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IN THE SUPREME COURT OF THE UNITED STATES

EARLENE PETERSON, KIMMA GUREL, AND MONICA VEILLETE, APPLICANTS

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.

(CAPITAL CASE)

RESPONSE TO EMERGENCY APPLICATION TO STAY THE MANDATE AND VACATE THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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On July 12, 2020, the United States Court of Appeals for the Seventh Circuit vacated the order of the United States District Court for the Southern District of Indiana preliminarily enjoining the execution of Daniel Lewis Lee, which is scheduled to occur at 4 p.m. today. The Seventh Circuit held that the APA claim on which the district court granted relief "lacks any arguable legal basis and is therefore frivolous." App. Appx. (Appx.) 4. Undeterred, applicants assert that this Court should vacate or stay the Seventh Circuit's order, arguing that this Court is likely to grant certiorari and rule for applicants on a claim the Seventh Circuit deemed "frivolous." Ibid. That argument is even more indefensible, and this Court should immediately deny the

application so that the government may proceed with the execution as planned.

Applicants are certain family members of Lee's victims who had planned to attend his execution even though they oppose it. On July 8, they sought a preliminary injunction barring Lee's execution from going forward based on the assertion that the decision to schedule Lee's execution for July 13, 2020 burdens their right to attend, given the current COVID-19 pandemic. On July 10, the district court granted applicants' request on the entirely unprecedented theory that some combination of the Federal Death Penalty Act (FDPA), 18 U.S.C. 3596, the Administrative Procedure Act (APA), 5 U.S.C. 706, and Arkansas law required the government to consider these witnesses' preference to postpone the execution until a treatment or vaccine for COVID-19 is available. Appx. 11-12.

In a published decision issued yesterday evening, a unanimous Seventh Circuit explained that the district court had erred at every step of its analysis. The APA does not permit review of applicants' claim because, as long as "BOP observes the minimal requirements in the regulations -- as it did here -- then it has unconstrained discretion to choose a date for the execution." Appx. 6. And the "claim is frivolous for" the additional reason that applicants are outside the FDPA's zone of interests because

they "have no statutory or regulatory right to attend the execution." Ibid.

Moreover, the Seventh Circuit explained that the district court was not remotely successful in its attempt to overcome these fundamental defects through its sua sponte assertion that the FDPA incorporates Arkansas law, which supposedly gives the victim's family a right to attend an execution. Appx. 8. Even "[s]etting aside the impropriety" of the district court's decision to interject its "own theory of the case," both the FDPA's text and precedent foreclose the contention that the federal statute incorporates the "Arkansas Code provision governing execution witnesses." Appx. 8-9.

These irremediable flaws were more than sufficient to justify vacatur of the district court's order, but they do not even capture the full extent to which the district court erred. Even if the court was permitted to review the government's decision regarding an execution date, and even if the FDPA somehow incorporated the Arkansas Code regarding execution witnesses, applicants still could not prevail because Arkansas law does not actually give them the right they claim. And even if applicants could also overcome that defect they still could not prevail because they cannot establish that the scheduling decision here was arbitrary or capricious, or otherwise contrary to law.

Lee's execution was originally scheduled for December 2019; after a stay entered by another court was lifted in June 2020, the Federal Bureau of Prisons (BOP) promptly rescheduled the execution for July 13, 2020. BOP's prompt rescheduling after the stay precluding the earlier-scheduled execution was lifted accords with the applicable federal regulations. Neither law nor logic requires BOP to consider the availability and travel preferences of every person who might attend the execution. And to the extent applicants' reluctance is rooted in a fear of contracting COVID-19, BOP has taken robust measures to minimize that risk to applicants.

In addition to these numerous merits' defects that render applicants' claim "frivolous," Appx. 4, the equities also counsel strongly against applicants' requested stay. The capital sentence at issue here -- imposed for the murder of an eight-year-old and her parents during a robbery to fund a white-supremacist movement -- has been repeatedly upheld by federal courts, and the inmate's own efforts to halt the execution have very recently been rejected by the courts of appeals and this Court. Although applicants' interests as victim family members who oppose Lee's execution are worthy of serious consideration (which BOP has provided), applicants are not the only victim family members, or even the only victim family members that planned to attend the execution, App., infra, 35a. Applicants' concerns about traveling during the

COVID-19 pandemic cannot be allowed to overwhelm the at least as weighty interests of other individuals and the public at large in the immediate and lawful implementation of this long-delayed sentence, particularly given the brutality of Lee's crimes.

Lee's lawful sentence for a triple murder should be carried out promptly. The application for a stay should be denied.

