CAPITAL CASE
EXECUTION SCHEDULED - JANUARY 12, 2021

No. 20-____

IN THE

Supreme Court of the United States

LISA MARIE MONTGOMERY,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Federal regulations provide that "[i]f the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons *when the stay is lifted*." 28 C.F.R. § 26.3(a)(1) (emphasis added).

The first question presented is whether, consistent with § 26.3(a)(1), the Director may designate a new execution date for a person condemned to death while a stay of that person's execution is in place.

2. A panel of the D.C. Circuit summarily reversed the reasoned decision of the district court on a motion and without full briefing.

The second question presented is whether a federal court of appeals may summarily reverse the decision of a district court on an important question of first impression.

PARTIES TO THE PROCEEDING

Petitioner is Lisa Marie Montgomery, plaintiff-appellee below.

Jeffrey A. Rosen, Acting Attorney General of the United States; Rosalind Sargent-Burns, Acting Pardon Attorney; Michael Carvajal, Director, Federal Bureau of Prisons; Barb von Blackensee, Regional Director of the North Central Region of the BOP; Michael Carr, Warden, Federal Medical Center Carswell; T.J. Watson, Warden, Federal Correctional Complex Terre Haute; Alix M. McLaren, National Administrator of Women and Special Populations Federal Bureau of Prisons; United States Department of Justice; Office of the Pardon Attorney; and Federal Bureau of Prisons, are respondents on review.

STATEMENT OF RELATED PROCEEDINGS

Lisa Montgomery v. Jeffrey Rosen, et al., No. 21-5001 (D.C. Cir.) (notice of appeal docketed on January 8, 2021).

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PETITION FOR A WRIT OF CERTIORARI

Lisa Marie Montgomery respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-2a) is unreported and is available at 2021 WL 22316. The opinion of the district court (App. 3a-38a) also is unreported and is available at 2020 WL 7695994.

JURISDICTION

The court of appeals entered judgment on January 1, 2021. App. 1a-2a. The petition for rehearing *en banc* was denied on January 5, 2021. App. 45a-46a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The regulation involved is 28 C.F.R. § 26.3. It is reproduced in the Appendix to this brief.

INTRODUCTION

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

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

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

The D.C. Circuit's decision presents two important questions worthy of this Court's review.

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

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

summarily vacate the district court here "so far departed from the accepted and usual course of judicial proceedings" that it "call[s] for [the] exercise" of the Supreme Court's "supervisory power." Sup. Ct. R. 10(a).

Given the exceptional importance of these questions, not only for Mrs. Montgomery and other death-sentenced persons, but for all litigants whose cases pose novel, timely raised questions that warrant full and considered treatment on appeal, the Court should grant certiorari and reverse.

STATEMENT

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

On October 16, 2020, the Government scheduled Mrs. Montgomery's execution for December 8 pursuant to 28 C.F.R. § 26.3. After visiting their client, Mrs. Montgomery's capital attorneys contracted COVID-19, rendering them incapable of filing her clemency petition. On November 12, Mrs. Montgomery filed a complaint asserting claims stemming from her lawyers' inability to assist her in the clemency process. Finding merit in the claims, the district court issued a stay of execution lasting "until December 31, 2020." Minute Order I, *Montgomery* v. *Barr et al.*, No. 1:20-cv-03261 (D.D.C. Nov. 25, 2020); *see* Mem. Op., *Montgomery* v. *Barr et al.*, No. 1:20-cv-03261 (D.D.C. Nov. 19, 2020). The Government did not appeal the court's stay.

While the stay remained in effect, on November 23, the Government rescheduled Mrs. Montgomery's

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

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

The court considered and rejected the Government's argument that the regulation was not triggered because, at the time they set a new execution date, Mrs. Montgomery's original date had not yet passed. "[T]he phrase 'date designated for execution,'" the court reasoned, "refers to the date of execution subject to the Court's stay, not whatever date the

Director subsequently sets." App. 29a. Indeed, the Government "never suggest[ed]—nor could they suggest—that the December 8, 2020 execution date would have passed had the Court not issued its stay or that the date passed for some other 'reason.'" App. 29a.

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

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

The Government then moved the D.C. Circuit for a stay pending appeal or vacatur of the district court's opinion. On January 1, 2021, a panel of the D.C. Circuit construed the Government's motion as one "for summary reversal," concluded that the merits were

"so clear as to warrant summary action," and summarily reversed the district court's ruling. App. 1a. The panel's reasoning was contained in a single sentence: § 26.3(a)(1) "did not prohibit the Director from making that designation [of a new execution date on November 23] … because, at that time, the 'date designated for execution' had not yet 'passe[d].'" App. 1a-2a.

