CAPITAL CASE
EXECUTION SCHEDULED – JANUARY 12, 2021

Nos. 20-922, 20A121

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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Lisa Montgomery has presented two bases on which this Court is likely to grant certiorari and reverse the D.C. Circuit. *First*, the D.C. Circuit erred in concluding that § 26.3(a)(1) permits the BOP Director to designate a new execution date while an execution is stayed. The Government barely defends the rationale adopted by the panel, instead offering arguments in favor of a construction even the panel did not adopt, all of them incorrect. *Second*, the D.C. Circuit erred in summarily reversing the district court on a question of first impression, and that marked departure from regular appellate procedure merits this Court's intervention. This Court should grant a stay of Mrs. Montgomery's execution so it can consider the weighty issues presented by her petition for certiorari before she is put to death.

I. There Is A Fair Prospect That This Court Will Grant Certiorari And Reverse The Panel's Interpretation Of § 26.3(a)(1)

Section 26.3(a)(1) expressly provides that if, as here, "the date designated for execution passes by reason of a stay," the Director "*shall*" designate a new date "*when the stay is lifted*." 28 C.F.R. § 26.3(a)(1) (emphases added). The Government expressly acknowledges that this regulation is "mandatory" in operation. Opp. 16. And it does not dispute that the phrase "when the stay is lifted" modifies the verb "designate," meaning that the duty imposed is to schedule a new execution date *after* the stay is lifted, and not one minute before. Nevertheless, the Government argues that nothing in § 26.3(a)(1) prevented the Director from designating a new date of execution *before* the expiration of the stay here. That position is at war with the regulation's text and logic.

1. Tellingly, the Government has little to say about the regulation's text, because the text—as the district court recognized—refutes the meaning the panel gave it. The panel interpretation focused exclusively on the word "passes" but entirely ignored the phrase "by reason of a stay." This Court has repeatedly cautioned against constructions akin to this one—emphasizing that a law's words "cannot be construed in a vacuum," but rather must be read "in their context and with a view to their place in the overall … scheme." *E.g.*, *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Here, the only plausible reading of the *entire* first clause in the context of this sentence is that a scheduled execution date "passes by reason a stay" when a stay

renders that date inoperable, regardless of whether the Director purports to designate a new date as well. Pet. 14-15.

The Government argues (Opp. 14) that "the date designated for execution," 28 C.F.R. § 26.3(a)(1), cannot refer to the original execution date in place when the stay went into effect if a new date has been designated. That phrase must refer to something, however, and if it didn't refer to the date that has been stayed, the Director could repeatedly "set[] and reset[] the execution date just before it passes to avoid the loss of authority to reschedule before the stay is lifted." Pet. App. 30a. Such a regime "can hardly be deemed to advance the 'orderly' implementation of death sentences"—the express purpose of these regulations. *Id.* Nor is the Government correct that "there is no such thing as 'the execution date subject to the stay.'" Opp. 14. There must be an execution date for an emergency stay of execution to be granted, and *that* date passes "by reason of a stay" *when it has been stayed*. *See, e.g.*, *Nooner v. Norris*, 499 F.3d 831, 834 (8th Cir. 2007) (*Ford* claims not ripe until execution date set). It is illogical for the Government to suggest that the original date was not "subject" to the district court's order.

Mrs. Montgomery's reading also does not require an impermissible inquiry into the Director's "subjective motives." Opp. 15. It is "black-letter administrative law" (*id.*) that courts should generally refrain from ordering the "administrative officials who participated in [a] decision *to give testimony* explaining their action," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added). But "[p]robing a decisionmaker's subjective mental reasoning" through extra-record

discovery is "distinct from the ordinary judicial task of evaluating whether the decision itself was objectively valid, considering all of the materials before the decisionmaker at the time he made the decision." *In re United States*, 138 S. Ct. 371, 373 (2017) (Breyer, J., dissenting from grant of stay). The invalidity of the decision here follows from objective circumstances—its timing—not its subjective basis. No court needs to probe the responsible officials' thinking to agree.

2. The Government devotes far more attention to a construction of § 26.3(a)(1) that the panel never adopted, arguing that the regulation imposes a "mandatory *duty* to reschedule" when a stay terminates but does not "*prohibit* the Director from rescheduling prior to the expiration of a stay." Opp. 16. As Mrs. Montgomery has explained (Pet. 7-8), when a statute or regulation "limits a thing to be done in a particular mode, it includes a negative of any other mode," *Christensen v. Harris Cty.*, 529 U.S. 576, 583 (2000) (citation omitted). Here, "the 'thing to be done' is rescheduling following a stay, "and the 'particular mode' is 'promptly … when the stay is lifted.'" Pet. App. 25a. Rescheduling an execution *before* the stay is lifted is prohibited.