STATEMENT

1. In January 1996, Daniel Lewis Lee robbed and murdered William and Nancy Mueller and their eight-year-old daughter as part of an effort to obtain funds for a white supremacist racketeering organization. United States v. Lee, 374 F.3d 637, 641-642 (8th Cir. 2004), cert. denied, 545 U.S. 1141 (2005). Lee and an accomplice overpowered the Muellers, interrogated their child, and stole approximately $50,000 worth of cash, guns, and ammunition. Ibid. Lee and his accomplice then shot the three victims with a stun gun, placed plastic bags over their heads, and sealed the bags with duct tape to asphyxiate them. United States v. Lee, No. 97-cr-243, 2008 WL 4079315, at *4 & n.52 (E.D. Ark. Aug. 28, 2008). Finally, they taped rocks to the three victims and threw them into the nearby Illinois bayou. Lee, 374 F.3d at 641-642; United States v. Kehoe, 310 F.3d 579, 590 (8th Cir. 2002), cert. denied, 538 U.S. 1048 (2003).

After a two-month jury trial, Lee was convicted and sentenced to death on three capital murder charges. Lee, 2008 WL 4079315,

at *2. Lee's direct appellate proceedings concluded in 2005. Lee v. United States, 545 U.S. 1141 (2005) (denying certiorari review of court of appeals' decision affirming conviction and sentence). In 2006, he filed an unsuccessful Section 2255 post-conviction motion, which was litigated to its conclusion in 2014. See Lee v. United States, 574 U.S. 834 (2014) (denying certiorari review). He has since filed a series of successive and meritless collateral attacks. See Lee v. Watson, No. 20-2128 (7th Cir. July 10, 2020), slip op. 6 (denying petition for writ of habeas corpus as "frivolous").

2. The FDPA directs that "[a] person who has been sentenced to death" must 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"; it further directs that "[w]hen the sentence is to be implemented, the Attorney General shall release the person" to the U.S. marshal, "who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). The applicable regulations delegate responsibility for scheduling the execution to the BOP Director, 28 C.F.R. 26.3, and provide that unless a court has ordered otherwise, the BOP Director shall designate an execution date that is "no sooner than 60 days from the entry of the judgment of death." 28 C.F.R. 26.3(a). And the regulations dictate that "[i]f

the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons when the stay is lifted." Ibid.

In accordance with this scheme, BOP could have set Lee's execution date once he had exhausted his "procedures for appeal of the judgment of conviction and for review of the sentence." 18 U.S.C. 3596(a). But by 2011, the government was no longer able to employ the three-drug lethal-injection regime it had used in federal executions in 2001 and 2003 because "a long and successful campaign of obstruction by opponents of capital punishment" had resulted in the removal of one of those drugs from the market. See Execution Protocol Cases, 955 F.3d 106, 128 (D.C. Cir.) (per curiam) (Katsas, J., concurring), cert. denied, No. 19-1348 (June 29, 2020). Faced with the practical problems of drug acquisition, the government "took time to study the successful track record of pentobarbital" before adopting an execution protocol utilizing it. See ibid.

Upon BOP's adoption of a new protocol in July 2019, the government scheduled the executions of several inmates -- including Lee -- who had exhausted all proper avenues of post-conviction relief, for December 2019. On Lee and other inmates' motion, the District Court for the District of Columbia entered a preliminary injunction barring those executions from going forward

as scheduled, No. 19-mc-145, D. Ct. Docs. 50, 51 (Nov. 20, 2019), which the D.C. Circuit later vacated, Execution Protocol Cases, 955 F.3d at 108–113 (per curiam).

On June 15, 2020, shortly after the D.C. Circuit issued its mandate and thereby lifted the injunction, the government rescheduled Lee's execution for July 13, 2020, and it promptly notified potential witnesses (including applicants) of the date. See App., infra, 34a. On June 29, 2020, this Court denied Lee and the other inmates' petition for a writ of certiorari and their stay request. See Bourgeois v. Barr, No. 19-1348 (June 29, 2020).[1]

3. Since March 2020, BOP has taken steps to respond to the COVID-19 outbreak. BOP first issued a "Shelter in Place" order, suspending all visitations until further notice. See Federal Bureau of Prisons, U.S. Department of Justice, https://www.bop.gov/locations/institutions/tha/. Then, once BOP rescheduled the inmates' executions, it took additional precautions to reduce the possible spread of COVID-19 in the days leading up to, and on the day of, each inmate's execution. See App., infra, 34a-36a. Among these: all BOP staff are instructed to wear masks and must pass a temperature check and symptom

[1] Lee and other inmates with rescheduled execution dates have jointly sought a new preliminary injunction in the District Court for the District of Columbia. No. 19-mc-145, D. Ct. Docs. 102, 103 (June 19, 2020). The court granted the injunction this morning, and the government is currently in the process of challenging that injunction before the court of appeals and this Court.

