No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

APPLICATION FOR A STAY OR VACATUR OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are William P. Barr, in his official capacity as Attorney General; the United States Department of Justice; Uttam Dhillon, in his official capacity as Acting Administrator of the Drug Enforcement Administration; Kathleen Hawk Sawyer, in her official capacity as Director of the Federal Bureau of Prisons; Nicole C. English, in her official capacity as Assistant Director, Health Services Division, Federal Bureau of Prisons; Jeffrey E. Krueger, in his official capacity as Regional Director, Federal Bureau of Prisons, North Central Region; T.J. Watson, in his official capacity as Warden, U.S. Penitentiary Terre Haute; William E. Wilson, M.D., in his official capacity as Clinical Director, U.S. Penitentiary Terre Haute; Joseph McClain, in his official capacity as United States Marshal for the Southern District of Indiana; and John Does I-X, individually and in their official capacities.

The respondents (plaintiffs-appellees below) are Alfred Bourgeois, Dustin Lee Honken, Daniel Lewis Lee, and Wesley Ira Purkey.*

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* The court of appeals' docket lists other appellees, but those individuals were not subject to the order at issue here.

RELATED PROCEEDINGS

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

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 20, 2019) (issuing preliminary injunction)**

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 22, 2019) (denying stay pending appeal)

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

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, No. 19-5322 (December 2, 2019) (denying motion to stay or vacate preliminary injunction)

** The district court's consolidated case, In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145, includes three individual cases relevant here: Bourgeois v. United States Dep't of Justice, No. 12-cv-782; Lee v. Barr, No. 19-cv-2559; and Purkey v. Barr, No. 19-cv-3214. The consolidated case also includes other individual cases, see, e.g., Roane v. Barr, No. 05-cv-2337, but the order at issue does not pertain to those other individual cases.

IN THE SUPREME COURT OF THE UNITED STATES

No. 19A-_____

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APPLICATION FOR A STAY OR VACATUR OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

The United States District Court for the District of Columbia preliminarily enjoined respondents' scheduled executions, the first of which is set for December 9, 2019, at 8:00 a.m. Eastern Standard Time. Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants William P. Barr et al., respectfully applies for an order setting aside the injunction, either in the form of a stay pending appeal (recognizing that the appeal will become moot after respondents' executions) or a summary vacatur. See pp. 5, 37, infra (citing orders of this Court providing such relief in both capital and non-capital contexts).

Respondents are federal death-row inmates, each of whom was convicted more than 15 years ago of crimes of staggering brutality -- including, in each case, the murder of a child. In each case, a federal jury unanimously determined that respondents' crimes warranted a sentence of death. And in each case, respondents have

exhausted all permissible direct appeals and collateral challenges to their convictions and sentences.

In July 2019, the Attorney General directed the Federal Bureau of Prisons (BOP) to schedule execution dates for each respondent. The Attorney General also directed BOP, which had completed a thorough review of possible lethal-injection protocols in consultation with the United States Marshals Service (USMS), to carry out the executions using a lethal dose of pentobarbital -- the same protocol that States have used to execute more than 100 inmates over the past seven years, that has been repeatedly upheld by lower courts, that this Court approved in Bucklew v. Precythe, 139 S. Ct. 1112 (2019), and that many Justices have recognized as more humane than other protocols previously used by the federal government and still used by some States, see, e.g., Zagorski v. Parker, 139 S. Ct. 11, 11-12 (2018) (Sotomayor, J., dissenting from denial of certiorari and denial of a stay).

Respondents moved to preliminarily enjoin their executions. They do not dispute that they may be executed by lethal injection. They contend only that the particular protocol selected by the Attorney General is unlawful. On November 20, 2019, the district court granted the requested injunction on a single ground: that the protocol conflicts with a provision of the Federal Death Penalty Act of 1994 (FDPA) directing that federal capital sentences be implemented "in the manner prescribed by the law of the State

in which the sentence is imposed." 18 U.S.C. 3596(a). In the district court's view, the FDPA requires not only that the federal government impose the death penalty using the same method of execution as the relevant State (i.e., lethal injection), but also that the federal government comply with all "additional procedural details" of the State's execution protocol, such as "how the intravenous catheter is to be inserted." App., infra, 9a, 12a. The court accordingly enjoined indefinitely the execution of all four respondents. See id. at 17a. The government sought a stay or vacatur of the injunction in the court of appeals, which denied the motion earlier today. See id. at 1a.

This Court should stay or vacate the preliminary injunction. The district court's holding is meritless. For virtually the entire history of the United States, beginning with the Crimes Act of 1790, federal statutory references to the "manner" of imposing the death penalty have been understood to refer only to the "mode of execution," Andres v. United States, 333 U.S. 740, 745 n.6 (1948) -- e.g., hanging, firing squad, or lethal injection -- not to all "additional procedural details" of the execution, such as the composition of the firing squad or "how the intravenous catheter is to be inserted," App., infra, 9a, 12a.

The district court's interpretation of the FDPA conflicts not only with the statutory text, context, and two centuries of history, but also with common sense. Under the court's reasoning,

a State could effectively veto a federal execution simply by making unavailable state officials or resources that are required by state law for the execution. Even an otherwise-cooperative State could prevent a federal execution by declining to disclose certain execution procedures or drug sources, consistent with many States' statutes designed to ensure the confidentiality of such matters. And the federal government would be barred from adopting procedures designed to be more humane than those used by the relevant State. Indeed, the paradoxical result of the district court's reasoning is that some federal inmates could not be executed using the single-drug pentobarbital protocol that the Attorney General selected after careful review and many members of this Court have recognized as humane, see p. 2, supra, but instead would have to be executed under a protocol that four Justices suggested could be the "chemical equivalent of being burned at the stake," Glossip v. Gross, 135 S. Ct. 2726, 2781 (2015) (Sotomayor, J., dissenting).

The equities in this case also weigh very heavily against the inmates. As noted, each of them murdered at least one child, and in each case that murder was accompanied by additional murders, torture, or rape. Acting on behalf of the public and the victims, the United States has an overwhelming interest in "the timely enforcement of" the death sentence handed down by an impartial jury and upheld by every reviewing court. Bucklew, 139 S. Ct. at 1133 (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)). The

federal government, moreover, has spent months preparing for these executions, a major logistical undertaking that requires mobilizing personnel, coordinating with the victims' families, providing security, and preparing the drug protocol.

By contrast, because respondents do not dispute that they can be executed by lethal injection, their only cognizable interest is a purported statutory entitlement to execution in conformance with state procedures, even though those procedures may in fact cause them greater pain. The balance of equities thus militates strongly in favor of setting aside the order below and allowing the executions to proceed as scheduled, as this Court has summarily done on other occasions when lower courts unjustifiably enjoined or stayed executions. See, e.g., Dunn v. McNabb, 138 S. Ct. 369 (2017); Brewer v. Landrigan, 562 U.S. 996 (2010); Sizer v. Oken, 542 U.S. 916 (2004); cf. Franklin v. Lombardi, 571 U.S. 1066 (2013) (denying a stay and permitting execution of an inmate challenging Missouri's use of a single-drug pentobarbital protocol just over one month after the protocol was adopted).

