No.

IN THE

Supreme Court of the United States

LEZMOND CHARLES MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Application for Stay

EMERGENCY APPLICATION FOR A STAY OF EXECUTION

Execution Scheduled for August 26, 2020 (time to be determined)

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MISCELLANEOUS

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner, Lezmond Mitchell, respectfully requests a stay of his execution, which is scheduled for August 26, 2020. The Government has not yet announced the time of the execution. Mitchell asks this Court to stay his execution to preserve the Court's jurisdiction to review his petition for certiorari to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(f).

INTRODUCTION

Mitchell seeks a stay of his execution so this Court has time to settle an important question that has now divided the circuits: What does the Federal Death Penalty Act ("FDPA") mean when it says that the federal government is required to implement a death sentence "in the manner prescribed by the law of the state"? This same question presented itself to this Court last month when the federal government executed three prisoners after a 17-year hiatus. In that case, the question split a panel of the D.C. Circuit: one judge concluded that "manner" means only the top-line method of execution, but in order to yield a panel decision joined another judge's conclusion that "manner" also means a state's statutes and formal regulations. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), *cert. denied sub nom. Bourgeois v. Barr*, No. (19A1050), 2020 WL 3492763 (U.S. June 29, 2020). *See also Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020) (holding that the FDPA did not require BOP to follow state law regarding witness attendance at executions).

Now, the Ninth Circuit has taken a different approach, akin to the dissenting judge's view in the D.C. Circuit case, thereby creating a circuit split. In Mitchell's case, the court "assumed without deciding" that Arizona's lethal injection protocol ("Order 710") is "state law" within the meaning of the FDPA. But unlike the D.C. Circuit, which reached a decision after full briefing and argument, the Ninth Circuit reached this conclusion with only emergency pleadings before it. Rather than granting a stay to thoroughly consider the issue, or remanding for factual development, the panel ordered the Government to declare that it will follow four select provisions of Arizona's protocol.[1] In doing so, the Ninth Circuit cobbled together a patchwork lethal injection protocol based on a non-confronted statement received for the first time on appeal, and sent Mitchell to his execution. This ad hoc resolution calls out for the exercise of this Court's supervisory authority. Sup. C. R. 10(a).

The meaning and scope of the FDPA will continue to vex lower courts until this Court grants certiorari to settle the matter. *See* Sup. C. R. 10(a), (c). It will also reoccur soon, given that three more federal executions (besides Mitchell's) are

[1] Pursuant to the panel's directive, the Government submitted a declaration stating that: (1) the person or persons who place the IV lines be "currently certified or licensed within the United States to place IV lines," (2) the insertion of "either peripheral IV catheters or a central femoral line" shall be based upon the recommendation of a person "currently certified or licensed within the United States to place IV lines," (3) "[a] central femoral venous line will not be used unless the person placing the line is currently qualified by experience, training, certification, or licensure within the United States to place a central femoral line," and (4) the chemicals used in the execution "have an expiration or beyond-use date that is after the date that an execution is carried out." App. A at 8-12.

scheduled between now and the end of September 2020, with more dates likely. And because the Government chooses to set execution dates on short notice, and this issue does not become ripe in the sentencing court until the Government sets an execution date and reveals how it plans to execute the particular inmate (App. B at 17), lower courts will always have to face this important issue on a rushed, emergency basis—in the midst of a pandemic that already strains judicial resources. This Court should grant Mitchell a stay of execution so that he can file a proper petition for certiorari that presents this important question for the Court's careful consideration.

JURISDICTION

The Ninth Circuit denied Mitchell's application for a stay of execution on August 19, 2020. Mitchell filed a timely petition for rehearing that was denied on August 21, 2020. This Court has jurisdiction to review his petition for certiorari to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1254(1). Under 28 U.S.C. § 2101(f), this Court may grant a stay for a reasonable amount of time to enable Mitchell to obtain a writ of certiorari.

RELATED PROCEEDINGS

Mitchell has a separate stay application (20A30) and petition for a writ of certiorari (20-5398) pending before this Court. This Court has not yet ruled upon that stay application.