screening each day they arrive at USP Terre Haute. Id. at 34a. If applicants were to attend the execution, BOP staff would transport them separately from others to the prison complex, ensure that applicants are provided personal protective equipment (PPE), and escort them to a staging area that allows for social distancing. Id. at 35a. Only respondent Veillette had requested to view Lee's execution, and BOP would segregate her in a witness room with two other witnesses who will have access to PPE, and some BOP staff members, who will be wearing masks. Ibid. [2]

4. After BOP announced on June 15 that Lee's execution would occur on July 13, respondent Veillette spoke to BOP staff to obtain information about COVID-19 safety measures. Appx. 23-24. Then, on July 7, Veillette and the other applicants asked the District Court for the Southern District of Indiana to enjoin Lee's

[2] When BOP prepared its declaration documenting these precautions on July 8, no member of the USP Terre Haute staff had tested positive for COVID-19. Hartkemeyer v. Barr, No. 20-cv-336, D. Ct. Doc. 51-1 (S.D. Ind., July 8, 2020). Yesterday, the government filed a declaration in the district court explaining that a BOP staff member tested positive for COVID-19 yesterday, after he had contact with infected individuals outside of work over the July 4th weekend. Id., Doc. 77, at 1-2 (July 12, 2020). That staff member left work as soon as he learned of his potential exposure on July 8, and he has been in self-quarantine since then. Ibid. The government informed the Seventh Circuit of this development before it vacated the stay, 20-2252, Doc. 11 (July 12, 2010), although the new information has no material effect on the litigation. As the government has explained, the risk of COVID-19 does not dictate the scheduling of executions and because BOP's precautions are confirmed, not undermined, by the fact that a single employee has been identified as positive and promptly removed from the prison.

execution based on their allegations that travelling to and witnessing the execution would expose them to the risk of contracting COVID-19. App, infra, 5a.[3]

Applicants asserted that BOP regulations, in combination with the government's execution protocol, "entitled" them to "attend Mr. Lee's execution," App., infra, 28a, and they claimed that BOP had "acted arbitrarily and capriciously" in setting the execution date without considering "the effect of COVID-19 on [applicants'] rights to attend the execution." Id. at 27a-28a. As relief, applicants asked the court to prohibit BOP from carrying out the execution "until treatment or a vaccine is available." Id. at 29a.

On July 10, 2020, the district court granted applicants' request for a preliminary injunction, concluding that BOP's scheduling of Lee's execution for July 13 was arbitrary and capricious under the APA. Appx. 24. Notably, the court did not adopt applicants' contention that BOP's regulations and execution protocol grant them an entitlement to attend the execution; instead, the court reasoned sua sponte that the FDPA incorporates Arkansas law regarding execution witnesses and that Arkansas law,

[3] Applicants initially sought to intervene in a separate suit brought by the spiritual advisor of a different inmate whose execution is scheduled for July 17, 2020. See Hartkemeyer, supra, No. 20-cv-336, D. Ct. Doc. 36 (S.D. Ind., July 7, 2020). The district court denied the motion but instructed the clerk to initiate the instant action so that applicants could press their claim for injunctive relief. Id., D. Ct. Doc. 55, at 4-5 (July 8, 2020).

in turn, "provides [applicants] a right to be present for the execution." Id. at 9a.

The court then concluded that applicants were likely to succeed on their claim that BOP's execution scheduling decision violated the APA because BOP had "produced no evidence to show that" its decision "accounted for the victims' family's members' right to be present." Appx. 21. Further, while the court acknowledged that BOP had produced evidence that family member witnesses "will have access to personal protective equipment, soap, and hand sanitizer," the court found that BOP had not established that it had "considered whether these measures give [applicants] adequate protection." Ibid.

Finally, the court concluded that the equities weighed in favor of granting a stay because applicants would be irreparably harmed given the risks associated with the virus, and that harm outweighed the governmental and public interest in Lee's timely execution. Id. at 12a–14a.

4. On July 12, 2020, a unanimous panel of the Seventh Circuit vacated the injunction. The court of appeals explained that applicants' "APA claim lacks any arguable legal basis and is therefore frivolous." Appx. 4. It identified several dispositive defects in the district court's reasoning.

First, the district court was wrong to conclude that applicants' claim was reviewable under the APA because the

challenged scheduling decision is "committed to agency discretion by law." Appx. 4 (internal quotation marks and citation omitted). The court of appeals explained that, while the FDPA and the applicable regulations may establish some "minimal constraints" on execution timing, BOP had "observe[d]" those requirements in this case. Appx. 7. And beyond those "minimal requirements," BOP has "unconstrained discretion to choose a date for the execution. Ibid.