On January 5, Mrs. Montgomery's request for rehearing *en banc* was denied.[1]

REASONS FOR GRANTING THE PETITION

A. Whether § 26.3(a)(1) Permits The United States To Designate A New Execution Date While The Execution Is Stayed Is An Important Question Worthy Of Review

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

1. Section 26.3(a)(1) provides that "[i]f the date designated for execution passes by reason of a stay of execution, then a new date *shall* be designated promptly by the Director of the Federal Bureau of

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

Prisons *when the stay is lifted*." 28 C.F.R. § 26.3(a)(1) (emphases added). The regulation on its face directs the Director—using the mandatory term "shall"—to designate a new execution date only once "the stay is lifted." The regulation is unambiguous; the Court should therefore presume it "says … what it means and means ... what it says." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005)).

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

Common canons of construction further support this interpretation. *First*, when a statute or regulation "limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen*, 529 U.S. at 583 (quoting *Raleigh & Gaston R.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871)); *see also* 2A Sutherland, Statutes and Statutory Construction § 47.23 (Norman J. Singer ed., 7th ed. 2020). As the

district court explained, "[h]ere, the 'thing to be done' is rescheduling after an execution date lapses by reason of a stay, and the 'particular mode' is 'promptly … when the stay is lifted.'" App. 25a. By specifying *how* and *when* an execution date "shall" be rescheduled, the regulation necessarily implies that the Director may not designate a new date in *other* ways, at *other* times.

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

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

a. In commanding that the Director designate a

new date only upon expiration of a stay, federal regulations simply make explicit what is already implicit in a stay of execution. A stay of execution—like any stay—"temporarily suspend[s]" the Government's "authority to act." *Nken v. Holder*, 556 U.S. 418, 428-29 (2009). As a result, a stay of execution temporarily sets aside the Government's authority to designate a new execution date during the pendency of a stay. All relevant judicial authority, the Government's own past practice, and its prior interpretations have all recognized as much, adhering to the foundational principle that the Government cannot schedule a new execution date during a pending stay.

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

Second, the Government has consistently adhered to this view in setting other federal executions. Dating back to at least 1830, the Executive Branch has "determined to leave the execution of sentences of the

law in all cases to the direction of the courts, in full confidence that they will give a reasonable time for the exercise of executive clemency in cases where it ought to be interposed." Death Warrants, 2 Op. Att'y Gen. 344, 344 (1830), 1830 WL 856. The Government has, until now, consistently respected this judicial role: For every execution scheduled since the Government resumed capital punishment in 2019, when the prisoner has obtained a stay of execution, the Government has waited until the expiration of the stay to set a new execution date. Indeed, Mrs. Montgomery's case is the only instance we could find since the regulations went into effect in 1993 in which the Government has designated a new execution date while a court's stay of execution was in place. *See* Declaration of Zohra Ahmed in Support of Plaintiff Lisa Montgomery's Motion for Partial Summary Judgment, Ex. 1, *Montgomery* v. *Barr et al.*, No. 1:20-cv-03261 (D.D.C. Dec. 15, 2020).[2]

Third, the Government's own written interpretations are consistent with this understanding.

The Government explicitly acknowledged, in promulgating the subject regulations in 1993, that its authority to set execution dates derives from that of the courts. *See* Implementation of Death Sentences in Federal Cases, 58. Fed. Reg. 4,898, 4,899 (Jan. 19,

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[2] In two instances—Alfred Bourgeois and Lezmond Mitchell—the Government appears to have designated a new execution date after courts ordered that the applicable stays be vacated, but before formal issuance of the associated mandates. Mrs. Montgomery's case is the only one in which the Government has set an execution date during a stay without a court having ordered the stay vacated.

1993) ("The Department is authorized to rely on the authority of the federal courts, acting pursuant to the All Writs Act, 28 U.S.C. [§] 1651(a), to order that … sentences be implemented."). Section 26.3 extends that authority to the Director under certain circumstances, subject to a court's superior authority to order otherwise. *See* 28 C.F.R. § 26.3(a). The Government's description in the promulgating commentary of § 26.3's purpose makes plain its understanding that when a court has issued a stay, the Government will forbear action in furtherance of the execution: The Government explained that vesting the Director with the power to designate an execution date "will obviate the practice, which is a pointless source of delay in state cases, of seeking a new execution date from the sentencing court each time a higher court lifts a stay of execution that caused an earlier execution date to pass." Notice of Proposed Rulemaking, Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992).