STATEMENT

1. "The Constitution allows capital punishment." Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019); see Glossip v. Gross, 135 S. Ct. 2726, 2732-2733 (2015); Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion). "It necessarily follows that there must be a means of carrying it out." Baze, 553 U.S. at 47

(plurality opinion). Congress first addressed that matter in the Crimes Act of 1790, 1 Stat. 112, which made the death penalty available for certain federal crimes, see §§ 1, 3-4, 8-10, 14, 23, 1 Stat. 112-115, 117, and provided that "the manner of inflicting the punishment of death[] shall be by hanging the person convicted by the neck until dead," § 33, 1 Stat. 119. That provision governed federal executions for the next 147 years. See Rev. Stat. § 5325 (1875) (codifying Section 33 of the Crimes Act of 1790); Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088, 1151 (codifying the provision in the Federal Criminal Code); 18 U.S.C. 542 (1925) (codifying the provision in the United States Code); United States Marshals Service, History - Historical Federal Executions, https://www.usmarshals.gov/history/executions.htm (USMS History) (last visited Dec. 2, 2019).

Around the turn of the twentieth century, States began to adopt new methods of execution, such as electrocution and lethal gas. See, e.g., Glossip, 135 S. Ct. at 2731-2732; In re Kemmler, 136 U.S. 436, 444 (1890). In 1936, the Attorney General submitted a letter to Congress describing the States' development of "more humane methods, such as electrocution," and proposing legislation under which "a sentence of death imposed by a Federal court shall be carried out in the same manner in which such sentences are carried out under the laws of the State in which the Federal court is held." H.R. Rep. No. 164, 75th Cong., 1st Sess. 2 (1937 Report).

Congress agreed and, in 1937, amended the longstanding provision that the "manner of inflicting the punishment of death shall be by hanging," 18 U.S.C. 542 (1934), to direct instead that 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," Act of June 19, 1937 (1937 Act), ch. 367, 50 Stat. 304. As this Court subsequently explained, "[t]he purpose of this legislation was * * * the adoption of the local mode of execution." Andres v. United States, 333 U.S. 740, 745 n.6 (1948). To address the possibility that no such mode of execution existed, the 1937 Act provided that "[i]f the laws of the State within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof." 50 Stat. 304.

2. The federal government conducted executions under the 1937 Act "for decades," from shortly after its passage until 1963, when the last federal execution of the twentieth century occurred. App., infra, 10a; see Federal Bureau of Prisons, Historical Information - Capital Punishment, https://www.bop.gov/about/history/federal_executions.jsp (BOP History).

In the 1970s, this Court's decisions in Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), placed procedural limits on the imposition of capital sentences

that called into question many federal statutes authorizing the death penalty. Following those decisions, Congress repealed the 1937 Act and related provisions as part of broader sentencing reform in 1984, see Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, and in 1988 reinstated the federal death penalty with new sentencing procedures for certain federal crimes, see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4387-4395.

To fill the void left by Congress's repeal of the 1937 Act, the Department of Justice proposed a rule providing "procedures for * * * the [USMS and BOP] to follow in * * * executing death orders" in federal capital cases. 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992). The Department reiterated that, under the 1937 Act, "executions in [f]ederal cases were to be conducted in the manner prescribed in the state in which the sentence was imposed." Ibid. Observing that "[l]ethal injection * * * increasingly is the method of execution in the states," the proposed rule provided that "[l]ethal injection will be the method of execution" for federal capital crimes. Ibid. The Department finalized the rule in 1993. 58 Fed. Reg. 4898 (Jan. 19, 1993); see 28 C.F.R. 26.1-26.5 (codifying the rule).

A year later, Congress enacted the FDPA, Pub. L. No. 103-322, Tit. VI, 108 Stat. 1959. The FDPA applied new procedures for imposing a death sentence to a substantial number of additional

federal offenses. 18 U.S.C. 3591-3594. Of particular relevance here, the FDPA also readopted the framework for executing death sentences established by the 1937 Act, providing that "a United States marshal * * * shall supervise implementation of [a death] sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). Like the 1937 Act, the FDPA further provides that "[i]f the law of the State does not provide for implementation of a sentence of death, the [sentencing] 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 the latter State in the manner prescribed by such law." Ibid. In addition, the FDPA states that a "United States marshal charged with supervising the implementation of a sentence of death may use appropriate State or local facilities" and "may use the services of an appropriate State or local official" if the federal government pays "the costs thereof in an amount approved by the Attorney General." 18 U.S.C. 3597(a).

The federal government has executed three inmates under the FDPA and the 1993 lethal-injection rule: Timothy McVeigh and Juan Garza in 2001, and Louis Jones in 2003. Administrative Record (A.R.) 929. Each of those executions was conducted in the federal execution chamber at the United States Penitentiary in Terre Haute, Indiana. BOP History, supra. In each execution, the government used three drugs: sodium thiopental, a sedative to induce

unconsciousness; pancuronium bromide, a paralytic agent that inhibits movement and stops breathing; and potassium chloride, which stops the heart. A.R. 929; see Baze, 553 U.S. at 44, 53 (plurality opinion) (describing this three-drug protocol and the federal government's use of it).

3. The United States continues to seek and obtain the death penalty for the most egregious federal crimes. See, e.g., United States v. Roof, No. 15-cr-472 (D.S.C. filed July 22, 2015) (hate-crimes prosecution for mass murder at an African-American church); United States v. Tsarnaev, No. 13-cr-10200 (D. Mass. filed June 27, 2013) (Boston Marathon bomber).

The three-drug protocol used to carry out previous federal executions under the FDPA, however, became unavailable when "anti-death-penalty advocates induced the company that manufactured sodium thiopental to stop supplying it for use in executions." Bucklew, 139 S. Ct. at 1120; see Glossip, 135 S. Ct. at 2733. In March 2011, BOP began exploring possible substitutes. See A.R. 870, 929. BOP personnel visited state execution sites and reviewed state lethal injection protocols, as well as after-action reports assessing problems that had arisen in state executions. A.R. 930-932. BOP also consulted with medical experts, reviewed case law, and assessed the quality and reliability of available drugs. A.R. 931-932. At the end of its review, BOP concluded that the federal government should conduct executions using a lethal dose of a

single drug -- pentobarbital, a sedative that induces unconsciousness and death when administered in a sufficiently large quantity. A.R. 871; see Bucklew, 139 S. Ct. at 1120.