Second, the claim was also "frivolous" because applicants "have no statutory or regulatory right to attend the execution," and therefore fall outside the statutory zone of interests. The FDPA "makes no mention of witnesses," Appx. 7, and the applicable federal regulations regarding witnesses are permissive. Id. at 8. They establish "a limitation on, not an entitlement to, witness attendance." Ibid.

Third, while the district court attempted to overcome this problem by "develop[ing] her own theory" based on the FDPA's alleged incorporation of Arkansas law, that "maneuver" was "improp[er]. Appx. 9. And even "setting [that] aside," the theory "is no more viable than the one raised by the plaintiffs" because the FDPA does not "incorporate[] the Arkansas Code provision governing execution witnesses." Ibid. To the contrary that element of Arkansas law "is irrelevant here." Id. at 10.

ARGUMENT

In order to obtain a stay of execution pending consideration of a petition for a writ of certiorari, a movant must first establish a likelihood of success on the merits -- specifically, "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" as well as "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). A movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted). Once the movant satisfies those prerequisites, the Court considers whether a stay is appropriate in light of the "harm to the opposing party" and "the public interest." Nken v. Holder, 556 U.S. 418, 435 (2009); see, e.g., Gomez v. United States District Court, 503 U.S. 653, 653-654 (1992) (per curiam).

Under those well-established standards, the application for a stay should be denied. The court of appeals correctly rejected applicants' claim as "frivolous," Appx. 4, and their application for a stay from this Court is even more indefensible.

I. THERE IS NO REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI AND REVERSE

As the Seventh Circuit correctly recognized, the district court committed multiple errors in adopting the novel theory that the judiciary may prevent the executive from carrying out a lawful

capital sentence at the request of potential third-party attendees at a particular execution. Applicants have no APA cause of action to challenge the government's choice of an execution date, and the district court acted improperly in inventing a theory based on Arkansas law in a failed attempt to circumvent that difficulty. Moreover, even if applicants' claim were reviewable, the government's decision to promptly reschedule Lee's execution after the earlier stay was lifted was not arbitrary and capricious.

A. Neither the APA nor the FDPA provides a basis for anyone to challenge the selection of an execution date, a matter committed to the government's discretion. And even if the decision were somehow reviewable, third-party witnesses permitted to attend an execution do not fall within the zone of interests protected by the FDPA. The district court did not contest either of these principles in general, but instead created an exception where -- in the court's view -- the law of the state of conviction entitles a particular type of third-party witness to attend the execution. This sua sponte theory misconstrues both the FDPA and state law, and applicants' efforts to defend it are wholly unpersuasive.

1. The APA does not extend judicial review to agency actions that Congress committed to agency discretion by law. See 5 U.S.C. 701(a)(2); Heckler v. Chaney, 470 U.S. 821, 829–833 (1985). The government's choice of execution date is such an action. An examination of the relevant statute and regulations demonstrates

that they provide "no judicially manageable standards" for judging whether the government appropriately exercised its discretion in this case. Heckler, 470 U.S. at 830.

The FDPA directs that "[a] person who has been sentenced to death" must be "committed to the custody of the Attorney General until exhaustion" of his appellate and post-conviction proceedings; it further directs that "[w]hen the sentence is to be implemented, the Attorney General shall release the person" to the U.S. marshal, "who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). The statute therefore requires the Attorney General to retain custody of a defendant until his appellate and post-conviction proceedings are exhausted, but it places no other limits on the Attorney General's discretion to determine "[w]hen" the execution will be carried out. Ibid.

The applicable regulations, in turn, delegate responsibility for execution scheduling to the BOP Director, 28 C.F.R. 26.3, and provide that unless a court has ordered otherwise, the Director shall designate an execution date that is "no sooner than 60 days from the entry of the judgment of death." 28 C.F.R. 26.3(a)(1). The only other relevant instructions in the regulations are either designed to afford notice to the inmate -- i.e., that the inmate will generally be given 20 days' notice, 28 C.F.R. 26.4(a) -- or

to ensure that a new execution date is "designated promptly" after a postponement, 28 C.F.R. 26.3(a)(1).

Thus, as relevant here, neither the FDPA nor its implementing regulations impose "concrete limitations * * * on the agency's exercise of discretion," Drake v. FAA, 291 F.3d 59, 70 (D.C. Cir. 2002), cert. denied, 537 U.S. 1193 (2003), or provide a "meaningful standard against which to judge the agency's exercise of discretion," Heckler, 470 U.S. at 830.

