No. 20A__

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, ET AL.,
APPLICANTS

v.

LISA MARIE MONTGOMERY

(CAPITAL CASE)

APPLICATION FOR STAY OR VACATUR OF THE STAY OF EXECUTION ISSUED BY THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PARTIES TO THE PROCEEDING

Applicants were the Defendants-Appellees below. They are Jeffrey A. Rosen, Deputy Attorney General and Acting Attorney General, in his official capacities; Rosalind Sargent-Burns, Acting Pardon Attorney, in her official capacity; Michael Carvajal, Director of the Federal Bureau of Prisons, in his official capacity; Barb von Blackensee, Regional Director of the North Central Region of the Bureau of Prisons, in her official capacity; Michael Carr, Warden of Federal Medical Center Carswell, in his official capacity; T.J. Watson, Warden of Federal Correctional Complex Terre Haute, in his official capacity; Morris Lewis, National Administrator of Women and Special Populations, Federal Bureau of Prisons, in his official capacity; the Department of Justice; the Office of the Pardon Attorney; and the Federal Bureau of Prisons.

Respondent was the Plaintiff-Appellant below. She is Lisa Marie Montgomery.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Montgomery v. Barr, No. 20-cv-3261 (Nov. 19, 2020) (granting preliminary injunction on clemency claim)

Montgomery v. Rosen, No. 20-cv-3261 (Dec. 26, 2020) (entering partial final judgment on 28 C.F.R. 26.3(a)(1) claim)

Montgomery v. Rosen, No. 20-cv-3261 (Jan. 8, 2021) (entering partial final judgment on the Federal Death Penalty Act claim)

United States Court of Appeals (D.C. Cir.):

Montgomery v. Rosen, No. 20-5379 (Jan. 1, 2021) (summarily reversing district court judgment of December 26, 2020)

Montgomery v. Rosen, No. 20-5379 (Jan. 5, 2021) (en banc) (denying rehearing)

Montgomery v. Rosen, No. 21-5001 (Jan. 11, 2021) (denying stay pending appeal)

Montgomery v. Rosen, No. 21-5001 (Jan. 11, 2021) (en banc) (granting stay pending appeal)

Supreme Court of the United States:

Montgomery v. Rosen, No. 20-922 (petition for a writ of certiorari on 28 C.F.R. 26.3(a)(1) claim)

Montgomery v. Rosen, No. 20A121 (motion for stay of execution on 28 C.F.R. 26.3(a)(1) claim)

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Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants Jeffrey A. Rosen et al., respectfully applies for an order immediately staying or vacating the court of appeals' "last-minute" stay of respondent's execution so that the execution can proceed as planned later today. Barr v. Lee, 140 S. Ct. 2590, 2591 (2020) (per curiam). That stay -- entered by a 5-4 vote of the en banc D.C. Circuit fewer than 24 hours before respondent's execution -- is contrary to the en banc D.C. Circuit's refusal to grant a stay on an identical claim just last month, and departs from the decisions of four other courts of appeals addressing the scope of the Federal Death Penalty Act (FDPA), 18 U.S.C. 3596(a). As this Court has done repeatedly over the past several months, it should immediately set aside this unwarranted obstacle to carrying out a lawful death sentence.

Respondent was convicted and sentenced to death 13 years ago for strangling a pregnant woman to death and kidnapping her baby by cutting it out of her body while the woman was still alive. She is scheduled to be executed today, January 12, 2021, at 6 p.m. In preparation for the execution, she was transferred yesterday evening from a federal women's prison in Texas to the federal execution facility in Indiana. Multiple members of the murdered woman's family are currently in Indiana to witness the execution.

Respondent's transfer to Indiana yesterday came shortly after a divided panel of the D.C. Circuit denied her motion for a stay of execution on a claim that the FDPA compels the federal government to comply with a Missouri Supreme Court rule of practice and procedure requiring 90 days of notice before an execution and capping the number of executions that the state department of corrections may be required to conduct in a single month. App., infra, 3a. That panel reached the same result as both a prior panel and the en banc court in December with respect to a virtually identical FDPA claim regarding a Texas notice provision asserted by federal death-row inmates Brandon Bernard and Alfred Bourgeois. App., infra, 49a. Both inmates were executed after the court's December decision.

Shortly after 11 p.m. last night, however, a 5-4 majority of the en banc court -- including one judge who had voted to deny a stay before Bernard and Bourgeois were executed in December -- sua

sponte reconsidered the panel's denial of a stay, granted a stay, and granted rehearing en banc. App., infra, 1a. The en banc majority provided no rationale for abandoning the disposition the en banc court had adopted just a month earlier with respect to two similarly situated capital inmates. Nor did the majority explain how respondent was likely to succeed on the merits or satisfy the other requirements for a stay -- let alone one entered at the eleventh hour before a scheduled execution. Judges Henderson, Katsas, Rao, and Walker dissented, with Judges Katsas and Walker having observed at the panel stage that respondent's claim was "indistinguishable from" the one raised by Bernard and Bourgeois and rejected by the court before their December executions. App., infra, 1a, 4a. The D.C. Circuit's belated about-face should be set aside by this Court for several reasons.

First, the en banc court's action is a betrayal of the principle that like cases should be treated alike. One month ago, Bernard and Bourgeois sought a stay or injunction of their executions, claiming that the FDPA required compliance with Texas's 91-day notice requirement. The district court denied relief, a court of appeals panel denied relief, and the en banc court declined to reconsider the panel's decision. App., infra, 49a. Here, respondent similarly sought a stay or injunction of her execution, arguing that the FDPA requires compliance with Missouri's analogous 90-day notice requirement. Id. at 15a.

