1790, ch. 9, § 33, 1 Stat. 112, 119 (specifying that "the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead"). But the Government itself does not dispute that the FDPA at least requires it to use the top-line method set out in state law. In other words, the marshal's role in ensuring state law is followed is not limited to those matters over which the marshal has historically exercised discretion.

Nor does it follow that the marshal cannot be charged with following state date-setting rules because it is *federal courts* that have historically had "authority to set execution dates." App. 42a-43a. Again, that logic would sweep in top-line execution methods too: "Throughout the nineteenth century and well into the twentieth, it fell to *each trial judge* to determine how the defendant would be put to

death." Mem. from Ted Calhoun to Henry Hudson, Dir. of the U.S. Marshals Serv. 1 (July 21, 1992) (emphasis added).[5]

Federal law, moreover, plainly envisions a role for both the Judiciary and the Executive Branch in setting federal executions: A federal court issues a judgment and order that a "sentence shall be executed on a date and at a place designated by the Director of the Federal Bureau of Prisons," 28 C.F.R. § 26.2, and the Director—deriving his authority from the court's—designates a "date and a time" for execution within the bounds established by the court's judgment and order, *id.* § 26.3. The marshal's duty to ensure state law is followed by ensuring the date is designated according to the rules "prescribed by the law of the State," 18 U.S.C. § 3596(a), does not amount to "overseeing the federal courts in the setting of execution dates," as the district court suggested. App. 43a. To the contrary, the marshal ensures that the *Executive Branch* follows state law, as incorporated by the FDPA. And to the extent § 3596(a), a federal law, suggests that federal court orders designating execution dates must also follow the incorporated state laws, that result is hardly remarkable.

5. Finally, independent of its other arguments concerning the construction of § 3596(a), the Government has also contended "that the FDPA does not incorporate Rule 30.30(f) because that Rule" references state officers and institutions, and thus governs only "the internal organization of and operations of

[5] https://files.deathpenaltyinfo.org/documents/United-States-Marshals-Federal-Execution-Documents.pdf (last visited Jan. 11, 2021).

Missouri state government." App. 17a n.1 (quoting Dkt. 37 at 31). But as the district court pointed out, the FDPA's incorporation of state law "would have little meaning if the government 'could avoid any obligation under state law because a state's laws contemplate that all matters relating to implementation of an execution will be carried out by that state's institutions.'" *Id.* (quoting Dkt. 42 at 22). The FDPA's mandate that federal officials follow state law necessarily entails the straightforward translation of state laws into the federal context—the substitution of state officials for federal officials, and the like. The Government has not suggested—and cannot suggest—that it would be impossible to follow the state procedures at issue here, which concern scheduling rules easily implemented by federal officials.

B. The En Banc D.C. Circuit's Stay Is Entirely Appropriate Under These Circumstances

1. For many of the same reasons, the panel's decision conflicts with the D.C. Circuit's own precedent. In *Execution Protocols I*, Judge Rao explained, what is true in ordinary speech is equally true "[i]n the death penalty context": "the term 'implementation' is commonly used to refer to a range of procedures and safeguards surrounding executions," including the "date, time, place, and method." 955 F. 3d at 134-35 (Rao, J., concurring) (cleaned up). That is why the Government's own timing and notice rules—enacted just the year before the FDPA—were promulgated in a regulation entitled "Implementation of Death Sentences in Federal Cases." *Id.* at 133-34 (citing 58 Fed. Reg. 4898 (Jan. 19, 1993)).

Indeed, *Execution Protocols I* stands in conflict with the panel's decision here.

As Judge Millett observed, Judge Rao's opinion—with which Judge Tatel agreed in pertinent part—says "that Section 3596(a) requires a United States marshal to follow 'all procedures prescribed by state statutes and formal regulations[.]' … That includes, specifically, the '[d]ate' of execution." App. 9a. "Whether or not that was the precise question at issue in [*Execution Protocols I*], those analyses were critical to both Judge Rao's and Judge Tatel's opinions on the execution protocol issue decided." App. 9a. Further, Judge Millett noted, "in ruling on a petition for rehearing en banc just last month, four members of [the D.C. Circuit] (including Judge Tatel) agreed specifically with Judge Rao's opinion in the precise context presented here." App. 10a.

At a minimum, the D.C. Circuit is fractured on how to implement the FDPA. In the last twelve months, the D.C. Circuit has issued a series of decisions (both in a three-judge panel and as an en banc court), which now represent the most prominent controlling interpretative authority on FDPA-related questions. *See generally Execution Protocols I*, 955 F.3d 106; *Execution Protocols II*, slip op. 1-4. The D.C. Circuit should be afforded the opportunity to reconcile the divided opinions by conclusively determining the law of the Circuit, for this and all future proceedings. *Execution Protocol Cases II*, slip op. at 3-4 (three concurring judges and four dissenting judges recognized Judge Rao's concurrence in *Execution Protocol Cases I* as the controlling D.C. Circuit opinion); *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020) (observing that the D.C. Circuit's *Execution Protocol Cases* resulted in a "split three ways" and not recognizing Judge Rao's concurrence as

controlling). Under these circumstances, it was well within the D.C. Circuit's discretion to enter a temporary stay of execution to permit en banc review of the panel's decision and "to resolve … circuit law on the important question of the meaning of 'implementation of death in the manner prescribed by the law of the State in which the sentence is imposed.'" App. 1a.