This lack of specification is unsurprising in light of the historic flexibility in setting particular execution dates. See Pardoning Power, 7 Op. Att'y Gen. 561, 562 (1855) (noting that sometimes the President fixed the date of execution and sometimes the sentencing court provided one); Holden v. Minnesota, 137 U.S. 483, 495-496 (1890). It also accords with the practical reality that the selection involves substantial planning across multiple government entities. See, e.g., App, infra, 30a-32a. No source of law imposes any standard by which federal courts could review the Attorney General's discretion to carry out executions on a timeline comporting with the Executive Branch's capabilities and priorities, much less whether the date is reasonable in light of the competing scheduling and travel logistics of potential attendees.

In sum, as the court of appeals correctly held, so long as "BOP observes the minimal requirements in the regulations -- as it

did here -- then it has the unconstrained discretion to choose a date for the execution." Appx. 6.

2. Even if applicants' claims were reviewable under the APA, their alleged injuries are not within the zone of interests protected by any federal statute or regulation. See 5 U.S.C. 702 (permitting judicial review only if a person is "aggrieved by agency action within the meaning of a relevant statute"); Air Courier Conference of Am. v. American Postal Workers Union, 498 U.S. 517, 523-524 (1991) (plaintiff must "establish that the injury he complains of * * * [is] protected by the statutory provision whose violation forms the legal basis for his complaint"). Although the government endeavors to facilitate attendance by victims' family members, applicants do not even arguably have a right under the FDPA to demand that the government schedule executions only at times when applicants are willing or able to attend. Indeed, the court of appeals observed that "the FDPA makes no mention of witnesses, whether members of the victims' family or others." Appx. 7.

Applicants have no arguable rights under the applicable federal regulations either. The only regulation on which applicants rely, 28 C.F.R. 26.4, merely specifies who may attend an execution; it does not require their attendance for the execution to move forward. While applicants observe (Stay Appl. 17-18) that Section 26.4(c) refers to those who "shall be present

at the execution," they do not come to grips with the full text of the regulation, which mandates that "[n]ot more than" a specified "number[]" of citizens (eight) or members of the press (ten) "selected by the Warden" "shall be present." 28 C.F.R. 26.4(c)(4) (emphasis added). The regulation's plain language therefore imposes a limit on the attendance of potential third-party witnesses like applicants, rather than bestowing any rights on them. Thus, as the court of appeals correctly held, the regulation neither gives applicants a right to control scheduling, nor requires "their attendance before the execution may proceed." Appx. 8. Were it otherwise, any of the permissible witnesses the regulation identifies -- including "friends or relatives" of the condemned, 28 C.F.R. 26.4(c)(3)(iii) -- could obstruct an execution by asserting a scheduling conflict.[4]

3. The district court did not dispute that the FDPA generally leaves execution dates to the government's discretion and confers no rights on execution witnesses. And the court also

[4] Applicants attempt to bolster their reliance on 28 C.F.R. 26.4 by asserting (Stay Appl. 17) that its rights-creating nature becomes apparent when viewed in conjunction with the BOP's execution protocol itself. But the relevant language in the protocol states that BOP "will ask the United States Attorney for the jurisdiction in which the inmate was prosecuted to recommend up to eight individuals who are victims or victim family members to be witnesses of the execution[]." See 20-cv-350 D. Ct. Doc. 9, Ch. 1, III.G.1.c(1), at 10-11 (July 8, 2020) (emphasis added). The protocol therefore contemplates discretion as to whom to permit to attend; it does not require BOP to choose such individuals or to arrange the scheduling to accommodate them.

declined to adopt applicants' theory that 28 C.F.R. 26.4 entitles applicants to be present at the execution. Instead, the court viewed Arkansas law as providing execution witnesses with an enforceable right to attend Arkansas executions, and concluded that the FDPA somehow incorporates this state-law entitlement, thereby requiring BOP to consider applicants' availability under the APA. That conclusion is incorrect.

As an initial matter, applicants never argued before the district court that the FDPA gives them a statutory right to dictate the scheduling of Lee's execution by virtue of Arkansas law; indeed, applicants never referenced or cited Arkansas law at all.[5] The district court "interjected" that argument on its own, which -- as the court of appeals recognized -- is reason enough to reject it. Cf. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1582 (2020); see also Appx. 8 (criticizing the "impropriety" of the district court's "maneuver").

In any event, the district court's sua sponte theory misconstrues both federal and state law. The FDPA provides that an execution shall be "implement[ed] * * * in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). This provision, the district court concluded, incorporates Arkansas law provisions governing

[5] In their stay opposition before the court of appeals, and their stay application before this Court, applicants did not dispute this point, implicitly conceding that the theory on which they prevailed was one of the district court's own creation.

witnesses, see Ark. Code Ann. § 16-90-502 (2020), and more generally cuts off the federal government's scheduling discretion. See Appx. 17-18. According to the court, the D.C. Circuit's decision in the Execution Protocol Cases, 955 F.3d 106 (D.C. Cir.) (per curiam), cert. denied, No. 19-1348 (June 29, 2020), supports this interpretation of the FDPA. See Appx. 17-18 & n.2.