Again, the district court denied relief, and a court of appeals panel denied relief. Id. at 3a, 14a. But this time, the en banc court granted a stay. Id. at 1a. Bernard and Bourgeois have been executed; respondent now has an indefinite stay of execution. For that disparity, the court of appeals provided not a word of explanation.

Second, apart from its inconsistency, the court of appeals halted "respondent's execution without finding that [s]he has a significant possibility of success on the merits." Dunn v. McNabb, 138 S. Ct. 369, 369 (2017) (per curiam) (summarily vacating an injunction granted to a capital defendant); see, e.g., United States v. Purkey, 141 S. Ct. 195 (2020) (per curiam) (same); Brewer v. Landrigan, 562 U.S. 996, 996 (2010) (per curiam) (same). Aside from the naked assertion that a "majority of the en banc court has determined that [respondent] has satisfied the stringent requirements for a stay pending appeal," App., infra, 1a, the court of appeals made no reference to -- much less the required finding of -- a likelihood of success on the merits. That failure alone warrants vacatur of the stay. See Nken v. Holder, 556 U.S. 418, 434 (2009).

Third, the court of appeals could not have found a likelihood of success on the merits, because respondent's position is wrong several times over. She claims that the FDPA provision requiring the federal government to "implement[]" a federal death sentence

"in the manner prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a), compels the federal government to follow state rules regarding how much notice to provide a state inmate. But as the government has explained at length in prior briefing -- and as three Justices of this Court have already expressly indicated is likely correct -- that provision of the FDPA requires the federal government to follow only the State's general method of execution (e.g., lethal injection or electrocution), rather than other procedural details. See Barr v. Roane, 140 S. Ct. 353, 353 (2019) (statement of Alito, J.); accord In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 113-114 (D.C. Cir.) (Katsas, J., concurring), cert. denied, 141 S. Ct. 180 (2020).

At a minimum, however, any state procedural details that the federal government is arguably required to follow under Section 3596(a) must relate to the effectuation of death. That is, after all, what it means to "implement[]" a death sentence. 18 U.S.C. 3596(a). Every court of appeals that has addressed the issue has construed Section 3596(a) consistently with that limitation, and this Court has repeatedly denied review and allowed executions to proceed. See United States v. Vialva, 976 F.3d 458, 462 (5th Cir.) (per curiam), cert. denied, 141 S. Ct. 221 (2020); LeCroy v. United States, 975 F.3d 1192, 1198 (11th Cir.), stay denied, 141 S. Ct. 220 (2020); United States v. Mitchell, 971 F.3d 993, 996-997 (9th

Cir.) (per curiam), stay denied, 140 S. Ct. 2624 (2020); Peterson v. Barr, 965 F.3d 549, 554 (7th Cir.), stay denied, 141 S. Ct. 195 (2020). Of particular relevance here, the Fifth Circuit unanimously rejected a claim materially identical to respondent's (and Bernard and Bourgeois's) assertion that the FDPA incorporates Texas's 91-day scheduling requirement, and this Court denied review without noted dissent.

Finally, the balance of equities weighs overwhelmingly against halting respondent's execution, and in favor of vacating the stay entered by the court of appeals. This Court has explained in precisely this context that "last-minute" stays of execution "'should be the extreme exception, not the norm.'" Lee, 140 S. Ct. at 2591 (citation omitted). No such exception is warranted here. Respondent was sentenced to death 12 years ago for a crime of staggering brutality. She has exhaustively litigated challenges to her conviction and sentence, all of which have failed. Her claim here is simply that she should have received 90 days of notice for her execution, rather than the 50 days she received after her execution was rescheduled.

Whatever theoretical harm might result from that moderately truncated notice pales in comparison to the "profound injury" that would be caused to the public and the victim's family by canceling the execution at the eleventh hour. Calderon v. Thompson, 523 U.S. 538, 558 (1998). Indeed, because respondent's execution was

rescheduled in December, she received a total of 88 days' notice of her execution. It simply cannot be that equity supports disrupting a lawful execution, with the victim's family already waiting in Terre Haute, simply because respondent arguably should have received 2 more days of notice. The victim's family, her community, and the Nation "deserve better." Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019). This Court should vacate the court of appeals' stay so that respondent's execution can "proceed as planned." Lee, 140 S. Ct. at 2592.

STATEMENT

A. Factual and Procedural Background

1. In April 2004, respondent and Bobbie Jo Stinnett met at a dog show. Stinnett maintained a website to promote her dog-breeding business, which she ran out of her home. In the spring of 2004, Stinnett became pregnant and shared that news with her online community, including respondent. United States v. Montgomery, 635 F.3d 1074, 1079 (8th Cir. 2011).

Around that time, respondent, who was herself unable to become pregnant because she had been sterilized years earlier, falsely began telling people that she was pregnant. Respondent said that she had tested positive for pregnancy, and she began wearing maternity clothes and behaving as if she were pregnant. Respondent's second husband and her children were unaware of her

sterilization and believed that she was pregnant. Montgomery, 635 F.3d at 1079-1080.

On December 15, 2004, when Stinnett was eight months pregnant, respondent contacted Stinnett via instant message using an alias and expressed interest in purchasing a puppy from her. The women arranged to meet the following day. The following day, respondent drove from her home in Melvern, Kansas, to Stinnett's home in Skidmore, Missouri, carrying a white cord and sharp kitchen knife in her jacket. Montgomery, 635 F.3d at 1079.