Mitchell has a stay of execution and a Certificate of Appealability ("COA") application pending in the Ninth Circuit, Case No. 20-99010.

OPINION BELOW

This stay application concerns the Ninth Circuit's published order denying Mitchell's emergency motion to stay execution. *United States v. Mitchell*, Case No. 20-9909, Dkt. 18, August 19, 2020 ("*Mitchell IV*"); Petitioner's Appendix ("App.") A.

The district court's unpublished order denying Mitchell's motion to strike the execution warrant was issued on August 13, 2020. App. B.

STATUTES INVOLVED

The Federal Death Penalty Act, 18 U.S.C. § 3596(a), provides:

> A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed.

STATEMENT OF THE CASE

On May 20, 2003, an Arizona jury recommended that the District Court for the District of Arizona sentence Mitchell to death. On September 10, 2003, the Government submitted a proposed judgment and order that stated: "When the sentence is to be implemented, the Attorney General shall release the Defendant to the custody of the United States Marshal, who shall supervise the implementation of the sentence in the manner prescribed by law of the State of Arizona." District Court Case No. 01-CR-1062, Dkt. No. 411 at 4:1-3. This language follows that of the FDPA, 18 U.S.C. § 3596(a). On September 15, 2003, the district court formally

sentenced Mitchell to death and issued its judgment, which included the following directive:

> Pursuant to the Federal Death Penalty Act of 1994, specifically, Section 3594 of Title 18 of the United States Code, pursuant to the jury's special findings returned on May 20, 2003, and pursuant to the jury's unanimous vote recommending that the defendant be sentenced to death, IT IS THE JUDGMENT OF THIS COURT THAT the defendant, Lezmond Charles Mitchell, be sentenced to death on Count Two of the Second Superseding Indictment. The judgment and death sentence on Count Two is supported by independent verdicts with regard to each victim. Furthermore, pursuant to Title 18, Section 3596 of the United States Code, the defendant is hereby committed to the custody of the Attorney General of the United States until exhaustion of the procedures for appeal of the judgment and conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the defendant to the custody of the United States Marshal, who shall supervise *implementation of the sentence in the manner prescribed by the law of the State of Arizona*.

Dkt. No. 425 (emphasis added). This language mirrored the Proposed Judgment and Order (Dkt. No. 411) submitted by the Government, which did not object to this language at the formal sentencing hearing or in any later motion. The district court subsequently amended its judgment on January 8, 2004, but left the above portion of the order unchanged. Dkt. No. 466.

On July 25, 2019, T.J. Watson, the warden of the Federal Correctional Complex at Terre Haute, Indiana ("USP Terre Haute") served Mitchell with a letter indicating that pursuant to 28 C.F.R. § 26.3(a)(1), the Director of the Bureau of Prisons ("BOP") had set December 11, 2019 as Mitchell's execution date. The same day, in the four pending federal lethal injection lawsuits in the District Court for

the District of Columbia, the Government filed a notice indicating that it had adopted a revised lethal injection protocol (2019 Protocol). Dkt No. 606-1. On July 31, 2019, Watson served an amended letter on Mitchell, correcting the name of the sentencing judge that was misstated on the prior version.

On October 4, 2019, the Ninth Circuit stayed Mitchell's execution pending its consideration of a previously filed appeal of the district court's denial of a motion to reopen the judgment pursuant to Federal Rule of Civil Procedure 60(b). *Mitchell v. United States*, Ninth Cir. Case No. 18-17031, Dkt. 26 (Oct. 4, 2019). The Ninth Circuit ultimately affirmed the district court's denial of the motion. *Id.*, Dkt. 37 (Apr. 3, 2020). A petition for writ of certiorari relating to that issue is currently pending before this Court. (Case no. 20-5398.)