The implication of that statement is that, when § 26.3 was written, the Government understood that it could seek a "new execution date" only after a "court lifts a stay of execution." *Id.* The regulations do not break with the background principle that a judicial stay suspends the Executive's authority to act; they reaffirm it, by stating that the Director would have the power to designate a new date "when the stay is lifted." *Id.* Nothing in those regulations even hints that the Government thought the Director would be permitted to reschedule an execution while a stay remained in effect. *See Meyer v. Holley*, 537 U.S. 280, 287 (2003) (when a text "has not expressed a contrary

intent, the Court has drawn the inference that it intended ordinary rules to apply").

This understanding has continued through the years: The Government's authority to schedule executions yields to the power of the Judicial Branch over the same matter. As the Government explained when promulgating amendments to related regulations, "Section 26.3(a)'s prefatory language … authoriz[es] BOP's Director to set an execution date and time '[e]xcept to the extent a court orders otherwise,'" and "nothing" in the regulations "alters the courts' power to set aside or postpone execution dates pursuant to their authority to issue stays and injunctions." Manner of Federal Executions, 85 Fed. Reg. 75,846-01, 75,850 (Nov. 27, 2020).

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

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

promptly rescheduled the executions, *consistent with the applicable regulation*" (emphases added) (citing 28 C.F.R. § 26.3(a)(1))).

The Government has never cited a *single authority*, in case law or otherwise, suggesting it may designate a new execution date during a stay. Every available authority contemplates, to the contrary, that the Director will designate a new execution date only after a court's stay has expired, just as the plain text of the regulation commands. Construing the regulation to permit the Director to act despite the existence of a stay thus conflicts with the long-recognized allocation of authority between the Judiciary and the Executive Branch.

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

This Court has long cautioned against interpretations that cast aside background norms, emphasizing that legal rules "are to be read with a presumption favoring the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, (1952). The rationale for that presumption is straightforward: Absent evidence to the contrary, courts can fairly assume that laws are enacted against the background of established principles and with an intention to preserve them. *See Neder v. United States*, 527 U.S. 1, 21-22 (1999) ("It is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress

means to incorporate the established meaning of these terms.'" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U. S. 318, 322 (1992)) (brackets and alteration in *Neder*)); *see also, e.g.*, *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1016 (2020); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911).

Regulatory "language cannot be considered in a vacuum." *E.g.*, *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). There is no indication that the Attorney General sought to jettison the usual rule here. As explained (*supra* 6-8), every interpretive tool confirms that the Director must wait until the stay is lifted before designating a new date. The regulation does not explicitly authorize the Director to reschedule an execution despite an order by an Article III court staying that execution—and the Attorney General did not hide that authority in a mousehole.

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

The panel's holding implausibly suggests that the

date that was stayed does not pass "by reason of a stay" so long as the Director designates a subsequent date in view of the stay. That is like saying a barbeque was rescheduled to avoid rain in the forecast, but not because of rain. Mrs. Montgomery's reading "makes sense of the overall provision, which, in the first sentence instructs the Director to set a date for execution, and in the second permits the Director to set a subsequent date 'when the stay is lifted.'" App. 29a. The panel's reading of the second sentence, by contrast, deprives half of the first clause of meaning: It asks whether the initial "date designated for execution passe[d]," but not (as the rest of the clause demands) whether the "reason" the initial execution date could not go forward was a stay. 28 C.F.R. § 26.3(a)(1). As the district court found, a date designated for execution passes "by reason of a stay" regardless whether the Government purports to designate a second date beforehand. App. 28a-29a.

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

effect, then up until the date passes, the Director can reschedule an execution date whenever he chooses; once the date passes, however, the Director's authority is frozen until the stay is lifted. That makes no sense.

Reading § 26.3(a)(1) as the district court did, to preclude the designation of a new execution date when a stay is in place, comports with the regulation's purpose of "ensur[ing] [the] orderly implementation of death sentences." 57 Fed. Reg. at 56,536. Section 26.3—together with § 26.4, which specifies that a prisoner must receive 20 days' notice of a new execution date after a lengthy postponement—ensures that a substantial stay of execution will be followed by a definite period before execution. That 20-day period gives an individual facing execution the opportunity to consider and pursue appropriate then-ripe legal remedies in the wake of a decision dissolving a stay and ensures adequate time for appellate review.