According to the Government, this canon applies only when "it is fair to suppose that [the drafter] considered the unnamed possibility and meant to say no to it." Opp. 17 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). But it *is* fair to make that assumption here. The agency not only *considered* the issue, the text of the regulation *expressly addresses* the Director's authority to redesignate an execution date that passes by reason of a stay; that is the central object of the second

sentence of § 26.3(a)(1), not some unforeseen eventuality. And if the text left any doubt, the 1993 Notice of Proposed Rulemaking eradicates it, as in promulgating this very regulation the Government expressly acknowledged its practice of seeking a new execution date only after a stay was lifted. *See* Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992) (discussing the regulation's purpose to give Director the authority to designate a new execution date without returning to the sentencing court "*each time a higher court lifts a stay* that caused an earlier execution date to pass" (emphasis added)).

In essence, the Government's argument is that *if*, in promulgating the regulations, the Department of Justice had considered whether the Director may designate a new date during the pendency of a stay (which it plainly did), it would have expressly provided that he may do so (which it plainly did not). The Government has the context wrong—but context in any case does not permit courts to "replace what the [drafter] said with what courts think the [drafter] *would have said* (i.e., in the judge's estimation *should have said*)," *Barnhart*, 537 U.S. at 181 (Scalia, J., dissenting). That is especially true where, as here, the drafter itself is trying to rewrite its own binding regulations on the fly.

The Government's remaining authorities (Opp. 18-19) are equally unavailing. The application of the *expressio unius* canon is context-specific. *See, e.g.*, *Christensen*, 529 U.S. at 583 (considering application of canon "in the context of the overall statutory scheme"); *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) (same). And the context in each of those cases is unilluminating here. In

Christensen, this Court concluded that "the canon [did] not resolve th[e] case in [the] petitioners' favor" because the petitioners had incorrectly identified the "thing to be done." 529 U.S. at 583 ("The 'thing to be done' as defined by § 207(o)(5) is not the expenditure of compensatory time" but the denial of "an employee's request to use compensatory time"). Here, by contrast, everyone agrees that "the 'thing to be done'" is the designation of an execution date.

Adirondack and others describe the *expressio unius* canon as a "feeble helper" when interpreting an agency's *authorizing statute*—because "Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." 740 F.3d at 697 (internal quotation marks omitted); *see also, e.g.*, *Mobile Commc'ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1406 (D.C. Cir. 1996) (similar).[1] This case, of course, does not involve a congressional grant of discretion. It involves an agency regulation—the express purpose of which was to bind the agency to a set of procedures ensuring the "orderly implementation of death sentences," 57 Fed. Reg. at 56,536—which the agency is attempting to rewrite retrospectively in service of the short-term policy goal of executing Mrs. Montgomery as quickly as possible.

3. Whether the Director can set a new execution date while a stay of execution is in place is an important question of federal law that this Court needs to resolve. The Government (Opp. 26) is wrong that the question presented is not worthy of this

[1] *St. Marks Place Housing Co., Inc. v. U.S. Department of Housing & Urban Development*, 610 F.3d 75 (D.C. Cir. 2010), which the Government also cites (Opp. 19), involved an agency regulation, but the agency's interpretation there was entitled to deference, *see id.* at 82-83. The case is accordingly inapposite: Although the Government (unsuccessfully) sought deference below, it abandons the request in this Court.

Court's review because it has relevance for only "an extremely narrow set of circumstances." Federal executions may (ordinarily) be relatively rare, but that only elevates the importance of clarifying the law in an appropriate case. This is that case.

In essence, the Government's argument is that it may set "execution dates in anticipation of the termination of a stay." *State v. Joubert*, 518 N.W.2d 887, 898 (Neb. 1994). Until now, courts had *uniformly* repudiated the Executive's authority to do so. Pet. 9. That demonstrates the unprecedented nature of the Government's conduct here, not the "novelty" of Mrs. Montgomery's claim (Opp. 25), and the question is exceptionally important for the more than 50 prisoners currently on federal death row, who depend on the regular and lawful implementation of these regulations in their final days.

II. There Is A Fair Prospect That This Court Will Grant Certiorari And Reverse The Panel's Grant Of Summary Reversal

The D.C. Circuit's summary reversal on a question of first impression—in contravention of this Court's own summary reversal precedent and the practice applicable in all of the federal courts of appeals—presents a separate and independent reason for this Court to grant certiorari and reverse.

1. In characterizing the D.C. Circuit's summary reversal as "routine," Opp. 3, the Government elucidates the error committed by the panel. Summary disposition—in particular summary *reversal*, on an important question of first impression—is supposed to be anything but routine. *See, e.g.*, *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (summary disposition should be "rare"); *Major League Baseball*

Players Ass'n v. Garvey, 532 U.S. 504, 512 (2001) (Stevens, J., dissenting) (summary disposition is an "extraordinary" remedy). Rather, summary reversal should be reserved for the unusual case "where the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., joined by Thomas & Alito, JJ., dissenting from grant of summary reversal) (internal quotation marks omitted).