When respondent arrived, she and Stinnett initially played with the puppies. But sometime after 2:30 p.m., respondent attacked Stinnett, using the cord to strangle her until she was unconscious. Respondent then cut into Stinnett's abdomen with the knife, which caused Stinnett to regain consciousness. A struggle ensued, and respondent again strangled Stinnett with the cord, this time killing her. Respondent then extracted the baby from Stinnett's body, cut the umbilical cord, and left with the child. Stinnett's mother arrived at Stinnett's home shortly thereafter, found her daughter's body covered in blood, and called 911. Stinnett's mother said the scene looked as if Stinnett's "stomach had exploded." Montgomery, 635 F.3d at 1079-1080.

The next day, December 17, 2004, state law-enforcement officers arrived at respondent's home, where respondent was sitting on the couch, holding the baby. An officer explained that they were

investigating Stinnett's murder and asked about the baby. Respondent initially claimed that she had given birth at a clinic in Topeka, but later admitted to that lie and told another one. She claimed that, unbeknownst to her husband, she had given birth at home with the help of two friends because the family was having financial problems. When asked for her friends' names, respondent said that they had not been physically present but had been available by phone if difficulties arose. Respondent asserted that she had given birth in the kitchen and discarded the placenta in a creek. Montgomery, 635 F.3d at 1080.

At some point, respondent requested that the questioning continue at the sheriff's office. Once there, respondent confessed that she had killed Stinnett, removed the baby from her womb, and abducted the child. The baby was returned to her father. Montgomery, 635 F.3d at 1080.

2. On December 17, 2004, the government filed a criminal complaint charging respondent with kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (2000). Compl., United States v. Montgomery, No. 05-cr-6002 (W.D. Mo.) (Dec. 17, 2004). Shortly thereafter, in January 2005, a federal grand jury indicted respondent on one count of kidnapping resulting in death. Indictment 1, Montgomery, No. 05-cr-6002 (W.D. Mo.) (Jan. 12, 2005). The indictment included special findings (id. at 1-4) required under the Federal Death Penalty Act of 1994, 18 U.S.C.

3591 et seq., for charges as to which a capital sentence is sought. See also Superseding Indictment 1-3, Montgomery, No. 05-cr-6002 (W.D. Mo.) (Mar. 13, 2007).

After trial, the jury unanimously found respondent guilty of kidnapping resulting in death and recommended a capital sentence. Montgomery, 635 F.3d at 1085. The district court sentenced respondent in accord with that recommendation. Ibid. The court of appeals affirmed, 635 F.3d 1074, and this Court denied certiorari, Montgomery v. United States, 565 U.S. 1263 (No. 11-7377) (Mar. 19, 2012).

In 2012, respondent sought post-conviction relief under 28 U.S.C. 2255. After holding an evidentiary hearing, the district court denied relief and further denied a certificate of appealability (COA). See Order, Montgomery v. United States, No. 12-8001 (W.D. Mo. Mar. 3, 2017); Order, Montgomery, No. 12-8001 (Dec. 21, 2015). The court of appeals similarly denied a COA and dismissed respondent's appeal. Judgment, Montgomery v. United States, No. 17-1716 (8th Cir. Jan. 25, 2019). This Court denied certiorari. Montgomery v. United States, 140 S. Ct. 2820 (No. 19-5921) (May 26, 2020).

B. The Present Proceedings

1. On October 16, 2020, the Director of BOP designated December 8, 2020, as the date for respondent's execution. D. Ct. Doc. 33, at 170-172 (Dec. 13, 2020); see 28 C.F.R. 26.3(a)(1)

(providing that the Director shall set an execution date "no sooner than 60 days from the entry of the judgment of death"). Respondent was thus notified of the designated date 53 days in advance of her initial execution date -- well in excess of the 20 days' notice required by regulation. See 28 C.F.R. 26.4(a) (effective until Dec. 27, 2020) ("The Warden of the designated institution shall notify the prisoner under sentence of death of the date designated for execution at least 20 days in advance, except when the date follows a postponement of fewer than 20 days of a previously scheduled and noticed date of execution, in which case the Warden shall notify the prisoner as soon as possible.").

On November 9, 2020, two of respondent's counsel, Kelley Henry and Amy Harwell, wrote to President Trump seeking a postponement of respondent's execution on the ground that they were suffering from symptoms of COVID-19. See D. Ct. Doc. 2-2, 2-3, 2-5 (Nov. 12, 2020). The Pardon Attorney responded the next day, explaining that, while not authorized to grant a reprieve, she would "accommodate the obvious difficulties" facing counsel. D. Ct. Doc. 2-6, at 1 (Nov. 12, 2020).

2. On November 12, 2020, respondent filed this action and moved for a temporary restraining order and preliminary injunction delaying her execution. She argued that permitting the execution to proceed despite the illness of two of her lawyers, which

hampered their ability to prepare a clemency application, would interfere with her right to counsel under 18 U.S.C. 3599.

On November 19, the district court granted respondent's motion in part, explaining that it would "stay Plaintiff's execution -- briefly -- to permit Harwell and Henry to recover from their illness and to have a short time to finish their work in supplementing Plaintiff's placeholder petition for a reprieve or commutation of sentence." D. Ct. Doc. 19, at 21. The court presumptively required respondent to file any clemency application by December 24, 2020 -- which she did, see D. Ct. Doc. 46 -- and enjoined the government from executing respondent "before December 31, 2020." D. Ct. Doc. 20, at 1 (Nov. 19, 2020).