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

4. The Director's ability to designate a new execution date during the pendency of a stay is a question of exceptional importance, not only to Mrs. Montgomery, but also to the more than 50 prisoners currently on federal death row.[3] As explained, the purpose of the federal regulations is to ensure the "orderly implementation of death sentences." 57 Fed. Reg. at 56,536. Section 26.3 and § 26.4 work together to advance that goal by guaranteeing that a substantial stay is followed by a definite 20-day period before execution—a period of time that allows executive and judicial officers to carry out their own responsibilities, gives an individual facing execution the opportunity to consider and pursue appropriate legal remedies in the wake of a decision dissolving a stay, and ensures that appellate courts have adequate time for meaningful review.

If § 26.3(a)(1) does not restrict the Government's ability to set an execution date for any of these prisoners while a stay is lawfully in effect, federal inmates will be denied time to which they are legally entitled to submit clemency petitions and have those petitions duly considered. Federal law recognizes that prisoners have a legally cognizable interest in "meaningful access" to clemency proceedings—the "'fail-safe' of our [criminal] justice system." *Harbison v. Bell*, 556 U.S. 180, 194 (2009). Further, prisoners condemned to death will be deprived of guidance on the timing of their executions, meaning they and their families will

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

not have the clarity needed to "prepare, mentally and spiritually, for their death[s]." *Ford v. Wainwright*, 477 U.S. 399, 421 (1986) (Powell, J., concurring). The execution regulations themselves recognize the importance of having such time to prepare. *See* 57 Fed. Reg. at 56,536 (regulations "enable the prisoner and his immediate family to prepare themselves for the execution").

5. Though there is no circuit split on the specific interpretation of § 26.3(a)(1), the decision below is in grave tension with prior decisions. This Court routinely grants certiorari to address regulatory and statutory questions of "unusual importance," even in the absence of a conflict. *Massachusetts v. E.P.A.*, 549 U.S. 497, 506 (2007). Indeed, just this Term, the Government sought—and obtained—a writ of certiorari on a case that raised only claims of statutory interpretation and did not involve a circuit split. *See Trump v. Sierra Club*, No. 20-138, 2020 WL 6121565, at *1 (U.S. Oct. 19, 2020); *see also, e.g.*, *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1750 (2019) (interpreting the Class Action Fairness Act without circuit split); *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 938 (2017) (interpreting Federal Vacancies Reform Act of 1998 without circuit split); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 57–58 (2004) (granting certiorari to decide whether ability to "compel agency action unlawfully withheld or unreasonably delayed" under the APA extended to review of Bureau of Land Management's statutory obligations without mention of circuit split) (quotations omitted); *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000) (interpreting Taylor Grazing Act and implementing regulations

without circuit split).

B. Whether Summary Reversal Is Available For Issues Of First Impression Is An Important Question Worthy Of Review

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

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

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

Decisions and rules of courts of appeals likewise state that summary reversal is not available on a new or unanswered question of law. *See, e.g.*, *Dunn v. Wells Fargo Bank, N.A.*, No. 20-1080, 2020 WL 1066008, at *1 (7th Cir. Feb. 25, 2020) (internal quotation marks omitted) (observing that summary disposition is appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists"); *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004) (noting that summary disposition is "used by appellate courts to resolve cases which do not raise novel or complex questions"); *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) (summary disposition appropriate "when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists"); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) (summary disposition appropriate where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," or where "the appeal is frivolous"); 1st Cir. R. 27.0 ("[T]he court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious error the court may, similarly, reverse."); 3d Cir. R. 27.4 ("A party may move for summary action … reversing a judgment, decree or order, alleging that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action."); 10th Cir. R.

27.3(A)(1)(b) ("A party may file only the following dispositive motions … a motion for summary disposition because of a supervening change of law or mootness.").

Of course, exigent issues arise that require the immediate attention of the courts. This Court's own efforts to handle legal questions relating to the country's public health emergency are but one example. But this was no emergency. Summary reversal is inappropriate when the circumstances permit reasoned consideration, as they did here: Mrs. Montgomery asserted her claim promptly after her execution was improperly designated; the Government appealed nearly three weeks before the date it sought to secure; and a court may always ensure that important issues receive due deliberation by using a stay to preserve the status quo, as this Court frequently does. *See, e.g.*, *Barr v. E. Bay Sanctuary Covenant*, 140 S. Ct. 3 (2019); *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). There was no practical impediment to plenary consideration of the opinion below and the claim it vindicated.