On July 29, 2020 — before the Ninth Circuit's mandate issued, and while a stay was still in effect — Watson served Mitchell with a letter indicating that pursuant to 28 C.F.R. § 26.3(a)(1), the BOP had set an execution date for Mitchell of August 26, 2020. App. C. On August 6, 2020, Mitchell moved in the district court to vacate the execution date as it failed to comply with the FDPA or with the trial court's judgment, and further moved to stay his execution pending the resolution of the motion. After briefing but no evidentiary development, the district court heard oral argument on August 12, 2020, and entered an order denying Mitchell's motions on August 13, 2020. App. B.

In that order, the district court interpreted the FDPA, and the court's judgment, as requiring that Mitchell be executed by the method used in Arizona —

lethal injection. App. B at 21-22. The court found that no Arizona statutes or regulations have the force and effect of law aside from the mandate that executions be carried out via lethal injection; thus it held that the Government need only follow Arizona's chosen method, not the binding procedures set forth in its execution protocol. *Id.* at 25-29.

Mitchell entered a notice of appeal that same day and filed an emergency motion for stay of execution the following day, August 14, 2020. The Ninth Circuit ordered the Government to respond to Mitchell's motion and permitted Mitchell to file a reply in support of his motion (limited to 10 pages, Circuit Rule 27-1(d).). The Ninth Circuit ordered "the remaining briefs on the pending emergency motion . . . to focus on the underlying merits of [the] appeal." The parties were also directed to "be prepared to discuss the merits of the appeal" at oral argument. App. D. Following oral argument, the Circuit Court ordered the Government to file a declaration from someone at the Bureau of Prisons stating that Mitchell's execution would comply in four ways with Order 710. App. E. at 33. The Government complied, App. F, and Mitchell filed an objection stating that he had always maintained that there were additional ways in which the BOP protocol differed from Order 710, and if the Court intended such a fact-based approach, then an evidentiary hearing was required in the district court. App. G at 42.

The Ninth Circuit denied Mitchell's motion, assuming, without deciding, that section 3596 requires that the Government follow Order 710, but only with respect to those provisions that "effectuate death." App. A at 7. Rather than parsing

through Order 710, or the 37-page table that Mitchell provided detailing differences between Order 710 and the BOP protocol, the Court addressed four examples of differences between Order 710 and the BOP protocol that Mitchell provided in his 10-page reply. Relying on the declaration filed earlier that day, the Ninth Circuit concluded that because the BOP would comply with those four provisions of Order 710, Mitchell could not show irreparable harm from his scheduled execution. App. A at 13.

Mitchell filed a petition for rehearing on August 20, 2020, which the Ninth Circuit denied the next day. App. H.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). "'[I]n a close case it may [also] be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Indiana State Police Pension Trust v. Chrysler, LLC*, 556 U.S. 960 (2009) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers)). Those standards are satisfied here.

I. There is a reasonable probability that this Court will grant certiorari.

A. Granting certiorari is necessary to decide the meaning of the FDPA's requirement of implementation in the manner prescribed by state law, a question this Court has never addressed and that has now split circuit courts.

This case presents an "important question of federal law that has not, but should be, settled by this Court," Sup. C. R. 10(c) — the meaning and scope of the FDPA's requirement that federal executions be implemented in the manner prescribed by the law of the state in which the judgment was imposed. This Court has never interpreted section 3596(a) of that statute. And because the lower courts lack guidance, the circuit courts[2] are now split on what constitutes "state law" under the FDPA and which provisions of state protocols the Government is bound to follow. Sup. C. R. 10(a).

The D.C. Circuit addressed the scope of the FDPA in *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d at 109. Although the three judges reached different interpretations of the FDPA, two of the three judges on the panel rejected the argument that the FDPA's language requires adherence only to the top-line method of execution provided by state law. *Id.* Judge Rao concluded "that the FDPA also requires the federal government to follow execution procedures set forth in state statutes and regulations, but not execution procedures set forth in less

[2] One district court has also weighed in, concluding that the FDPA requires adherence to all procedures contained in state statutes, including whether an autopsy must be conducted. *United States v. Hammer*, 121 F. Supp. 2d 794 (M.D. Pa. 2000)

formal state execution protocols." *Id.* at 112. Judge Tatel "agree[d] with Judge Rao that the term 'manner' refers to more than just general execution method." *Id.* at 146 (Tatel, J., dissenting). Only Judge Katsas believed that "manner" referred solely to the choice of execution method, such as lethal injection versus hanging. Judge Tatel similarly rejected Judge Katsas' limited definition of manner. *Id.* at 146 ("I agree with Judge Rao that the term 'manner' refers to more than just general execution method.") (Tatel. J. dissenting).