In actuality, as the court of appeal correctly held, both the text of Section 3596(a) and the D.C. Circuit's reasoning contradict the district court's theory. See Appx. 8-10 (the Arkansas Code "provision governing execution witnesses" is "irrelevant here"). Section 3596(a) incorporates only the "manner" of implementing the death sentence prescribed by state law. As Judge Katsas has explained and three Justices of this Court have suggested is likely correct, "manner" captures only the "top-line choice among execution methods such as hanging, electrocution, or lethal injection." Execution Protocol Cases, 955 F.3d at 113 (Katsas, J., concurring); see Barr v. Roane, 140 S. Ct. 353 (2019) (Statement of Alito, J.). And, while Judge Rao set out a more generous reading in her concurrence, she nonetheless identified only Ark. Code Ann. 5-4-617 (requiring executions to be conducted by lethal injection), and not Ark. Code Ann. § 16-90-502(e) (describing permissible witnesses to an execution), as the relevant "manner" incorporated by the FDPA. See, e.g., Execution Protocol Cases, 955 F.3d at 142 (Rao, J., concurring). And for

good reason: Arkansas law identifies Ark. Code 5-4-617, not Ark. Code Ann. § 16-90-502(e), as establishing the "manner" of execution. See Ark. Code Ann. § 16-90-502(c)(2020). And Section 5-4-617 places no limits on the choice of an execution date. Even if it did, such a timing provision -- like Section 16-90-502(e)'s provisions regarding witnesses -- would have nothing to do with the "manner" of implementing death sentences referenced in the FDPA.

Even the dissenting D.C. Circuit judge would not have extended the FDPA as far as the district court did here. In his view, the FDPA does not require the government to follow "'every nuance'" of a state procedure, but rather only "those procedures that 'effectuat[e] the death,' including choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements." Execution Protocol Cases, 955 F.3d at 151 (Tatel, J., dissenting) (citation omitted). Indeed, even the plaintiffs in the execution-protocol case, including Lee himself, disavowed the sweeping reading of the FDPA that the district court here adopted. See Oral Arg. at 1:01:04-40, No. 19-5322 (D.C. Cir. Jan. 15, 2020) (asserting that state law provisions regarding "who's in the chamber," and "those sorts of things" are "not part of the manner of implementing the sentence," which they cabined to the "manner of effectuating the death").

Applicants nonetheless maintain (Stay App. 15) that the "court of appeals erred in holding that the FDPA does not incorporate Arkansas law" because the plain meaning of the term "manner" must include provisions regarding witnesses. But the fact that all three judges of the D.C. Circuit and the unanimous Seventh Circuit rejected this understanding of the term suggests it is anything but "plain."

Applicants' fare no better in their insistence that the "FDPA relies on the States to determine which procedures comprise the 'manner" of execution.'" Stay Appl. 14. Even if that were true, Arkansas law provides that the "manner" of execution is described in Ark. Code 5-4-617, not Ark. Code Ann. § 16-90-502(e). And in any event, applicants and the district court misread the provisions of Arkansas law on which they rely. Ark. Code Ann. § 16-90-502(e)(1)(C) (2020) provides that "[n]o more than six" specified family members of a victim "shall be present" "if he or she chooses to be present" (emphasis added). Like 28 C.F.R. 26.4, this provision imposes a limit on, not an entitlement to, witness attendance. See p. 18, supra. And the district court provided no support for its broader conclusion that Ark. Code Ann. § 16-90-502(e)(1)(2020) gives anyone an enforceable right to attend an execution at their preferred time. Section 16-90-502 appears to prevent the prison from barring access to certain types of witnesses -- but the district court cited no support for the

proposition that it somehow requires Arkansas officials to plan an execution around third-party witness schedules. It almost certainly does not, given that the provision also provides that "[c]ounsel for the person being executed if he or she chooses to be present" "shall be present," id. § 16-90-502(e)(1)(E), and Arkansas presumably has not granted a death-row inmate's lawyer the right to unilaterally prevent his client's execution simply by refusing to attend or manufacturing scheduling conflicts. Accordingly, even if this statute were incorporated by the FDPA, it would provide no basis for the proposition that BOP was further required to consider applicants' schedules and travel preferences (regardless of the reason for those preferences).