In explaining its decision, BOP noted that at least 14 States use pentobarbital in their lethal injection protocols, and five States -- Georgia, Idaho, Missouri, South Dakota, and Texas -- use pentobarbital as the sole drug. A.R. 871. Indeed, Missouri and Texas have used a single-drug pentobarbital protocol to execute around 100 inmates since 2012, and more than half of all executions in the United States since 2018 have used such a protocol. Ibid. BOP observed that none of the reported complications in state executions had stemmed from the use of pentobarbital, and that courts have repeatedly upheld the use of pentobarbital against Eighth Amendment and related challenges. See id. at 871 & n.13. Of particular note, this Court upheld Missouri's use of a single-drug pentobarbital protocol to execute an inmate with a distinctive medical condition, see Bucklew, 139 S. Ct. at 1130-1133, and this Court has denied review of decisions by the courts of appeals upholding the general use of a single-drug pentobarbital protocol by both Missouri and Texas, see Zink v. Lombardi, 783 F.3d 1089, 1097-1107 (8th Cir.) (en banc) (per curiam), cert. denied, 135 S. Ct. 2941 (2015); Ladd v. Livingston, 777 F.3d 286, 289-290 (5th Cir.), cert. denied, 135 S. Ct. 1197 (2015).

BOP observed, moreover, that inmates challenging three-drug protocols in other States have often argued that pentobarbital would be a constitutionally valid alternative. A.R. 932 (citing cases); see Glossip, 135 S. Ct. at 2738; see also Zagorski v. Parker, 139 S. Ct. 11, 11-12 (2018) (Sotomayor, J., dissenting from denial of certiorari and denial of a stay) ("Pentobarbital, a barbiturate, does not carry the risks [of other drugs used in lethal injections, because it] is widely conceded to be able to render a person fully insensate."); Arthur v. Dunn, 137 S. Ct. 725, 726-728 (2017) (Sotomayor, J., dissenting from denial of certiorari) (noting that the inmate had proposed that Alabama use a single-drug pentobarbital protocol to execute him).

Finally, BOP explained that the single-drug pentobarbital protocol was preferable to other alternatives because using a single drug "reduces the risk of errors in administration" and could be more reliably obtained. A.R. 931. BOP stated that it had located a domestic manufacturer and a domestic compounding pharmacy to produce the drug, that it had conferred with the Drug Enforcement Administration to ensure those entities were properly registered, and that both the active pharmaceutical ingredient and the injectable solution had passed quality-assurance testing. Id. at 872, 932-933. BOP also consulted with two medical experts, both of whom "concluded that the protocol would produce a humane death," and with the USMS, which "concurred" with the modified

protocol and maintains a supervisory role in executions. A.R. 872, 931; see A.R. 1069.

4. After reviewing BOP's recommendation, the Attorney General in July 2019 directed BOP to adopt the single-drug pentobarbital protocol it had proposed. A.R. 868. As relevant here, the Attorney General then directed BOP to schedule execution dates for respondents, each of whom was convicted more than 15 years ago and has fully exhausted all permissible appeals and collateral challenges. See App., infra, 2a.

The first execution, scheduled for December 9, 2019, is of Daniel Lewis Lee -- a member of a white supremacist organization who was convicted of murdering all three members of an Arkansas family, including an eight-year old girl, by shooting them with a stun gun, duct-taping plastic bags over their heads, weighing down their bodies with rocks, and drowning them in a bayou. App., infra, 2a; see United States v. Lee, 374 F.3d 637, 641 (8th Cir. 2004), cert. denied, 545 U.S. 1141 (2005). Additional executions are scheduled in December and January for Wesley Ira Purkey, who kidnapped, raped, murdered, and dismembered a sixteen-year-old girl, United States v. Purkey, 428 F.3d 738, 744-745 (8th Cir. 2005), cert. denied, 549 U.S. 975 (2006); Alfred Bourgeois, who tortured and then murdered his two-year-old daughter, United States v. Bourgeois, 423 F.3d 501, 503-505 (5th Cir. 2005), cert. denied, 547 U.S. 1132 (2006); and Dustin Lee Honken, who murdered

two federal witnesses, along with the girlfriend of one witness and her six- and ten-year-old daughters, United States v. Honken, 541 F.3d 1146, 1148-1149 (8th Cir. 2008), cert. denied, 558 U.S. 1091 (2009).[1]

5. Respondents each sought preliminary injunctions prohibiting the government's use of the single-drug pentobarbital protocol in their executions. The district court consolidated their cases, and, on November 20, 2019, granted a preliminary injunction. App., infra, at 2a-16a, 17a.

The district court concluded that respondents had demonstrated a likelihood of success on the merits based on a single ground: that the protocol "exceeds statutory authority by establishing a single procedure for all federal executions rather than using the FDPA's state-prescribed procedure." App., infra, 8a. The court rejected the government's position that it had complied with the FDPA's requirement to ensure "implementation of

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[1] As noted, respondents have fully exhausted the permissible collateral challenges to their convictions and sentences. See, e.g., United States v. Lee, No. 97-cr-243, 2008 WL 4079315, at *1 (E.D. Ark. Aug. 28, 2008), aff'd, 715 F.3d 215 (8th Cir. 2013), cert. denied, 135 S. Ct. 72 (2014); Purkey v. United States, No. 01-cr-308, 2009 WL 3160774, at *6 (W.D. Mo. Sept. 29, 2009), aff'd, 729 F.3d 860 (8th Cir. 2013), cert. denied, 135 S. Ct. 355 (2014); United States v. Bourgeois, No. 02-cr-216, 2011 WL 1930684, at *7, *12 (S.D. Tex. May 19, 2011), certificate of appealability (COA) denied, 537 Fed. Appx. 604 (5th Cir. 2013), cert. denied, 135 S. Ct. 46 (2014); Honken v. United States, 42 F. Supp. 3d 937, 1197 (N.D. Iowa 2013) (vacating non-capital convictions under 28 U.S.C. 2255, but otherwise denying relief), COA denied, No. 14-1329 (8th Cir. May 2, 2014), cert. denied, 136 S. Ct. 29 (2015).

the sentence in the manner prescribed by the law of the State," 18 U.S.C. 3596(a), by using the same method of execution as in each of the relevant States -- here, lethal injection. Id. at 9a.[2] The court instead perceived a distinction between the "manner" of execution and the "method" of execution, with the "manner" encompassing not only the method but also "additional procedural details." Ibid.

In particular, the district court acknowledged that all of the relevant States in respondents' cases "permit[] or require[]" lethal injection, App., infra, 11a, but concluded that "a single federal protocol" conflicted with the FDPA because of more granular differences between the federal protocol and state procedures, id. at 12a. Specifically, the court observed, "states of conviction establish specific and varied safeguards on how the intravenous catheter is to be inserted," while the federal protocol "provides only that the method for insertion of the IV is to be selected based on the training, experience, or recommendation of execution personnel." Ibid.