In reversing the district court summarily, on a motion and without briefing on the merits, the D.C. Circuit turned that standard on its head. The district court, in a thoughtful and rigorous opinion, addressed a question of first impression—whether § 26.3(a)(1) permits the Director to set a new execution date while a stay of execution is in place. Given the absence of controlling precedent, the meaning of § 26.3(a)(1) is neither "settled" nor "stable," and the district court's decision finding in favor of Mrs. Montgomery was not "demonstrably erroneous," *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999). This marked departure "from the accepted and usual course of judicial proceedings … call[s] for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

2. The Government's argument that Mrs. Montgomery's reading of § 26.3 is only novel because no one else has ever attempted an "atextual reading," Opp. 25, also gets things backwards. Questions of first impression necessarily press arguments for the first time; that does not diminish the need for careful consideration of the merits of the claim, after full briefing and argument. Nor is there anything

"novel" about the argument that a stay of execution deprives the Government of the authority to set a new execution date. *See supra* 7.

That this Court has summarily reversed decisions of lower courts in the execution context is similarly irrelevant. Opp. 24-25. When this Court employs summary reversal as a procedural device, it typically occurs in a later stage of appellate review on a more fully developed record, with the benefit of thoughtful, reasoned decision-making from both a district court and court of appeals. Or, like the cases cited by the Government (Opp. 25), summary reversal may be warranted where issues presented have already been extensively litigated. *See, e.g.*, *Barr v. Lee*,140 S. Ct. 2590, 2590 (2020). Here, though, Mrs. Montgomery never had the chance to brief or argue the issue on the merits before the D.C. Circuit, so this Court does not have the benefit of the D.C. Circuit's reasoned judgment after full briefing and argument. And this case presents an issue of first impression, so the merits have not been addressed by other litigants and courts. For these reasons, as this Court stated in upholding a stay in a previous case, "it would be preferable for the District Court's decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the execution [is] carried out." *Barr v. Roane*, 140 S. Ct. 353, 353 (2019).

III. Mrs. Montgomery Will Suffer Irreparable Harm Absent A Stay, And The Equities Favor A Stay

Mrs. Montgomery will clearly suffer irreparable harm absent a stay: She will be denied days of life, critical time to seek relief from her death sentence, and time to

prepare for death—all of which she is entitled to under law. Stay App. 24-25. The Government's error limits her opportunity to pursue clemency, the "'fail-safe' of our [criminal] justice system," *Harbison v. Bell*, 556 U.S. 180, 194 (2009). *See* Pet. 17-18. This is not a "bare procedural violation"; "the *timing* of her … execution" affects Mrs. Montgomery's substantive rights. *Contra* Opp. 30. And as this Court has 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).

The Government's own assertions of harm range from the inapplicable to the self-inflicted. *First*, "the public's powerful and legitimate interest in punishing the guilty, by carrying out a sentence of death in a timely manner," Opp. 31 (internal quotation marks omitted), does not justify the unlawfully *premature* enforcement the Government seeks here. Further, compliance with federal regulations would delay the Government's implementation of the death sentence by only a few days. "[T]he Government is not injured by a short extension of the time for implementing the death sentence as required by federal … law," *Montgomery v. Rosen*, No. 21-5001, slip op. at 9 (D.C. Cir. Jan. 11, 2021) (Millett, J., dissenting), as this Court implicitly recognized in *Roane*, 140 S. Ct. at 353.

Nor have the "public's 'interests … been frustrated in this case.'" Opp. 31 (citing *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019)). In *Bucklew*, the petitioner had exhausted his appeals and habeas challenges more than a decade earlier and sought relief just days before a previously scheduled execution, resulting in a lawsuit that "carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-

hour stays of execution, and plenary consideration in this Court." 139 S. Ct. at 1134. Mrs. Montgomery, by contrast, is one of the most recently-sentenced prisoners on federal death row; indeed, there are over 20 prisoners sentenced earlier without execution dates.[2] To the extent the Government claims that "logistical challenges" require that Mrs. Montgomery be executed the week of January 11, Opp. 32, any administrative burdens result from the Government's own scheduling choices.

Finally, the Government indefensibly asserts that Mrs. Montgomery has delayed in bringing this claim. Mrs. Montgomery brought this claim a mere two weeks after the Director designated the execution date under review. Mrs. Montgomery diligently pursued the pending claim as soon as it arose. That this litigation is occurring at all is because the Government has unlawfully truncated the time between notice and a scheduled execution in an unprecedented rush to the execution chamber. But the Court should not truncate its own consideration of the law that will govern the implementation of death sentences. The law, the public interest, and Mrs. Montgomery deserve otherwise.

CONCLUSION AND PRAYER FOR RELIEF

Mrs. Montgomery respectfully requests that the Court grant Mrs. Montgomery's stay application and petition for a writ of certiorari, stay her execution, and grant any other relief that the Court may find just.

[2] Death Penalty Information Center, *List of Federal Death-Row Prisoners*, https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners (last visited Jan. 11, 2021).

Respectfully submitted this 12th day of January, 2021,

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