In a separate Seventh Circuit case, the family members of Lee's victims sought to enjoin Lee's execution to allow them to attend, as is their right under the Arkansas protocol, the state in which Lee was sentenced to death. The Seventh Circuit held that when section 3596 speaks to the manner prescribed by state law, it does not refer to the "details" of the state's execution protocol "such as witnesses." *Peterson v. Barr*, 965 F.3d at 554.

In Mitchell's case, the Ninth Circuit "assume[d] without deciding that the Department Order Manual constitutes 'law of the State' for purposes of the FDPA and the Judgment." (*Mitchell* IV at 6). It then ordered the Government to declare it would comply with four provisions of Order 710 — those that the court said "effectuate death." (*Id.* at 7.) Though the Ninth Circuit purported to decide nothing, it effectively endorsed an interpretation broader than that of the D.C. Circuit, including at least portions of Arizona's protocol within its understanding of the law of the state.

Three circuit courts have now weighed in on the meaning of the FDPA and all have produced varying interpretations of the Act. But until this Court settles the matter, parties will need to litigate what constitutes a binding regulation in each state and whether the BOP must modify its protocol depending on the state where the judgment arises. Given this, there is a reasonable probability that at least four justices will vote to grant certiorari in this case.

B. The Ninth Circuit's order so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Faced with the legal question of the interpretation of the FDPA, the Ninth Circuit reached — indeed, created — a fact-intensive answer. In both process and result, the Ninth Circuit's approach is unacceptable and requires this Court's correction.

The district court reached a legal decision that federal executions need not comply with Order 710 *at all* because that Order was not "state law" under the FDPA. It did this after expedited briefing and oral argument without any factual development. But the Ninth Circuit made the factual finding that the BOP and Arizona protocols were largely indistinguishable and further concluded that because BOP would comply with certain portions of the Arizona protocol, Mitchell would suffer no harm. It relied on a declaration submitted for the first time on appeal from a declarant who was not called as a witness, or cross-examined, below. If an appellate court concludes that factual findings are essential to the resolution of a case, the appropriate course is to remand for factual development. *Kappos v. Hyatt*, 566 U.S. 431, 439 (2012) ("[A] district court, unlike a court of appeals, has the

ability and the competence to receive new evidence and to act as a factfinder."); *see also Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 n.5 (9th Cir. 1994) ("Facts not presented to the district court are not part of the record on appeal."). In this case, appropriate briefing and factual development could determine: (1) which portions of Order 710 fall within the category of procedures that effectuate death; (2) whether those provisions are consistent with the BOP protocol; and (3) whether the U.S. Marshalls can supervise, and the BOP can implement, the execution in the manner consistent with requisite provisions of Order 710.

The Ninth Circuit did not just develop facts. It drafted its own execution protocol. By judicial fiat, it inserted four specific portions of Arizona's protocol into the BOP's execution protocol. And it did all of this just six days before the scheduled execution. In so doing, the court overreached not just the role of appellate courts, but of the judiciary generally, and invaded the appropriate province of legislators and agency rule-makers. *See, e.g., Morales v. Cate*, 623 F.3d 828, 831 (9th Cir. 2010) *as amended* (Sept. 28, 2010) (holding that judicial modification of the lethal injection protocol is "beyond the power and expertise of the district court at this juncture"). The result of the Ninth Circuit's effort is a patchwork lethal injection protocol that will create confusion and substantial litigation. There is a reasonable probability at least four justices will grant certiorari under this Court's supervisory powers.