The Government's argument (at 18) that the D.C. Circuit's decision not to rehear en banc *Execution Protocols II* perpetuates the false notion that a full court's refusal to exercise its discretion under Federal Rule of Appellate Procedure 35(a) is tantamount to the court tacitly approving the panel opinion's erroneous reasoning. This effectively rewrites Rule 35(a), which is entirely discretionary. It provides that the court "may order" rehearing en banc, and advises that such an order "is not favored" and is reserved for "a question of exceptional importance" or "to secure or maintain uniformity of the court's decisions." In any event, the full D.C. Circuit or this Court is likely to reverse the panel's decision, which is sufficient to establish a likelihood of success on the merits.

2. The Government is likewise wrong (at 20) that there is "circuit consensus" that "the FDPA does not incorporate state scheduling procedures like those at issue here." Lower courts are also badly divided over the interpretation of the FDPA. As noted, the D.C. Circuit itself has issued a multiplicity of decisions on this question. *See supra* 19-21; *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020) (observing that the D.C. Circuit's *Execution Protocol Cases* resulted in a "split three ways" and not recognizing Judge Rao's concurrence as controlling).

Meanwhile, performing far more perfunctory review, panels in other circuits have departed from the D.C. Circuit's precedent. The Ninth Circuit has held, for example, that "procedures that do not effectuate death fall outside the scope of" § 3596(a), although it did "not comprehensively delineate the scope of the FDPA." *United States v. Mitchell*, 971 F.3d 993, 996 (9th Cir. 2020). The Fifth Circuit has similarly held that "§ 3596(a) is at least limited to procedures effectuating death and excludes pre-execution process requirements such as date-setting and issuing warrants." *Vialva*, 976 F.3d at 462. The Fifth Circuit noted that this holding was based on "[t]he text of the provision," but provided essentially no analysis as to why its reading of the text was the right one. *Id.* And the Eleventh Circuit noted that "[w]e needn't decide today precisely what the phrase 'in the manner prescribed by the law of the State in which the sentence is imposed' entails—whether it refers only to top-line methods, execution procedures more generally, etc.," which *supports* the D.C. Circuit's review of this important question that other courts have yet to reach. *LeCroy v. United States*, 975 F.3d 1192, 1198 (11th Cir.), *cert. denied*, 141 S. Ct. 220 (2020).

II. Mrs. Montgomery Will Be Irreparably Harmed Absent A Stay

As the en banc D.C. Circuit correctly found, Mrs. Montgomery will plainly suffer irreparable harm unless her execution is stayed. That conclusion is consistent with this Court's precedent, which instructs that "execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.).

By setting an unlawfully early execution date, the Government has denied Mrs. Montgomery critical time in which she is entitled to seek legal relief from her death sentence. "So long as [Mrs. Montgomery's] clemency petition[] [has] not been acted upon, there is a chance that [it] could be granted after further consideration." *Execution Protocols II*, No. 20-5361, slip op. at 4-5 (Wilkins, J., dissenting). "The denial of time for that further consideration to occur is itself irreparable harm." *Id.*

Absent a stay, Mrs. Montgomery will also be unlawfully denied the "valu[able]" time afforded to her by law to "prepare, mentally and spiritually, for [her] death." *Ford*, 477 U.S. at 421 (Powell, J., concurring)—a legally cognizable interest recognized in the Government's own regulations governing federal executions. *See* Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992) (regulations "enable the prisoner and his immediate family to prepare themselves for the execution"). And at the most elemental level, the Government's unlawful action will irreparably cut Mrs. Montgomery's life short. As Justices of this Court have repeatedly recognized, "[a] prisoner under a death sentence remains a living person and consequently has an interest in h[er] life." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (Connor, J., concurring in part and concurring in the judgment); *see id.* at 281 (a death-sentenced prisoner retains a "residual life interest") (Rehnquist, J.); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("irreparable harm … necessarily present in capital cases").

III. The Remaining Equitable Factors Favor Granting A Stay

The D.C. Circuit was also correct in finding that the remaining equitable factors support the brief stay it entered to permit en banc review. Absent a stay, the only consequence to the Government will be the need to reschedule the execution date in conformity with Missouri's scheduling requirements. To the extent the Government asserts that "logistical issues" require that Mrs. Montgomery be executed the week of January 11, any administrative burdens result from the Government's choices with respect to other executions. Mrs. Montgomery's execution may be scheduled, but it must be done in accordance with law.

Nor is this a case where the prisoner has unduly delayed in asserting her claim. This particular APA claim grounded in the FDPA did not arise until the Director rescheduled Mrs. Montgomery's execution on November 23. After that new designation, Mrs. Montgomery promptly filed a supplemental complaint and moved for summary judgment on the claim. The district court initially granted summary judgment only on Mrs. Montgomery's regulatory claim, declining to address her FDPA-based claim. After the D.C. Circuit summarily reversed on the regulatory claim, Mrs. Montgomery renewed her partial motion for summary judgment on her FDPA claim *the very same day* the D.C. Circuit's mandate issued. That this litigation is occurring at all—and now so close to the scheduled execution date—is entirely because the Government has unlawfully abbreviated the time between notice and a scheduled execution in an unprecedented rush to the

execution chamber. But the D.C. Circuit and this Court should not truncate their consideration of the law that will govern the implementation of death sentences, now and forever.

Finally, there is "a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *E.g.*, *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citation omitted). As a general matter, the public interest is undermined by the "perpetuation of unlawful agency action." *Id.* That concern is only heightened in capital cases, like this one. *See Execution Protocol Cases II*, slip op. at 5 (Wilkins, J., dissenting). As this Court recently recognized, "when so much is at stake, … 'the Government should turn square corners.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909-10 (2020) (citation omitted).

CONCLUSION AND PRAYER FOR RELIEF

Ms. Montgomery respectfully requests that the Court deny the Government's application.

Respectfully submitted this 12th day of January, 2021,

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