2. The traditional standards delimiting summary reversal serve an important purpose in our judicial system. Summary dispositions are fundamentally unfair to the litigants, depriving them of the opportunity for full briefing and argument. *See Presley v. Georgia*, 558 U.S. 209, 217-18 (2010) (Thomas, J., dissenting) ("I am unwilling to decide this important question summarily without the benefit of full briefing and argument."); *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) ("I am sure that, if we are to decide this case, we should not do so

without briefing and argument."); *Montana v. Hall*, 481 U.S. 400, 405-06 (1987) (Marshall, J., dissenting) (summary disposition "deprive[s] the litigants of a fair opportunity to be heard on the merits"). Summary reversal in particular fails to "accord proper respect for the judgments of the lower courts," when "[t]he judges below *have had* the benefit of full briefing on the merits and review of the entire record" but the court of appeals has not. *Hall*, 481 U.S. at 408-409 (Marshall, J., dissenting). Summary disposition likewise deprives courts of a decisional process that is designed to enable judges to reach the correct outcome across cases. *Cf.* Fed. R. App. P. 1, Advisory Committee Note (1979 Amendment) ("Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process."). This Court has itself recently recognized the importance of procedural regularity to the integrity and proper functioning of our judicial system. *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581-82 (2020) (reversing based on court of appeals' procedural error of appointing three amici to brief and argue legal issues not raised by the parties).

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

Here, the question before the court of appeals concerning the construction of § 26.3(a) was concededly a novel one, *i.e.*, a "new or unanswered question of law." *See* Resp. to Pet. for Reh'g at 8, *Montgomery* v. *Rosen, et al.*, No. 20-5379 (D.C. Cir. Jan 4, 2021). Indeed, the

decision below was the first ever to address the meaning of § 26.3(a)(1) and determine that an execution may be scheduled during a stay. The decision below thus necessarily did not depend on a "demonstrably erroneous application of federal law," *Dyson*, 527 U.S. at 467 n.1, that warrants summary reversal. Rather, all prior judicial authority concerning the broader question of whether the Government may schedule an execution during a stay indicated that the district court's decision was a *correct* application of law.

In summarily reversing the district court's well-reasoned, careful opinion on a matter of first impression, the panel "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Under the approach taken by the panel, any case on which the panel disagrees with the merits can be summarily reversed without full briefing, thereby subverting the regular appellate process, inevitably reaching wrong, hasty results, and contradicting this Court's own practice regarding summary dispositions. The Court "has a significant interest in supervising the administration of the judicial system" and the "Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010).

Members of this Court have recognized that its own use of summary disposition amounts to "bitter medicine," *Spears v. United States*, 555 U.S. 261, 268 (2009) (Roberts, C.J., dissenting), to be dispensed infrequently, but this Court has provided only limited

guidance to the lower courts regarding the standard governing the availability of summary reversals. This case provides the ideal opportunity for the Court to provide that guidance.

C. This Case Is A Good Vehicle For Addressing Both Questions

This case is an ideal vehicle for addressing both questions presented. Whether the Director, consistent with § 26.3(a), may designate a new execution date for Mrs. Montgomery while a stay of her execution was in place—a question on which the D.C. Circuit summarily reversed without the benefit of full briefing on the merits—is an exceedingly important question of first impression. The panel's opinion cleanly sets up the question of the proper interpretation of the regulation, as well as the question of whether summary reversal was appropriate.

Further, as the district court explained, the prejudice to Mrs. Montgomery resulting from the Government's unlawful action is "obvious." App. 35a. Had the Government complied with § 26.3(a)(1), it would not have been able to set a new execution date for Mrs. Montgomery before December 31. App. 43a. As noted *supra* 16, moreover, under § 26.3's neighboring provision, § 26.4, a "prisoner under sentence of death is entitled to notification "of the date designated for execution at least 20 days in advance."[4] Accordingly,

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[4] The exception to the 20-day notice requirement for short stays is inapplicable here. *See* 28 C.F.R. § 26.4(a) (providing exception "when the date follows a postponement of fewer than 20 days of a previously scheduled and noticed execution").

the Government may not lawfully execute Mrs. Montgomery before January 20.

The Government's violation of the regulations, in other words, deprives Mrs. Montgomery of eight days of life. And it "diminishe[s] the time that she has to seek legal relief from her death sentence, including through the clemency process, and to prepare, mentally and spiritually, for [her] death." App. 35a-36a (cleaned up); *see also Ford*, 477 U.S. at 421 (Powell, J., concurring).

Nor is this a case where the prisoner has unduly delayed asserting her claim. This particular APA claim grounded in § 26.3(a)(1) 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 subsequently moved expeditiously—ultimately issuing a 28-page opinion granting final judgment to Mrs. Montgomery on December 24, about one month after the claim first arose. Mrs. Montgomery is before this Court days before her scheduled execution through no fault of her own, but because of the Government's attempt to put her to death on an unlawfully expedited timeline.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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