II. There is a fair prospect that this Court will hold that the Ninth Circuit's order is erroneous.

There is at least "a fair prospect" that this Court will conclude the Ninth Circuit erred in the opinion below. At this stage, Mitchell need not show that outcome is a certainty. *See Araneta v. United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers) ("such matters cannot be predicted with certainty"); *Bd. of Educ. of City of L.A. v. Super. Ct. of Cal., Cty. of L.A.*, 448 U.S. 1343, 1347 (1980) (Rehnquist, J., in chambers) (comparing this exercise to "the reading of tea leaves"). Instead, the arguments in the petition need pass only the threshold of "plausibility." *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989) (Marshall, J., in chambers); *accord California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers). Mitchell meets this standard.

The FPDA requires "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. Properly interpreted, this provision requires federal officials to implement executions as state officials are bound to implement them. The text, context and history of the statute confirm this reading.

"Implementation" means more than a single act; rather it entails the process of making something happen. Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/implementation. (defining "implementation" as "the process of making something active or effective"); *see also* Black's Law Dictionary (10th ed. 2014) (defining "Implementation Plan" as "An outline of steps needed to accomplish a particular goal.") The BOP's own protocols

recognize as much. Its Addendum to the BOP's Execution Protocol is titled "Federal Death Sentence *Implementation* Procedures" and provides that "procedures utilized by the BOP to *implement* federal death sentences shall be" as set forth therein. App. I at 85.

"Prescribed" is another expansive term that includes direction at various levels of formality. Merriam-Webster's Collegiate Dictionary 921(10th ed. 1994) (defining "prescribe" as "to lay down as a guide, direction, or rule of action."); *see also* Oxford English Dictionary Online (defining "prescribe" as "[t]o write or lay down as a rule or direction to be followed; to impose authoritatively, to ordain, degree; to assign").

Likewise, "manner" is a broad term that encompasses the procedures surrounding a prisoner's execution. Merriam Webster's Collegiate Dictionary 708 (10th ed. 1993) (defining "manner" as "a mode of procedure or way of acting"); Webster's Collegiate Dictionary 609 (5th ed. 1936) ("way of acting; a mode of procedure"). The breadth of the term "manner" stands in contrast to "method," which has a specific meaning in the death-penalty context. Had Congress intended that deference to state law be limited to the state's chosen execution *method*, using this word would have clearly signaled such intent. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (when Congress "did not adopt 'obvious alternative' language, 'the natural implication is that [it] did not intend' the alternative"). While the broader idea of manner of execution certainly includes the specific method of execution, it is not limited to that narrow sense.

This understanding of the FDPA's requirements finds support from additional provisions of the FDPA. For example, the statute identifies as an aggravating factor that the "defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim." 18 U.S.C. § 3592(c)(6). Judge Rao recently recognized that this use of "manner" in the same statute "refers not to the general method of killing, but to the precise way in which the offense was committed" — supporting the conclusion that the statute's use of "manner prescribed by state law" likewise entails the details of the procedure specified in state law, rather than just the method of execution. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d at 130 (Rao, J., conc.).

Other provisions further support this conclusion. The law provides that a marshal overseeing an execution "may use appropriate State or local facilities" and "may use the services of an appropriate State or local official." 18 U.S.C. § 3597(a). Following as this section does after the general requirement of section 3596 that death sentences be implemented per state law, this provision creates an exception regarding facility, suggesting that adherence to all other state procedures is mandatory.

Legislative history of the FDPA provides additional support for this conclusion. From 1937 to 1984, federal death sentences were carried out pursuant to 18 U.S.C. § 3566, which provided that with respect to death sentences imposed under the few then extant federal capital offenses, "the manner of inflicting the

punishment of death shall be the manner prescribed by the laws of the State within which the sentence is imposed." An Act to Provide for the Manner of Inflicting the Punishment of Death § 323, 50 Stat. 304, 304 (June 19, 1937).[3] Congress repealed Section 3566, however, upon enactment of the Sentencing Reform Act of 1984.