B. In any event, the government's choice of an execution date was not arbitrary or capricious. Under courts' "narrow," review of agency action under the arbitrary-and-capricious standard, Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983), applicants cannot demonstrate that the government made a "clear error in judgment," Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 96 (1983), in rescheduling Lee's execution for July 13.

That choice was entirely consistent with the governing regulations, which provide that "[i]f the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau

of Prisons when the stay is lifted." 28 C.F.R. 26.3(a)(1). BOP initially scheduled Lee's execution for December 2019. See Press Release, Office of Public Affairs, U.S. Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019).[6] That execution date was preliminarily enjoined, but the government worked with dispatch to obtain vacatur of that injunction, repeatedly emphasizing its important interest in the timely enforcement of death sentences. When the D.C. Circuit issued its mandate, the Government "promptly" rescheduled the long-delayed execution, as contemplated by 28 C.F.R. 26.3(a)(1). Rather than being arbitrary and capricious, that action reflects the government's compliance with the governing regulation and its consistent opposition to undue delay of the originally scheduled execution date.

The district court nonetheless invalidated the agency's scheduling decision as arbitrary and capricious based on the erroneous conclusion that BOP failed to consider (1) applicants' supposed right under Arkansas law to attend the execution or to view it by closed-circuit TV, and (2) any health risks related to conducting an execution during the COVID-19 pandemic. See Appx. 21-22. As explained above, no provision of federal law gives applicants such rights at all, and even Arkansas law does not require facilitating witnesses' attendance by considering their

[6] https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse.

scheduling and travel logistics. Federal and state officials would face an overwhelming task if they were obliged to consider the schedule and travel logistics of every witness permitted to attend before selecting an execution date. And that task would become virtually impossible given that some witnesses, like applicants here, may oppose the execution altogether.

Nor can BOP's alleged failure to consider the pandemic's possible effects on attendees provide a basis to set aside the execution. Appx. 21a. For one thing, the district court appears to have faulted the government for failing to mention COVID-19 in its scheduling notice. See ibid. But BOP was under no obligation to document every rationale for its scheduling decision or every factor it considered before setting the execution date. See Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653-656 (1990) (agency was not required to provide plaintiffs with a "statement showing its reasoning") (citation omitted). Agency "decisions are routinely informed by unstated considerations"; that is no basis to set them aside unless the articulated rationales are themselves inadequate or pretextual. Department of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019); see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, No. 19-431 (July 8, 2020), slip op. 24 (explaining that courts cannot add to the APA's procedural requirements). Here, the stated reasons were plainly sufficient: the scheduling notice explained

that petitioners had received "full and fair proceedings" and that the executions were being scheduled in accordance with 28 C.F.R. 26.3. See Press Release, Office of Public Affairs, U.S. Dep't of Justice, Executions Scheduled for Four Federal Inmates Convicted of Murdering Children (June 15, 2020).[7] The laws and regulations did not require any more. See pp. 14-15, supra.

Regardless, the district court's assumption that BOP did not consider the risks inherent in scheduling Lee's execution despite the emergence of COVID-19 is belied by the record. Since March 2020, BOP has taken measures to minimize the spread of COVID-19. Fed. Bureau of Prisons, U.S. Dep't of Justice, BOP Implementing Modified Operations.[8] And BOP has consistently informed applicants that it will have in place appropriate safety protocols and procedures to mitigate COVID-19 risks. See App., infra, 34a-36a. In nevertheless finding BOP's scheduling decision arbitrary and capricious, the court improperly "substitute[d] its judgment for that of the agency." State Farm, 463 U.S. at 43.

Notably, BOP is not alone in carrying out important public law enforcement functions at this time. Texas carried out an execution just last week. See Wardlow v. Davis, No. 19-8850 (July 8, 2020) (denying application for stay of execution and writ of certiorari). Those in attendance donned masks and gloves. CBSN,

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[7] https://www.justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children.

[8] https://www.bop.gov/coronavirus/covid19_status.jsp.

Texas executes Billy Joe Wardlow for killing elderly man nearly 30 years ago, CBS News, July 8, 2020.[9] Meanwhile, the Southern District of Indiana reopened federal courthouses to the public on July 6, with visitors asked to wear face coverings and undergo screenings; jury trials are set to begin July 20. In re: Continued Court Operations Under The Exigent Circumstances Created By COVID-19 and Related Coronavirus (S.D. Ind. June 26, 2020) (reopening courthouses); In re: Continued Court Operations Under The Exigent Circumstances Created By COVID-19 and Related Coronavirus (S.D. Ind. June 26, 2020) (initiating jury trials).