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[2] Respondents Lee, Purkey, and Bourgeois were convicted by federal district courts in Arkansas, Missouri, and Texas, respectively. App., infra, 11a-12a. Each of those States provides for lethal injection as a method of execution. See ibid. Respondent Honken was convicted by a federal district court in Iowa, a State that does not have a death penalty. Id. at 12a n.4. Pursuant to the FDPA's direction for such a scenario, the sentencing court designated Indiana as the State for Honken's execution. Ibid. Indiana provides for lethal injection as a method of execution. See id. at 12a.

The district court further concluded that respondents had met the equitable requirements to obtain a preliminary injunction. App., infra, 14a-16a. The court stated that respondents would, without a preliminary injunction, "suffer the irreparable harm of being executed under a potentially unlawful procedure before their claims can be fully adjudicated." Id. at 15a. The court acknowledged that the government "does have a legitimate interest in the finality of criminal proceedings," but found that the "potential harm to the government caused by a delayed execution is not substantial." Ibid. For similar reasons, the court concluded that the public interest favors a preliminary injunction. See id. at 15a-16a.

6. The government moved for a stay or vacatur of the preliminary injunction in the court of appeals. The court denied that motion earlier today, December 2, 2019. App., infra, 1a.

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 a district-court order pending appeal to a court of appeals, or may summarily vacate the order. See, e.g., Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3, 3 (2019); Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017) (per curiam) (IRAP); West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016); p. 37, infra (citing orders of this Court vacating district-court injunctions and stay orders in

capital and non-capital cases). "In considering stay applications on matters pending before the Court of Appeals," the three questions are, first, "whether four Justices would vote to grant certiorari" if the court below ultimately rules against the applicant; second, "whether the Court would then set the order aside"; and third, the "balance" of "the so-called stay equities." San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (citation and internal quotation marks omitted); see Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Here, all those factors counsel in favor of a stay or vacatur given the government's overwhelming likelihood of success on the merits, the profound public interest in implementing the sentences lawfully imposed on respondents for their grievous crimes, and the purely procedural (and likely harmless) nature of the alleged defect in the challenged lethal-injection protocol.

1. On the merits, the district court did not hold that the federal protocol violates the Eighth Amendment, nor could it have given that this Court just last term rejected an Eighth Amendment challenge to the Missouri single-drug pentobarbital protocol that was a model for the federal protocol. Bucklew v. Precythe, 139 S. Ct. 1112, 1130-1133 (2019); see A.R. 871 & n.13, 932 (citing additional courts rejecting challenges to similar protocols). Nor did the district court hold that BOP had failed to adequately

consider or explain its choice of a protocol that has been used more than 100 times by States without reported complications and that medical experts have described as producing "highly consistent results and extremely rapid and peaceful passing." A.R. 525. The court instead relied entirely on the premise that the federal protocol conflicts with the FDPA's requirement that federal capital sentences 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), even though the court acknowledged that every State relevant here prescribes lethal injection as a permissible manner of execution, App., infra, 11a-12a & n.4.

That reading is implausible. For virtually the entire history of the United States, beginning with the First Congress, federal statutory references to the "manner" of execution have been understood -- including by this Court -- to refer to the mechanism for inflicting the death penalty (e.g., hanging, firing squad, or lethal injection), not to every "procedural detail[]" that might be employed in an execution. App., infra, 9a. The district court's contrary interpretation would effectively empower any State to veto a federal execution by preventing federal compliance with any arcane procedural matter, and would perversely bar the federal government from taking extra precautions for the benefit of death-row inmates. Congress would not and did not enact such an upside-down scheme. And at the very least, even the district

court's mistaken interpretation does not support a preliminary injunction here, because the court did not identify any actual conflict with the prescribed state procedures. Given the importance of the issue and the extent of the error, if the court of appeals were to affirm the district court's injunction, this Court would grant certiorari and reverse.

a. As relevant here, the FDPA provides that, when a death 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." 18 U.S.C. 3596(a); see ibid. (requiring implementation of a federal death sentence, when a State does not have the death penalty, "in the manner prescribed by [the] law" of a State "designated" by the sentencing court).

The federal protocol complies with that statutory directive in this case because it prescribes the same "manner" of implementing a death sentence as is "prescribed by the law of" each relevant State. 18 U.S.C. 3596(a). Specifically, the federal protocol prescribes "intravenous injection of a lethal substance or substances in a quantity sufficient to cause death," 28 C.F.R. 26.3(a)(4), as do the laws of Arkansas, Indiana, Missouri, and Texas, see App., infra, 11a-12a; p. 15 n.2, supra.

The district court rejected that straightforward reading by drawing a distinction between a State's "manner" of implementing a death sentence, 18 U.S.C. 3596(a), and its "'method' of execution," App., infra, 9a. In the court's view, a State's "manner" of execution is necessarily broader than its "method" of execution, because "the word 'manner' * * * includes not just execution method but also execution procedure." Ibid. Thus, the court concluded, the FDPA requires that federal executions not only employ the same method of execution prescribed by the relevant State, but also follow "additional procedural details" -- in particular, "how the intravenous catheter is to be inserted." Id. at 9a, 12a.

The district court's position is fundamentally flawed. As an initial matter, the word "manner" is not necessarily broader than the word "method" as a matter of plain language. An ordinary English speaker might say, for example, that the method of obtaining this Court's review includes filing a petition for a writ of certiorari in the manner prescribed by the Court's rules. A different speaker might swap the position of "method" and "manner," and the sentence would be equally natural. The words can thus be used interchangeably. Indeed, this Court has used the terms -- and other similar terms -- interchangeably in precisely this context. See Baze v. Rees, 553 U.S. 35, 42-43 & n.1 (2008) (plurality opinion) (using "means," "mode," "method," and "manner"

to refer to mechanisms for inflicting death -- e.g., "hanging," "electrocution," "firing squad," or "lethal injection"); see also, e.g., Bucklew, 139 S. Ct. at 1124-1125 (referring interchangeably to "modes of execution" and "methods of execution").

Determining the meaning of the FDPA's directive that the federal government implement a death sentence in the "manner" prescribed by state law, 18 U.S.C. 3596(a), thus requires interpreting the text in light of the "statutory context, structure, history, and purpose," Abramski v. United States, 573 U.S. 169, 179 (2014) (citation and internal quotation marks omitted). And those considerations all point in the same direction. As explained above, the Crimes Act of 1790 provided that "the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead." § 33, 1 Stat. 119 (emphasis added). That statutory directive, which was signed into law by President Washington and governed all federal executions for more than half the Nation's history, unambiguously equated "the manner" of execution, ibid., with "the method" of execution, App., infra, 9a -- hanging. See Wilkerson v. Utah, 99 U.S. 130, 133 (1878) (upholding an execution by firing squad as the "mode of execut[ion]" prescribed by Utah territorial law while explaining that "the act of Congress provides that the manner of inflicting the punishment of death shall be by hanging").