In 1988, Congress amended the continuing criminal enterprise statute to allow the death penalty in certain cases, 21 U.S.C. § 848(e), but that section lacked provisions specifying the manner by which executions would be carried out. Thus, effective on February 18, 1993, the Attorney General of the United States promulgated regulations providing that "[e]xcept to the extent a court orders otherwise, a sentence of death shall be executed ... [b]y intravenous injection of a lethal substance or substances in a quantity sufficient to cause death." 58 Fed. Reg. 4898, 4901–02 (1993) (codified at 28 C.F.R. § 26.3).

When Congress passed the FDPA, however, it included an implementation provision that closely tracked the former Section 3566:

> When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in that latter State in the manner prescribed by such law.

[3] Available at https://www.loc.gov/law/help/statutes-at-large/75th-congress/session-1/c75s1ch367.pdf

18 U.S.C. § 3596.

Instead of incorporating the then-existing federal regulation governing federal executions, the FDPA adopts some of the language of the 1937 statute referencing state law. 18 U.S.C. § 3596 (Marshal "shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed"). But while the FDPA incorporated the earlier statute's reference to state procedures, it broadened the scope of state procedures invoked. The earlier law requires that the "manner of inflicting the punishment of death" reflect state law. The FDPA mandates more broadly that "implementation" of the sentence must occur as prescribed by state law.

This broader scope reflects the reality of executions carried out under the 1937 law, the majority of which occurred at state facilities and presumably according to state procedures. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d at 137 (Rao, J., conc.) (citing the Government's concession at argument that "nearly all executions conducted under the 1937 statute took place in state facilities"). Janet Reno, in her role as Attorney General, commented that the FDPA mandated that this practice resume, explaining that the law "contemplate[s] a return to an earlier system in which the Federal Government does not directly carry out executions, but makes arrangements with states to carry out capital sentences in Federal cases." H.R. Rep. No. 104-23, at 22 (1995).

The DOJ therefore recommended an amendment to the law that would allow federal executions to be "carried out … pursuant to uniform regulations issued by

the Attorney General." *Id.* Congress did not make such an amendment. Indeed, on nine occasions since the passage of the FDPA, Congress has considered and failed to pass bills that would have provided for federal executions to be carried out "pursuant to regulations prescribed by the Attorney General." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d at 151 (Tatel, J., conc.) (citing H.R. 2359, 104th Cong. § 1 (1995); see also H.R. 851, 110th Cong. § 6 (2007); H.R. 3156, 110th Cong. § 126 (2007); S. 1860, 110th Cong. § 126 (2007); H.R. 5040, 109th Cong. § 6 (2006); S. 899, 106th Cong. § 6504 (1999); H.R. 4651, 105th Cong. § 501 (1998); S. 3, 105th Cong. § 603 (1997); H.R. 1087, 105th Cong. § 1 (1997)).

Finally, the purpose of the statute further supports Mitchell's interpretation. In the sensitive area of the death penalty, Congress enacted a federalist system, deferring to the states, which have substantially more experience in conducting executions. In light of this choice, it is reasonable to interpret the FDPA as binding the federal government to those provisions that state officials conducting executions would be bound. Indeed, interpreting binding protocol as part of the law of the state is consistent with this Court's treatment of execution procedures as a creation of "state legislatures," even without notice and comment, pursuant to legislative delegation. *Baze v. Rees*, 553 U.S. 35, 44-45, 51 (2008) (plurality opinion).

III. Mitchell will suffer irreparable harm absent a stay.

Mitchell will suffer irreparable harm if this Court declines to grant a stay of his August 26, 2020 execution. The harm is not the execution itself — which Mitchell does not contest in this application. Rather, he will be harmed by an execution conducted pursuant to an ad hoc, judicially-created protocol, without any

court ever conducting evidentiary proceedings relating to this newly-developed process.

This Court has granted stay applications to prevent far less severe consequences, ranging from the chilling of witness testimony to the reduction of commercial competition. *See, e.g.*, *Hollingsworth*, 558 U.S. at 195; *California v. American Stores Company*, 492 U.S. 1301, 1304, 1302 (1989). Such harms pale in comparison to the irreparable harm that would result if the Government executed Mitchell in violation of the FDPA and the trial court judgment in a manner drafted by the Ninth Circuit after limited emergency briefing.