The government chose not to appeal or otherwise seek relief from the district court's injunction. Instead, on November 23, the Director of BOP designated January 12, 2021 as the new date for respondent's execution. D. Ct. Doc. 33, at 173-175. Upon designation, this date superseded the original date of December 8.

On December 9, respondent sought leave to file a supplemental complaint raising two new claims. First, she alleged that the Director had violated 28 C.F.R. 26.3(a)(1) by designating a new execution date during the pendency of the injunction. Second, she alleged that the Director had violated 18 U.S.C. 3596(a) by failing to comply with a Missouri state court procedural rule in rescheduling her execution. D. Ct. Doc. 29-1; Docket Entry (Dec.

11, 2020). That rule provides that "[t]he [Missouri Supreme] Court shall set dates of execution after consultation with the director of the department of corrections," and "[a]ny date of execution shall be at least 90 days but not more than 120 days after the date the order setting the date is entered." Mo. S. Ct. R. 30.30(f). Separately, it states that "[t]he department of corrections shall not be required to execute more than one warrant of execution per month." Ibid.

On December 24, the district court granted partial summary judgment on respondent's first supplemental claim, concluding that the Director violated Section 26.3(a)(1) when he rescheduled respondent's execution during the pendency of the stay. D. Ct. Doc. 47, at 25. The court vacated the Director's designation and granted partial final judgment. Id. at 26-27; D. Ct. Doc. 48. On January 1, 2021, a panel of the D.C. Circuit summarily reversed. Order, Montgomery v. Rosen, No. 20-5379 (Jan. 1, 2021). The full court then denied respondent's petition for rehearing en banc, with no member of the court calling for a vote. Order, Montgomery, No. 20-5379 (Jan. 5, 2021). Respondent filed a petition for a writ of certiorari and motion for emergency stay pending certiorari in this Court, which remain pending. See Montgomery v. Rosen, Nos. 20-922, 20A121.

After the court of appeals rejected her Section 26.3(a)(1) claim, respondent renewed her motion for partial summary judgment

on the FDPA claim in the district court. See D. Ct. Doc. 57. The district court denied her motion. See App., infra, 14a-48a. The court concluded that "the FDPA's reference to '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), is best read to include the steps of the administrative process by which the government carries out an execution after a prisoner has exhausted her appeals." Id. at 37a-38a. The court further concluded that "the setting of an execution date" is not "one of those steps." Id. at 38a.

The district court explained that the "primary responsibility for setting the dates of federal executions has traditionally rested * * * with the sentencing court," and that "[w]hen Congress drafted the FDPA, it was presumably aware of this historical practice." App., infra, 40a, 42a. It observed that "[t]here is no indication that Congress, in assigning the U.S. marshals the task of supervising implementation of executions, intended to reassign the task of setting execution dates from the courts to the U.S. marshals." Id. at 42a-43a. The court found it "highly implausible * * * to suggest that Congress assigned the U.S. marshals the (constitutionally suspect) task of overseeing the federal courts in the setting of execution dates"; indeed, the court believed that a marshal would lack the authority to disregard a court order to carry out an execution on a particular date simply

"because he determines that the court's order conflicts with a state law." Id. at 43a.

The court separately rejected respondent's contention that, in light of the other two federal executions scheduled for January under the laws of other States, her scheduled execution violates Rule 30.30(f)'s prohibition on requiring the department of corrections to perform more than one execution per month. App., infra, 46a-47a. The court reasoned that this rule "does not seem to bestow any right or privilege on death row inmates" and applies "only when the prisoner was sentenced in Missouri." Id. at 47a. The court further noted that, "in any event, Montgomery's execution is the first federal execution scheduled in January." Ibid.

The district court denied respondent's application for emergency relief pending appeal. Minute Order (Jan. 8, 2021). Respondent then sought the same relief from the court of appeals, and on January 11, a panel of the D.C. Circuit denied her motion on the ground that she had "not satisfied the stringent requirements for a stay pending appeal." App., infra, 3a. Judge Katsas, joined by Judge Walker, concurred, explaining that the FDPA does not "require[] the federal government to follow state law in scheduling executions." Id. at 4a. Judge Millett dissented, arguing to the contrary that the FDPA "requires that the date on which an execution is carried out comply with state law timing requirements." Id. at 9a.

Just before midnight last night, the D.C. Circuit on its "own motion" reconsidered the panel's denial of a stay, granted a stay, and granted rehearing en banc. App., infra, 1a. The order stated without elaboration that "[a] majority of the en banc court has determined that appellant has satisfied the stringent requirements for a stay pending appeal." Ibid. Judges Henderson, Katsas, Rao, and Walker voted against reconsideration. Ibid. The court further set an expedited briefing schedule to conclude on January 29, with oral argument thereafter. Id. at 1a-2a.[1]

ARGUMENT

Under Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay or summarily vacate a stay of execution entered by a lower court. The Court must determine whether the applicant is likely to succeed on the merits and which party the equities support. See Nken v. Holder, 556 U.S. 418, 434 (2009); San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). In recent months, this Court has repeatedly set aside

[1] On Friday, respondent filed a new claim seeking relief under Ford v. Wainwright, 477 U.S. 399 (1986), in the Southern District of Indiana. Last night, the district court granted a stay on the basis of that claim. See Order Granting Motion to Stay Execution Pending a Competence Hearing, Montgomery v. Warden of USP Terre Haute, No. 21-cv-20 (S.D. Ind. Jan. 11, 2021). The government is currently pursuing emergency relief with respect to that claim in the Seventh Circuit and is prepared to seek relief in this Court if necessary.

orders halting lawful federal executions at the last minute based on tenuous legal claims. See, e.g., Barr v. Lee, 140 S. Ct. 2590, 2591-2592 (2020) (summarily vacating injunction); Barr v. Purkey, 140 S. Ct. 2594 (2020) (same); Barr v. Purkey, 141 S. Ct. 196 (2020) (same); Barr v. Hall, No. 20A102, 2020 WL 6797719 (Nov. 19, 2020) (same). This Court should do so now again.