Congress did not change the long-settled understanding of "manner of inflicting the punishment of death" in 1937 when it replaced "hanging," 1 Stat. 119, with "the manner prescribed by the laws of the State within which the sentence is imposed," 50 Stat. 304. To the contrary, the history of the amendment makes clear that Congress preserved the statutory meaning of "the manner" as synonymous with "the method" of execution. The Attorney General proposed the 1937 amendment to "the manner" of federal executions to incorporate the "more humane methods, such as electrocution," adopted by the States. 1937 Report 2 (emphasis added). The Report of the House Committee on the Judiciary, entitled "Method of Imposition of Death Sentence," id. at 1 (emphasis added; capitalization altered), likewise observed that "[m]any States" had adopted "more humane methods of execution, such as electrocution, or gas," and recommended that the federal government replace "[t]he method of imposition of the death sentence imposed by" the prior statute -- "by hanging" -- with "the manner of execution * * * prescribed by the laws of the State," ibid. (emphases added).

Consistent with that history, this Court has read the 1937 Act to equate "the manner" of execution with "the method" of execution. In Andres v. United States, 333 U.S. 740 (1948), the Court explained that, under the 1937 Act's "manner" provision, the "method of inflicting the death penalty" in Hawaii (which at the

time was a territory) was "death by hanging." Id. at 745. The Court did not suggest that the statute required any additional procedures. To the contrary, the Court explained that the 1937 Act's "manner" provision had been derived from the Crimes Act of 1790 in response to the State's development of "more humane methods" of execution, id. at 745 n.6 (quoting 1937 Report 1) (emphasis added), and that the "purpose of" the 1937 Act was simply "the adoption of the local mode of execution," ibid. (emphasis added).

The 1937 Act governed federal executions for decades before its repeal as part of broader sentencing reforms in 1984. In keeping with its consistent understanding of the statutory reference to "the manner" of execution, the federal government conducted executions under the 1937 Act using the method of execution prescribed by the relevant State. See BOP History, supra. Thus, as the district court observed, the United States executed Julius and Ethel Rosenberg in 1953 using New York's method of execution (electrocution), while it executed Victor Feguer in 1963 using Iowa's method of execution (hanging). App., infra, 10a-11a. As the district court also observed, those federal executions -- and some others (though not all) under the 1937 Act -- occurred in state prisons. Ibid.; see BOP History, supra (noting that federal executions occurred in federal facilities in Michigan and Kansas in 1938). But neither the district court nor

respondents have suggested that those federal executions were required to (or did) comply with every minute detail of state execution procedures beyond the method of execution.

The federal government maintained its consistent reading of the 1937 Act even after the statute was repealed. When the Department of Justice in 1993 issued a rule adopting a uniform federal execution protocol, it reiterated that, under the 1937 Act's "manner" of execution provision, "Congress allowed the method of [federal] execution to turn on the method used in the state in which the prisoner was sentenced." 58 Fed. Reg. 4899 (emphases added). And when Congress enacted the FDPA in 1994 with the same operative "manner prescribed by the law of the State" language that existed in the 1937 Act (and that derived from the Crimes Act of 1790), it gave no indication that it intended to depart from the two-centuries-old understanding that "the manner" of execution in this context is synonymous with "the method of execution." See, e.g., Hall v. Hall, 138 S. Ct. 1118, 1128 (2018) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (citation omitted).

Indeed, some of the very "laws of the State" the FDPA references, 18 U.S.C. 3596(a), reflect the same understanding of "manner" as synonymous with "method" of execution. See, e.g., 1988 Mo. Laws 985 ("The manner of inflicting the punishment of

death shall be by the administration of lethal gas or * * * lethal injection.") (emphasis added); ch. 558, 1992 Cal. Stat. 2075 ("Notwithstanding" a provision permitting "[p]ersons sentenced to death * * * to elect to have the punishment imposed by lethal gas or lethal injection," "if either manner of execution * * * is held invalid, the punishment of death shall be imposed by the alternative means.") (emphasis added).

As a matter of practice, moreover, the federal government has implemented the FDPA in keeping with its longstanding reading of "manner" as synonymous with "method" of execution. In the first execution under the FDPA, the United States executed Timothy McVeigh for numerous federal capital offenses stemming from his bombing of the Alfred P. Murrah Federal Building in Oklahoma City. See United States v. McVeigh, 153 F.3d 1166, 1176-1177 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999); BOP History, supra. The execution was conducted by lethal injection in the federal execution chamber at the United States Penitentiary in Terre Haute, Indiana, under the supervision of the United States Marshal for Northern Indiana. See USMS History, supra.

The federal government's use of lethal injection in McVeigh's execution was consistent with Oklahoma law defining the "[m]anner of inflicting punishment of death" as "intravenous administration of a lethal quantity of [a] barbiturate in combination with a chemical paralytic agent." Okla. Stat. Ann. tit. 22, § 1014(A)

(West 1986). But Oklahoma law also provided that "[a] judgment of death must be executed at the Oklahoma State Penitentiary at McAlester, Oklahoma, * * * under the authority of the Director of the Department of Corrections." Okla. Stat. Ann. tit. 22, § 1015(A)-(B) (West Supp. 2001). Thus, if the district court correctly interpreted the FDPA's reference to "manner" to require compliance not just with the state's method of execution (i.e., lethal injection), but also with other statutory procedural requirements, then the federal execution of Timothy McVeigh would have been unlawful. So would the federal executions of Juan Garza and Louis Jones under the FDPA in 2001 and 2003, both of which occurred at the United States Penitentiary in Terre Haute under the supervision of the United States Marshal, see USMS History, supra, in apparent conflict with Texas procedural requirements, see Tex. Code Crim. Proc. Ann. art. 43.19 (West Supp. 2001).

That result would not only be alarming and counterintuitive; it would conflict with the FDPA itself, which provides that the federal government "may use appropriate State or local facilities for the purpose," and "may use the services of an appropriate State or local official or of a person" in conducting federal executions. 18 U.S.C. 3597(a) (emphases added). Congress's use of that permissive language contrasts with its use of mandatory language in the FDPA requirement that federal officials "shall" implement the death sentence in the "manner prescribed by the law of the

State." 18 U.S.C. 3596(a); cf. Lopez v. Davis, 531 U.S. 230, 241 (2001) (contrasting "Congress' use of the permissive 'may' in" one statutory provision "with the legislators' use of a mandatory 'shall' in the very same section"). Reading Sections 3596 and 3597 together thus further highlights the fundamental defect in the district court's conclusion that the FDPA's reference to implementing a death sentence "in the manner prescribed by state law," 18 U.S.C. 3596(a), includes every detail of state execution procedure.[3]

b. The district court's reading of the FDPA is not only at odds with the plain meaning of the text, the statutory context and history, and longstanding practice, but also produces results that defy common sense and cannot reflect Congress's design.