Failure to issue a stay risks "foreclos[ing] . . . certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302; *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309. Allowing the Government to proceed towards executing Mitchell while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison*, 468 U.S. at 1302. The Government would not "be significantly prejudiced by an additional short delay," and a stay would serve both the public interest and judicial economy. *Id.*

IV. The balance of equities and relative harms weighs strongly in favor of granting a stay.

"[I]n a close case it may be appropriate to balance the equities, to assess the relative harms to the parties, as well as the interests of the public at large." *Indiana State Police Pension Trust*, 556 U.S. at 960 (internal quotations omitted). These considerations favor a stay here.

Mitchell's request for stay of execution is not a "last-minute attempt[] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam)). The district court correctly found that Mitchell had timely raised this issue upon the Government's notice of scheduling his execution. Instead, it was the Government that manufactured urgency when it chose to set an execution date with just 28 days' notice at a time when the Ninth Circuit's stay order was still in effect.

Both the Government and the public have an "interest in the timely enforcement of a [death] sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). In the forthcoming certiorari petition, Mitchell will not contest the Government's authority to execute him. But the very issue at stake in this litigation is whether the Government's noticed execution even constitutes a valid enforcement of the judgment and sentence entered by the trial court. The Government and public interests are served by ensuring that the enforcement of death sentences is legal as well as timely.

And the Government's own history of delay undermines its interest in timeliness. The Government has stated that "a scheduled federal execution date cannot readily be moved in light of BOP contractor availability and other complex logistical considerations." *Mitchell v. U.S.*, No. 18-17031 (9th Cir., July 29, 2020), dkt. 47. In support of this claim, it cited an application filed in this Court, which states that if the execution in question were delayed, it could not be rescheduled for

at least *one* month. *Id*. (citing *Barr v. Lee*, No. 20A8, 2020 WL 3964985 (July 14, 2020)). In contrast, prior to this year, the Government had not executed a federal prisoner since 2003, and the Government itself suspended executions from 2011 until 2019. The Government's years-long delay in generating any execution protocols dwarfs its expected delay in rescheduling and undermines any purported claim of urgency. *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018) ("the fact that the Government has not – until now – sought to" act "undermines any urgency" to do so now).

Allowing the Government to now rush toward an execution disserves the public by turning the solemn undertaking of an execution into a disgraceful scramble. Approximately one month ago, the Government executed three men at the federal prison at Terre Haute: Daniel Lee, Wesley Purkey, and Dustin Honken. The executions of Lee and Purkey were utterly chaotic. Although Lee's execution was scheduled for July 13, 2020 at 4:00 p.m., he was not pronounced dead until 8:07 the next morning after being strapped to the execution gurney for four hours. Purkey was scheduled to be executed on July 15, 2020 at 4:00 p.m., but was not pronounced dead until 8:19 the next morning. These executions were the result of the Government's attempt to cut corners and meet its own schedule instead of following court orders. Indeed, the Government apparently did not realize that the Eighth Circuit had not yet issued its mandate when they strapped Lee to the execution gurney. As a result, the Government had to request the extraordinary remedy that the Eighth Circuit issue its mandate in the middle of the night so it

could proceed with Lee's execution without violating the Eighth Circuit's previously issued stay of execution. *United States v. Lee*, Eighth Circuit Case No. 19-3618 (July 14, 2020). These problems arose under the BOP protocol that had been issued over a year before the executions.

Now, the Government's seeks to execute Mitchell under a new procedure judicially created only *six days* before its use, and without the benefit of full merits briefing by the appellate court. This procedure "inflicts the most irreparable of harms without the deliberations such an action warrants" and the Court should not allow it. *Barr v. Lee*, 591. U.S. __, (Sotomayor, J. dissenting) (slip op. at 3-4).

CONCLUSION

For the foregoing reasons, the Court should grant a stay of execution pending consideration and disposition of Mitchell's petition for writ of certiorari.

Respectfully submitted,

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