The relevant considerations overwhelmingly favor a stay or vacatur of the court of appeals' stay of execution, given the substantial likelihood that the stay will not withstand appellate review, the absence of irreparable harm to respondent from the alleged procedural violation, and the profound public interest in implementing respondent's lawfully imposed sentence without further delay. Allowing the court of appeals' legally baseless stay to remain in place "would serve no meaningful purpose and would frustrate the [federal government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion). Particularly given the extensive preparations that have taken place, and the fact that the victim's family members are already waiting in Terre Haute to witness justice for respondent's victim, this Court should vacate the court of appeals' unsupportable "last-minute" stay and allow the execution to "proceed as planned." Barr v. Lee, 140 S. Ct. 2590, 2591–2592 (2020).

I. THE COURT OF APPEALS' STAY IS UNLIKELY TO WITHSTAND APPELLATE REVIEW

The en banc court of appeals concluded -- without any analysis, and in direct contravention of its own denial of relief on the same claim last year, see App., infra, 49a-50a -- that respondent is entitled to a stay pending appeal on her claim that the FDPA incorporates a state court rule of practice and procedure governing the scheduling of executions. That decision is wrong and would create a lopsided circuit conflict. Indeed, three Justices of this Court have already concluded that the FDPA likely incorporates only those state procedures governing method of execution. See Barr v. Roane, 140 S. Ct. 353, 353 (2019) (Alito, J., statement respecting the denial of stay or vacatur). And even if the FDPA extends more broadly to procedures effectuating death, it still would not incorporate state scheduling rules.

1. Insofar as the court of appeals found a likelihood of success on the merits at all, that implicit holding departs from decisions of the Fifth, Seventh, Ninth, and Eleventh Circuits -- all of which this Court declined to review. Most notably, the Fifth Circuit, in rejecting the same FDPA argument based on Texas's analogous 91-day notice requirement, held that Section 3596(a) "is at least limited to procedures effectuating death and excludes pre-execution process requirements such as date-setting." United States v. Vialva, 976 F.3d 458, 462 (per curiam), cert. denied, 141 S. Ct. 221 (2020). The other circuits have reached similar

conclusions. See LeCroy v. United States, 975 F.3d 1192, 1198 (11th Cir.) (explaining that whether Section 3596(a) "refers only to top-line methods" or "execution procedures more generally," "we are confident that it does not extend to ensuring a lawyer's presence at execution"), stay denied, 141 S. Ct. 220 (2020); United States v. Mitchell, 971 F.3d 993, 996-997 (9th Cir.) (per curiam) (holding that Section 3596(a) "addresses, at most, state laws that set forth procedures for giving practical effect to a sentence of death"), stay denied, 140 S. Ct. 2624 (2020); Peterson v. Barr, 965 F.3d 549, 554 (7th Cir.) (holding that Section 3596(a) "cannot be reasonably read to incorporate every aspect of the forum state's law regarding execution procedure" and that a state law governing execution "witnesses" falls outside the scope of the FDPA), stay denied, 141 S. Ct. 195 (2020).

Indeed, the en banc court's grant of equitable relief contradicts its own denial of relief on the same claim only a month ago. In In re Fed. Bureau of Prisons' Execution Protocol Cases, No. 20-5361 (D.C. Cir.) (Protocol Cases II), the stay panel unanimously declined to enter relief based on an analogous state-law 91-day notice provision, refusing to halt two Texas-based executions -- one scheduled with 55 days' notice and the other rescheduled with 21 days' notice. See Order, Protocol Cases II, No. 20-5361 (Dec. 9, 2020) (per curiam). And when the inmates sought en banc review, a majority of the en banc panel voted to

deny reconsideration. See App., infra, 49a-50a. In her briefing below, respondent herself asserted that the prior en banc disposition involved "virtually identical circumstances." C.A. Emergency Mot. for Stay (Jan. 9, 2021) (C.A. Mot.). The D.C. Circuit's unequal treatment of similarly situated inmates -- in the capital context, no less -- undermines public trust in the fair and equal administration of justice. And the court neither explained nor acknowledged its reversal in course. See App., infra, 1a.

Moreover, the circuit consensus is correct: the FDPA does not incorporate state scheduling procedures like those at issue here. Other than an ipse dixit assertion that respondent "satisfied the stringent requirements for a stay pending appeal," App., infra, 1a, the en banc court made no finding to the contrary. It did not analyze the legal issue or find a likelihood of success on the merits, instead noting its own "divided decisions" and granting expedited hearing "to resolve our circuit law," ibid. -- notwithstanding that the same purported confusion was rejected as the basis for en banc reconsideration in Protocol Cases II. The absence of any clear finding as to likelihood of success alone warrants vacatur. See Dunn v. McNabb, 138 S. Ct. 369 (2017) ("Because the District Court enjoined respondent's execution without finding that he has a significant possibility of success on the merits, it abused its discretion.").