As an initial matter, the district court's reading of the FDPA could render it virtually impossible to administer. The court interpreted Section 3596 to require federal compliance with "procedural details" of state law, App., infra, 9a-10a, without any apparent limitation. The federal government would thus presumably be responsible for complying with every single state procedural requirement, regardless of whether the requirement is embodied in a state statute, regulation, policy manual, or

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[3] To the extent the district court suggested that the FDPA may not require adhering to execution locations specified by state law, see App., infra, 9a-10a & n.3, that arbitrary exclusion would underscore the atextual nature of the court's interpretation of the FDPA as incorporating some, but not all, state procedures.

unwritten practice. The federal government would also presumably be required to comply with such state procedures even if the State itself regularly overlooks them. No basis exists to infer that Congress imposed such rigid constraints on federal officials carrying out federal executions for federal crimes. Nor would Congress have expected courts to serve as "boards of inquiry" policing federal compliance with every nuance of state execution procedure. Baze, 553 U.S. at 51 (plurality opinion).

Moreover, the district court's reasoning would lead to the extraordinary result that a State could block implementation of a federal death sentence. If the FDPA requires compliance not only with the state's method of execution, but also with state "procedural details" down to the level of catheter-insertion procedures, App., infra, 9a, 12a, a State could exercise an effective veto over a federal execution by making it impossible to follow some discrete aspect of state procedural law. For example, the Governor of a State could simply direct that state officials or resources that are required under state law not be made available on the execution date. See, e.g., Ala. Code § 15-18-82(c) (LexisNexis 2018) (requiring that the warden "shall be the executioner").

Respondents deride that possibility as "fanciful," C.A. Stay Opp. 17, but it is not. The Governor of California, for example, recently imposed a moratorium on state executions and announced

the closing of the execution chamber at the San Quentin prison. See Phil Willon, Gov. Gavin Newsom To Block California Death Row Executions, Close San Quentin Execution Chamber, L.A. Times, Mar. 12, 2019, https://www.latimes.com/politics/la-pol-ca-governor-gavin-newsom-death-penalty-moratorium-20190312-story.html. Having taken that position, it seems "fanciful" that the Governor would nevertheless allow a federal execution to occur at San Quentin, as required by state law. Cal. Penal Code § 3603 (West 2011).

Nor is state hostility to the death penalty the only possible cause of the federal government's inability to comply with every aspect of state execution procedure. Some States have enacted statutes protecting the secrecy of their protocols and drug sources, see, e.g., Ark. Code Ann. § 5-4-617(i)(1) (Supp. 2017), and may be unable or unwilling either to reveal such information to the federal government or to carry out executions on its behalf. Nothing about the FDPA's text or history suggests that Congress intended to turn the Supremacy Clause on its head, subordinating federal law enforcement to States' approval. Indeed, Section 3596's second sentence -- permitting a sentencing court in a State without capital punishment to designate a different State's law -- is designed to avoid precisely that result.

On top of that, the district court's reasoning would frustrate responsible implementation of the FDPA by precluding federal officials from selecting more humane lethal-injection protocols

than those used by States. As noted above, BOP chose the single-drug pentobarbital protocol in part because of its demonstrated reliability compared to the former three-drug protocol. A.R. 871; see id. at 525 (noting expert views that a single-drug pentobarbital protocol "is more humane than the other double and triple agent injections still employed" by some States); see also Zagorski v. Parker, 139 S. Ct. 11, 11-12 (2018) (Sotomayor, J., dissenting from denial of certiorari and denial of a stay). The district court's position would have the perverse result of forcing the federal government to use state three-drug protocols that BOP concluded -- and that death-row inmates have contended for the past decade -- are more likely to cause pain. See, e.g., Glossip, 135 S. Ct. at 2740. For example, to execute an inmate sentenced by a federal court in Oklahoma, the federal government would (in the district court's view) have to set aside its single-drug pentobarbital protocol and instead use Oklahoma's three-drug protocol containing midazolam, which four members of this Court suggested could be the "chemical equivalent of being burned at the stake." Id. at 2781 (Sotomayor, J., dissenting). That cannot be what the FDPA requires.

c. The district court reached its counterintuitive conclusion based in substantial part on Congress's failure to enact certain legislation after the FDPA. See App., infra, 4a-5a, 10a. In particular, the court observed that unenacted legislation

introduced after the FDPA would have amended Section 3596 to require that federal death sentences "be implemented pursuant to regulations prescribed by the Attorney General." H.R. 2359, 104th Cong., 1st Sess., § 1 (1995); see H.R. 1087, 105th Cong., 1st Sess., § 1 (1997). From Congress's failure to enact such bills, the district court inferred that "the FDPA as drafted did not permit federal authorities to establish a uniform procedure" for federal executions. App., infra, 10a; see also C.A. Stay Opp. 4-5, 13 (drawing similar conclusions from Department of Justice statements in support of such bills).

The district court's analysis is triply deficient. It relies on the combination of post-enactment legislative history, which this Court has deemed "not a legitimate tool of statutory interpretation," Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011), and "failed legislative proposals," which constitute "'a particularly dangerous ground on which to rest an interpretation of a prior statute,'" Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U.S. 164, 187 (1994) (citation omitted), and it then misinterprets those failed post-enactment proposals. The bills the district court cites were designed to address a real conflict between the Justice Department's 1993 rule and the FDPA that is entirely distinct from the one the district court misperceived here. Specifically, the bills would have allowed the Attorney General to use lethal

injection to execute an inmate sentenced in a State that does not allow that method of execution -- i.e., where the only method of execution is electrocution. Cf. Baze, 553 U.S. at 43 n.1 (plurality opinion) (noting that Nebraska retained electrocution as its sole method of execution until 2009); see 57 Fed. Reg. 56,536 (stating that lethal injection was "increasingly," but not exclusively, "the method of execution in the states" in 1992).