BOP likewise will employ a host of safety measures to reduce the risks of infection during the execution proceedings. See App., infra, 34a-36a (describing measures regarding social distancing, sanitization, and protective equipment). And to the extent the court viewed those measures as inadequate, they are the sort of "'medical and scientific uncertainties'" that must be addressed by "politically accountable officials" without inappropriate "second-guessing by an 'unelected federal judiciary.'" South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–1614 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (citations omitted).

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[9] https://www.cbsnews.com/news/texas-executes-billy-joe-wardlow-for-killing-elderly-man-nearly-30-years-ago/.

II. THE EQUITIES STRONGLY COUNSEL AGAINST A STAY

The balance of equities also leans decidedly against a stay. The district court determined that the equities favor applicants based on their assertions that attending the execution will expose them to the risk of contracting COVID-19 if they attend the execution. Appx. 22. But the mere "possibility" of viral exposure does not "demonstrate that irreparable injury is likely in the absence of an injunction," Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008), especially given the virus-related precautions BOP has taken and offered applicants, see App., infra, 34a-36a.

Applicants' assertions of irreparable harm are also diminished by the fact that they waited until July 7 to seek relief. While respondent Veillette states that she asked BOP staff about protective measures, see Appx. 23-24, those requests provide no justification for applicants' delay in surfacing their extraordinary request that Lee's execution be halted "until treatment or a vaccine is available", App., infra, 29a; see Nelson v. Campbell, 541 U.S. 637, 649-650 (2004) ("before granting a stay, a district court must consider * * * the extent to which the [movant] has delayed unnecessarily in bringing the claim"). And this is especially so given that applicants oppose Lee's execution. See Campbell Robertson, She Doesn't Want Her Daughter's Killer To

Be Put To Death. Should the Government Listen?, N.Y. Times, Oct. 29, 2019.[10]

Further, applicants are not the only victim family members with an interest in attending the execution; others, who may not oppose the execution, are expected to be present in the witness room. App., infra, 35a. Applicants' interests cannot be permitted to overwhelm those of other individuals who themselves have weighty interests in seeing the sentence for Lee's horrific murders carried to fruition.

In any event, whatever harms may flow to applicants, they cannot outweigh the government's interest in carrying out scheduled executions after lengthy post-conviction review periods. Cf. Execution Protocol Cases, 955 F.3d at 129 (Katsas, J., concurring) (noting that federal courts "should not assist" attempts "to delay lawful executions indefinitely"). The courts that have considered Lee's own last-minute efforts to stop the execution have consistently rejected them: The Seventh Circuit deemed his latest attempt to obtain post-conviction relief "frivolous." Lee v. Watson, No. 20-2128, 2020 WL 3888196 (July 10, 2020), slip op. 6. And the court of conviction, in rebuffing Lee's recent request to reschedule his July 13 execution in light of COVID-19, reasoned in part that "no more delay is warranted" and that the "Government's interest in finality * * * counsel[s]

[10] https://www.nytimes.com/2019/10/29/us/Arkansas-federal-death-penalty.html?smid=em-share.

in favor of the July 13 date." 97-cr-243 D. Ct. Doc. 1425, at 9 (E.D. Ark. July 10, 2020). In so ruling, the court refused to substitute its own "weighing of the advantages and disadvantages" for the "judgment" of the "elected branches of government," which have not suspended executions during this time. Id. at 10.

Indeed, even where an inmate himself directly challenges the method of execution, this Court has warned that courts must "police carefully against attempts to use such challenges as tools to interpose unjustified delay," Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019), which can even "undermine [capital punishment's] jurisprudential rationale by reducing its deterrent effect and retributive value," id. at 1144 (Breyer, J., dissenting) (internal quotation marks omitted; brackets in original). Once post-conviction proceedings "have run their course," as they have here, "an assurance of real finality" is necessary for the government to "execute its moral judgment." Calderon v. Thompson, 523 U.S. 538, 556 (1998). The interest in doing so does not belong exclusively to victims or their families, let alone a subset of them who oppose the execution. The government takes seriously the views of surviving family members -- including applicants -- on the propriety of a death sentence, in accordance with their terrible loss and distinctive perspective. But "[b]oth the [government] and [all] the victims of crime have an important interest in the

timely enforcement of a sentence." Hill v. McDonough, 547 U.S. 573, 584 (2006).

Finally, the government's interest in implementing Lee's sentence is "magnified by the heinous nature" of those crimes, which include murdering a child in a brutal fashion. See Execution Protocol Cases, 955 F.3d at 127 (Katsas, J., concurring) (discussing Lee's crimes). Applicants' interest in witnessing an execution they oppose that will redress Lee's terrible crimes cannot outweigh the government's interest in actually conducting it.

CONCLUSION

The application for a stay should be denied.

Respectfully submitted.

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