2. To the extent the en banc court implicitly found that respondent was likely to succeed, it gravely erred.

a. At the outset, as the government has discussed at length in this Court in prior briefing, the FDPA's directive to "implement[]" a federal death "sentence in the manner prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a), requires the federal government to follow only a State's general, top-line method of execution, like execution, hanging, or lethal injection. See, e.g., Gov't Br. in Opp. at 14-24, Bourgeois v. Barr, No. 19-1348 (June 19, 2020). As Judge Katsas has thoroughly explained, "[a]ll indicators of the FDPA's meaning -- statutory text, history, context, and design -- point to [this] conclusion." In re Federal Bureau of Prisons' Execution Protocol Cases (Protocol Cases I), 955 F.3d 106, 114 (D.C. Cir.) (per curiam) (Katsas, J., concurring), cert. denied, No. 19-1348 (June 29, 2020); see id. at 114-124. And the three Justices to address the issue have indicated that the government's position is "likely to prevail when this question is ultimately decided." Roane, 140 S. Ct. at 353 (Alito, J., statement respecting the denial of stay or vacatur).

The "manner" provision of the FDPA traces its roots to the Crimes Act of 1790, which provided that "the manner of inflicting the punishment of death[] shall be by hanging." Act of Apr. 30, 1790, ch. 9, § 33, 1 Stat. 119. That provision prescribed the

general method of execution ("hanging"), not comprehensive procedures or details related to the execution process. Ibid. That understanding "followed the law of England," where Blackstone equated the "'manner'" of execution with the general method of causing an offender's death -- e.g., "'hanging'" -- rather than "subsidiary details" of the process. Protocol Cases I, 955 F.3d at 115 (Katsas, J., concurring).

After more than 140 years under the Crimes Act of 1790, Congress in 1937 changed the prescribed "manner" of federal executions from hanging to the "the manner prescribed by the laws of the State within which the sentence is imposed." Act of June 19, 1937 (1937 Act), ch. 367, 50 Stat. 304. There is no indication that Congress broadened the scope of the term beyond its long-settled meaning in the federal execution context -- i.e., as a reference to the general method of execution -- by retaining the term in the 1937 Act. To the contrary, "if a word is obviously transplanted from another legal source," it typically "brings the old soil with it." Hall v. Hall, 138 S. Ct. 1118, 1128 (2018) (citation omitted).

The history and context of the 1937 Act strongly reinforce that presumption. The Act was "prompted by the fact that" States had adopted "'more humane methods of execution, such as electrocution, or gas,'" and the Attorney General proposed that Congress "change its law in this respect." Andres v. United

States, 333 U.S. 740, 745 n.6 (1948) (emphases added; citation omitted). Accordingly, this Court has described the 1937 Act as adopting "the local mode of execution," which it equated with the general method of execution -- e.g., "death by hanging." Ibid. Indeed, when the federal government announced the first executions under the 1937 Act, it made clear that the inmates would "be executed by whatever method is prescribed by the laws of the State," while the Department of Justice would provide "all United States marshals instructions for carrying out executions" that would govern other particulars associated with the execution "[u]nless [a] court specifies otherwise." Associated Press, U.S. Arranging To Execute Five, June 17, 1938; see ibid. (citing federal instructions regarding execution time and number of witnesses). BOP confirmed that understanding in a 1942 manual, explaining that the 1937 Act's "manner" provision "refers to the method of imposing death, whether by hanging, electrocution, or otherwise, and not to other procedures incident to the execution prescribed by the State law." 19A1050 Resp. App. 3a (emphases added). The manual included regulations providing that a U.S. Marshal would be in "charge of the conduct of executions," which would occur "at the place fixed in the judgment" of the court or "designated by the Department of Justice." Id. at 3a-4a. The manual also specified details about the execution date, time, and witnesses. Ibid.

Thus, although the federal government was permitted to carry out executions under the 1937 Act in state facilities in cooperation with state personnel, see 50 Stat. 304 -- just as it may today, see 18 U.S.C. 3597(a) -- it did not consider itself legally obligated to follow subsidiary details of state execution protocols, let alone pre-execution procedures established by state law. The government's longstanding "practice" in that regard adds further "weight" to the already compelling evidence that references to the "manner" of execution in federal law have long referred only to the top-line choice of execution method, and not to pre-execution procedures. Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933).

In 1994, Congress "carried forward the relevant language and" substance of the 1937 Act in the FDPA. Protocol Cases, 955 F.3d at 117 (Katsas, J., concurring); see id. at 148 (Tatel, J., dissenting) ("By using virtually identical language in FDPA section 3596(a), Congress signaled its intent to continue the same system" as the 1937 Act.). The FDPA therefore requires what the 1937 Act required: compliance with "the local mode of execution," such as lethal injection, but not with all the procedural details of state law. Andres, 333 U.S. at 745 n.6. Because BOP conducts federal executions using lethal injection, 28 C.F.R. 26.3(a)(4) -- which Missouri also uses, see Bucklew v. Precythe, 139 S. Ct. 1112, 1120 (2019) -- the government has fully complied with the

FDPA provision that respondent invokes, and it need not follow additional state procedures, including those specified in Rule 30.30(f).

b. Even assuming the FDPA extends beyond a State's top-line choice of execution method, it would in no circumstance reach Missouri's 90-day notice requirement for scheduling executions or its cap on the number of executions that the department of corrections may be required to conduct in a single month. Section 3596(a) governs the manner of "implementation of the sentence" of "death." To "implement" a sentence means to carry it out. See Implement, Webster's Third New Int'l Dictionary 1134 (3d ed. 1993) ("to carry out: accomplish, fulfill"); Implementation Plan, Black's Law Dictionary 872 (10th ed. 2014) ("An outline of steps needed to accomplish a particular goal."). In other words, the statute is limited to state "procedures effectuating death." Vialva, 976 F.3d at 461-462 (internal quotation marks omitted); accord Peterson, 965 F.3d at 554; Mitchell, 971 F.3d at 996-997; LeCroy, 975 F.3d at 1198. A procedure effectuates death if it "concern[s] how a state conducts an execution, not when it does so." App., infra, 51a (Katsas, J., concurring).