Whatever might be inferred from Congress's failure to adopt such proposals, it does not in any way support the district court's conclusion that the FDPA bars a federal execution that adheres to the relevant State's method of execution (here, lethal injection) but does not comply with additional procedural minutiae. And in any event, the conflict that those bills were designed to address has largely resolved itself, now that every State that has a death penalty authorizes execution by lethal injection. See Baze, 553 U.S. at 43 n.1 (plurality opinion) (noting that the Nebraska Supreme Court invalidated the state's electrocution method); A.R. 856 ("All * * * states that currently permit the death penalty allow for lethal injection as the primary method of execution.").

d. Finally, the only specific "inconsisten[cy]" the court actually purported to identify "between the FDPA's required state procedures and the" federal protocol" was that some States "establish specific and varied safeguards on how the intravenous catheter is to be inserted," while the federal protocol leaves

that matter to be determined "based on the training, experience, or recommendation of execution personnel." App., infra, 12a. But those provisions are not in conflict, because (if the FDPA actually requires such fine-grained compliance with state procedure), the "execution personnel" carrying out the federal protocol could readily follow the state catheter-insertion procedures. Ibid.[4]

2. The balance of equities tips decidedly in favor of a stay or vacatur of the preliminary injunction. Although the district court asserted that "the potential harm to the government caused by a delayed execution is not substantial," App., infra, 15a (citing Harris v. Johnson, 323 F. Supp. 2d 797, 809 (S.D. Tex. 2004)), this Court has rejected that view, emphasizing that "[b]oth the [government] and the victims of crime have an important interest in the timely enforcement of a [death] sentence," Bucklew, 139 S. Ct. at 1133 (quoting Hill v. McDonough, 547 U.S. 573, 584 (2006)); see Calderon v. Thompson, 523 U.S. 538, 556 (1998) (explaining that "finality acquires an added moral dimension" once post-conviction proceedings are complete, and that "[o]nly with an assurance of real finality can the [government] execute its moral

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[4] Respondents point to additional purported discrepancies concerning the offer of a sedative and the presence of a physician, see C.A. Stay Opp. 18-19, but nothing in the federal protocol expressly precludes such procedures, cf. A.R. 1069 (indicating that the federal protocol allows for modification "at the discretion of the [BOP] Director"). In any event, respondents' focus on such minutiae only underscores how implausible it is that Congress would have required federal officials to comply with every last detail of a state execution protocol.

judgment in a case * * * [and] the victims of crime move forward knowing the moral judgment will be carried out"). Indeed, this Court has recognized that unduly delaying executions can frustrate the death penalty, and undermine its retributive and deterrent functions. See Bucklew, 139 S. Ct. at 1134; id. at 1144 (Breyer, J., dissenting).

The district court and respondents suggest that the public interest in execution of the sentence is undermined because of the length of time the government took to revise its protocol. See App., infra, 15a; C.A. Stay Opp. 19. But the government should not be faulted for undertaking its grave responsibility to select a mechanism for implementing the ultimate punishment in a conscientious manner, including by reviewing States' experiences, soliciting and considering the opinions of medical experts, and ultimately selecting the protocol most likely to result in a humane execution. See pp. 10-13, supra.

Nor, contrary to respondents' assertion, did the government schedule these executions "at an unreasonably fast pace." C.A. Stay Opp. 19. The four-month lead time provided by the Department is more than double the 60-day minimum between the "entry of the judgment of death" and the execution date "designated by the Director of the Federal Bureau of Prisons" under the relevant regulation, 28 C.F.R. 26.3(a), and roughly four times as long as Missouri provided the first inmate executed under its new single-

drug pentobarbital protocol -- an execution this Court declined to stay. See Franklin v. Lombardi, 571 U.S. 1066 (2013); see also Zink v. Lombardi, 783 F.3d 1089, 1096 (8th Cir.) (en banc) (per curiam), cert. denied, 139 S. Ct. 2941 (2015).[5]

Preparing for a federal execution, moreover, is a complicated endeavor that requires mobilizing hundreds of federal and other personnel, coordinating with victims' families who decide to view the execution of their loved one's murderer, providing security, and safely preparing the drug protocol. See Gov't C.A. Add. A17-A19 (declaration from BOP official explaining the required preparations). After years spent locating a reliable drug source and developing an effective federal protocol, see A.R. 871-872, 929-932 -- and long after respondents have exhausted the many available challenges to their convictions and sentence -- the government has a powerful and well-recognized interest in

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[5] The Court proceeded to deny stay-of-execution applications for 12 other Missouri inmates while challenges to Missouri's single-drug pentobarbital protocol were pending in the lower courts. See, e.g., Storey v. Lombardi, 135 S. Ct. 1198 (2015); Goodwin v. Lombardi, 135 S. Ct. 780 (2014); Taylor v. Lombardi, 135 S. Ct. 701 (2014); Ringo v. Lombardi, 573 U.S. 986 (2014); Worthington v. Lombardi, 573 U.S. 977 (2014); Middleton v. Roper, 573 U.S. 974 (2014); Winfield v. Lombardi, 573 U.S. 927 (2014); Rousan v. Lombardi, 572 U.S. 1083 (2014); Ferguson v. Lombardi, 572 U.S. 1031 (2014); Taylor v. Lombardi, 571 U.S. 1234 (2014); Smulls v. Lombardi, 571 U.S. 1187 (2014); Nicklasson v. Missouri, 571 U.S. 1107 (2013). The Court similarly denied a stay of execution to an Oklahoma inmate while a challenge to that State's three-drug protocol was pending in this Court. See Warner v. Gross, 135 S. Ct. 824 (2015).

proceeding with the administration of justice as planned. See, e.g., Bucklew, 139 S. Ct. at 1133-1134; Hill, 547 U.S. at 584.

On the other side of the balance, respondents are of course correct that staying the district court's injunction will almost certainly result in their execution before the court below and this Court resolve the government's appeal, and that "[n]othing is so irreparable as death." C.A. Stay Opp. 20. Critically, however, respondents' position is not that they cannot be executed, or that they cannot be executed by lethal injection, but only that they cannot be executed using this particular protocol because it is not necessarily consistent with certain procedural requirements imposed by the States. Such a purely procedural injury is a far more limited harm. Cf. Bucklew, 139 S. Ct. at 1118-1119. Indeed, respondents have not only failed to identify any material way in which the federal lethal-injection protocol will put them at a greater risk of pain (or inflict any other concrete injury) as compared to the state lethal-injection procedures that they assert must instead be followed, but inmates commonly contend that a one-drug will be more humane and less painful than the state three-drug protocols that would otherwise be required for two of them. See p. 12, supra. Setting aside the district court's injunction in these circumstances is amply warranted. Cf. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 32-33 (2008) (explaining that where "the ultimate legal claim is that the Navy must prepare an

[environmental impact statement], not * * * cease sonar training, there is no basis for enjoining such training" at the risk of national security).