Context confirms the plain meaning. The FDPA provides that an inmate under sentence of death must be "committed to the custody of the Attorney General" while any appeal is pending. 18 U.S.C. 3596(a). "When the sentence is to be implemented," the Attorney

General must "release" the prisoner to the Marshal, "who shall supervise implementation of the sentence." Ibid. As Judge Katsas has noted, "[t]his language makes clear that the prisoner is transferred to the marshal only '[w]hen the sentence is to be implemented,' and that the 'implementation of the sentence' covers only conduct that follows the transfer. In short, 'implementation' does not include scheduling the execution, but instead presupposes a set time and date." App., infra, 51a (Katsas, J., concurring).

The incompatibility of Rule 30.30(f) with federal executions confirms the error of respondent's interpretation. Rule 30.30(f) provides that the Missouri Supreme "Court shall set dates of execution after consultation with the director of the department of corrections," and "[t]he department of corrections shall not be required to execute more than one warrant of execution per month." Mo. S. Ct. Rule 30.30(f). That language establishes certain duties of the Missouri Supreme Court, and it prohibits that court from overburdening the state department of corrections by providing inadequate notice or by mandating multiple executions in rapid succession.

Respondent has never argued that the FDPA incorporates Rule 30.30(f) directly, such that the Missouri Supreme Court is responsible for scheduling federal executions. And the rule's framework cannot sensibly be translated to the federal level. This Court -- the federal equivalent of the Missouri Supreme Court --

does not set the dates of federal executions and does not consult with the BOP in scheduling executions. Respondent implicitly recognizes this problem by picking and choosing the parts of the Missouri rule she wishes to incorporate. She argues that the 90-day notice provision binds the Marshal, but does not suggest that the rule requires this Court, or any other federal court, to schedule executions or consult with the BOP in doing so. But she has never offered any plausible explanation for why, on her theory, the FDPA selectively incorporates the state law's rule about when the execution will be scheduled, but not the state law's rule about which type of official will schedule the execution.

c. As the panel majority and district court both recognized, "historical practice confirms [the] understanding" that the FDPA does not incorporate state scheduling rules, App., infra, 5a (Katsas, J., concurring), because the Marshal does not "supervise" the scheduling of executions, 18 U.S.C. 3596(a). The Congress that enacted the FDPA did so against a historical backdrop in which the Executive and federal courts shared responsibility for scheduling executions, and "the historical record is devoid of any indication that the marshals ever set dates on their own." App., infra, 40a; see id. at 5a (Katsas, J., concurring); id. at 39a-42a (tracing historical practice).

"Nothing in the FDPA upends * * * [this] longstanding historical practice" or reflects an intent to "vest[] scheduling

decisions with United States marshals." App., infra, 5a (Katsas, J., concurring). And the district court explained that "[i]t is highly implausible * * * to suggest that Congress assigned the U.S. marshals the (constitutionally suspect) task of overseeing the federal courts in the setting of execution dates," and further noted that "if a federal court orders a U.S. marshal to carry out an execution on a certain date, the marshal has no authority to ignore that order because he determines that the court's order conflicts with a state law." Id. at 43a. Although Judge Millett took issue with the district court's analysis, she did not dispute that the Marshal lacks the authority to disobey or otherwise "supervise" a court-ordered date. App., infra, 10a (Millett, J., dissenting). Thus, as the district court concluded, "the statutory text is best understood as providing that the marshal's supervision begins after the setting of the date." Id. at 43a.

d. Finally, Rule 30.30(f)'s limitation on the number of executions that the state department of corrections can be required to carry out in a particular month is patently inapplicable on multiple additional grounds. Respondent claims that the scheduling of her execution violated this rule because two other federal executions are also currently scheduled for January 2021. But neither of those executions is governed by Missouri law. See App., infra, 47a. Moreover, respondent's execution is the first execution scheduled for January. Rule 30.30(f) limits the number

of executions that may be required in a particular month, not the number that may be scheduled. As a result, even assuming Rule 30.30(f) governs all three executions in January, there would be no violation of the rule at the time of respondent's execution. Indeed, that would be true even if all three executions were Missouri executions and respondent's execution were not the first: after all, no court is "requir[ing]" the Department of Justice to schedule three executions in the month, Mo. S. Ct. R. 30.30(f); rather, the Department "has chosen" to do so, App., infra, 8a n.1 (Katsas, J., concurring).

II. THE ABSENCE OF IRREPARABLE HARM AND THE BALANCE OF THE EQUITIES OVERWHELMINGLY FAVOR PERMITTING RESPONDENT'S EXECUTION TO PROCEED

The balance of the equities weighs strongly in favor of permitting respondent's lawful execution to proceed as scheduled. At the outset, respondent has failed to show that she will suffer irreparable harm arising from the bare procedural violation she alleges -- an essential showing she needed to make in order to obtain relief in the court of appeals, and without which her claim is unlikely to prevail on appeal. See Nken, 556 U.S. at 434-435. Respondent does not challenge her conviction, her sentence, or even the method of execution the government intends to use. The mere fact that she will be put to death does not qualify as the requisite harm for purposes of this lawsuit. See Hill v. McDonough, 547 U.S. 573, 580–581 (2006).

Instead, respondent challenges only the timing of her lawful execution. And even in that regard, she has no material basis for her objection. Respondent received 50 days' notice of her rescheduled execution date, and has been on notice of the government's intent to execute her imminently for 88 days -- two days shy of what she claims is required under Missouri law. See Vialva, 976 F.3d at 462 (finding an absence of irreparable harm despite noncompliance with a state-law notice requirement given that "Vialva has thoroughly litigated his conviction and sentence" and "was given official notice well in advance of his execution date").

Respondent has had adequate time to seek clemency. See C.A. Mot. 19 (asserting an entitlement to seek clemency); App., infra, 11a (Millett, J., dissenting). When the district court initially postponed respondent's execution to allow her attorneys more time to prepare a clemency petition in light of their illnesses, the government rescheduled the execution rather than seek emergency appellate relief, and respondent has since filed the clemency petition that formed the basis for the injunction. In all events, respondent has no basis for asking the Judiciary to determine the amount of time that is sufficient for the consideration of a clemency petition. The President has exclusive authority to grant federal clemency, see U.S. Const. Art. II, § 2, Cl. 1, and courts have no power to regulate his decisions in this area, cf. Harbison

v. Bell, 556 U.S. 180, 187 (2009).

Respondent also asserted below that she requires additional time to "seek legal relief from her death sentence," C.A. Mot. 19, but that is a self-defeating contention from a litigious prisoner bent on delay for delay's sake. And her contention that the planned execution will "cut [her] life short," id. at 20; see App., infra, 11a (Millett, J., dissenting) (similar), misunderstands Missouri law. Rule 30.30(f) governs notice, not life, and did not prohibit the government from scheduling respondent's execution for this week. At most, it would have required the government to give her earlier notice of that fact.

Respondent's claim of irreparable harm is also belied by her inexcusable delay. The Director's original scheduling of respondent's execution on October 16, for the date of December 8, did not provide the 90 days' notice purportedly required under Missouri law. See D. Ct. Doc. 33, at 170-172. Respondent could have brought her FDPA claim under Rule 30.30(f) at that time. Instead, she waited nearly two months, until December 9, see D. Ct. Doc. 29, which has forced the courts into a last-minute rush to adjudicate her challenge. The panel dissent argued that respondent "promptly filed a challenge to the [rescheduled] date in early December," App., infra, 9a (Millett, J., dissenting), but that contention completely elides the fact that respondent could have obtained a resolution of the applicability of Rule 30.30(f) by

suing upon receipt of her initial scheduling notice in October (if not before). Respondent's egregious delay underscores that her current claim is not necessary to vindicate any substantive right, but is rather a transparent effort to sandbag the government with dilatory challenges.

On the other side of the balance, this Court has repeatedly emphasized the public's "powerful and legitimate interest in punishing the guilty," Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted), by "carrying out a sentence of death in a timely manner," Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion). Once a criminal defendant is convicted and sentenced, and exhausts all permissible appeals and collateral challenges, the need for "finality acquires an added moral dimension." Calderon, 523 U.S. at 556. "Only with an assurance of real finality can the [government] execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." Ibid. As this Court has recognized, unduly delaying executions can frustrate the death penalty and undermine its retributive and deterrent functions. See Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019); id. at 1144 (Breyer, J., dissenting).

The public's "interests have been frustrated in this case." Bucklew, 139 S. Ct. at 1133. Respondent committed her crime over 16 years ago, and has exhausted all permissible opportunities for further review of her conviction and sentence. Nevertheless, her

execution has already been delayed once by the district court based on a (legally baseless) claim that two of her attorneys were temporarily unavailable to work on a clemency petition, and the court of appeals granted still further delay on the ground that her execution was scheduled on the basis of 50 days' notice rather than 90 days' notice.

Nor is the harm to the government and the public mitigated in a meaningful way by the fact that respondent's legal claim would only entitle her to a limited period of delay. Cf. Barr v. Hall, No. 20A102, 2020 WL 6797719, at *1 (U.S. Nov. 19, 2020) (vacating brief stay designed to permit additional findings). Even minor delays can inflict serious psychological harms on the families of victims -- including the family members in this case who traveled to and are waiting in Terre Haute to witness the execution. Delay also amplifies the substantial logistical challenges that inhere in any execution, even absent last-minute injunctive relief. And the expedited schedule adopted by the en banc court does little to alleviate that burden. This Court has vacated unwarranted stays in the past when the D.C. Circuit likewise adopted expedited briefing schedules that displaced the scheduled execution date. See, e.g., Lee, 140 S. Ct. at 2591-2592; see also Order at 2, In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5206 (July 15, 2020).

The balance of equities does not support relief. Respondent committed one of the most horrific crimes imaginable: strangling a pregnant mother to death and cutting her premature baby out of her stomach to kidnap the child. Respondent does not challenge her conviction for the kidnapping and murder she committed "in an especially heinous or depraved manner," United States v. Montgomery, 635 F.3d 1074, 1095-1096 (8th Cir. 2011), nor does she challenge her sentence of death or even the protocol that will be used in her execution. The relief she requested in the court of appeals -- a stay on the eve of execution based on a meritless rationale that has nothing to do with her criminal culpability and that was rejected by the district court, the panel in this case, and even the banc D.C. Circuit itself only a month ago -- does not come close to tipping the equities toward respondent or justifying further delay. This Court should vacate the stay below so that respondent's execution may "proceed as planned." Lee, 140 S. Ct. at 2592.

CONCLUSION

The court of appeals' stay should be stayed or summarily vacated effective immediately.

Respectfully submitted.

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Acting Solicitor General

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