In the end, respondents' position wholly lacks merit, and the purely procedural violation they seek to avoid is likely illusory and at most harmless. The Court has summarily set aside lower-court orders in capital cases that rest on such errors. See, e.g., Dunn v. McNabb, 138 S. Ct. 369, 369 (2017) (vacating an injunction because the district court "enjoined [an] execution without finding that [the inmate] has a significant possibility of success on the merits"); Brewer v. Landrigan, 562 U.S. 996, 997 (2010) (vacating a temporary restraining order because the district court's "speculat[ion] as to the risk of harm * * * cannot substitute for evidence that the use of the drug is 'sure or very likely to cause serious illness and needless suffering'") (citation omitted); Sizer v. Oken, 542 U.S. 916 (2004) (summarily vacating a stay entered based on asserted lack of access to state execution protocol); cf. IRAP, 137 S. Ct. at 2087 (staying a preliminary injunction with respect to certain foreign nationals, even though the injunction would become moot before the Court could review its merits); Trump v. Hawaii, 138 S. Ct. 542 (2017) (same). This Court should likewise set aside this flawed injunction against the implementation of lawful executions.

CONCLUSION

The district court's injunction should be stayed or vacated.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2019

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5322 **September Term, 2019**

1:19-mc-00145-TSC

Filed On: December 2, 2019

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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James H. Roane, Jr., et al.,

Appellees

v.

William P. Barr, Attorney General, et al.,

Appellants

BEFORE: Rogers, Griffith, and Rao, Circuit Judges

ORDER

Upon consideration of the motion to stay or vacate preliminary injunction, the opposition thereto, and the reply, it is

ORDERED that the motion be denied. Appellants have not satisfied the stringent requirements for a stay pending appeal. See Nken v. Holder, 556 U.S. 418, 434 (2009); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2018).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Amy Yacisin
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,	)	
LEAD CASE: *Roane et al. v. Barr*	)	Case No. 19-mc-145 (TSC)
THIS DOCUMENT RELATES TO:	)	
Bourgeois v. U.S. Dep't of Justice, et al., 12-cv-0782	)	
Lee v. Barr, 19-cv-2559	)	
Purkey v. Barr, et al., 19-cv-03214	)	

MEMORANDUM OPINION

On July 25th of this year, the U.S. Department of Justice ("DOJ") announced plans to execute five people. *See* Press Release, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse. The DOJ intends to execute Daniel Lewis Lee on December 9, 2019; Lezmond Mitchell on December 11, 2019; Wesley Ira Purkey on December 13, 2019; Alfred Bourgeois on January 13, 2020; and Dustin Lee Honken on January 15, 2020. *Id.* To implement these executions, the Federal Bureau of Prisons ("BOP") adopted a new execution protocol: the "2019 Protocol." *Id;* (ECF No. 39-1 ("Administrative R.") at 1021–1075).

Four of the five individuals with execution dates[1] (collectively, "Plaintiffs"), have filed complaints against the DOJ and BOP (collectively, "Defendants"), alleging that the 2019

[1] Mitchell has not filed a complaint in this court.

Protocol is unlawful and unconstitutional on numerous grounds.[2] *See Purkey v. Barr,* 19-cv-03214 (D.D.C.), Doc. # 1 (Oct. 25, 2019); *Lee v. Barr,* 1:19-cv-02559 (D.D.C.), Doc. #1 (Aug. 23, 2019); *Bourgeois v. U.S. Dep't of Justice, et al.*, 1:12-cv-00782 (D.D.C.), Doc. # 1 (May 5, 2012); ECF. No. 38 ("Honken Compl."). The court consolidated the cases and ordered Plaintiffs to complete the necessary 30(b)(6) depositions on or before February 29, 2020 and to amend their complaints on or before March 31, 2020. (*See* ECF No. 1 ("Consolidation Order"); Min. Entry, Aug. 15, 2019.) Because Plaintiffs are scheduled to be executed before their claims can be fully litigated, they have asked this court, pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, to preliminarily enjoin the DOJ and BOP from executing them while they litigate their claims. (ECF No. 34 ("Purkey Mot. for Prelim. Inj."); ECF No. 29 ("Honken Mot. for Prelim. Inj."); ECF No. 13 ("Lee Mot. for Prelim. Inj."); ECF No. 2 ("Bourgeois Mot. for Prelim. Inj.")) Having reviewed the parties' filings, the record, and the relevant case law, and for the reasons set forth below, the court hereby GRANTS Plaintiffs' Motions for Preliminary Injunction.

I. BACKGROUND

Beginning in 1937, Congress required federal executions to be conducted in the manner prescribed by the state of conviction. *See* 50 Stat. § 304 (former 18 U.S.C. 542 (1937)), recodified as 62 Stat. § 837 (former 18 U.S.C. 3566). After the Supreme Court instituted a *de*

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[2] Bourgeois' complaint was filed in 2012 and relates to a separate execution protocol. *See Bourgeois v. U.S. Dep't of Justice, et al.*, 1:12-cv-00782 (D.D.C.), Doc. # 1 (May 5, 2012). In addition, his Motion for Preliminary Injunction (ECF. No. 2 ("Bourgeois Mot. for Prelim. Inj.")) does not articulate his bases for a preliminary injunction, but instead argues that a preliminary injunction is warranted because the plaintiffs in the *Roane* litigation were granted a preliminary injunction. Despite the shortcomings of Bourgeois' briefing, this court has determined that he meets the requirements of a preliminary injunction, as do the three other plaintiffs in the consolidated case, whose motions are fully briefed.

facto moratorium on the death penalty in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972), and then lifted it in *Gregg v. Georgia,* 428 U.S. 153, 187 (1976), Congress reinstated the death penalty for certain federal crimes but did not specify a procedure for implementation. *See* Anti-Drug Abuse Act of 1988, Pub. L. 100–690, § 7001, 102 Stat. 4181 (enacted Nov. 18, 1988). Four years later, under the direction of then-Attorney General William Barr, the DOJ published a proposed rule to establish a procedure for implementing executions. Implementation of Death Sentences in Federal Cases, 57 Fed. Reg. 56536 (proposed Nov. 30, 1992). The proposed rule noted that the repeal of the 1937 statute "left a need for procedures for obtaining and executing death orders." *Id.* The final rule, issued in 1993, provided a uniform method and place of execution. *See* 58 Fed. Reg. 4898 (1993), *codified at* 28 C.F.R. pt. 26 (setting method of execution as "intravenous injection of a lethal substance.")

But a year later, Congress reinstated the traditional approach of following state practices through passage of the Federal Death Penalty Act ("FDPA"). *See* Pub. L. No. 103–322, 108 Stat. 1796 (1994), *codified at* 18 U.S.C. §§ 3591–3599. The FDPA establishes that the U.S. Marshal "shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." *Id.* § 3596(a). The FDPA provides no exceptions to this rule and does not contemplate the establishment of a separate federal execution procedure. Plaintiffs' cases are governed by the FDPA because when the death penalty portions of the ADAA were repealed in 2006, the FDPA was "effectively render[ed] . . . applicable to all federal death-eligible offenses." *United States v. Barrett*, 496 F.3d 1079, 1106 (10th Cir. 2007).

Given the conflict between the FDPA's state-by-state approach and the uniform federal approach adopted by DOJ's 1993 rule (28 C.F.R. pt. 26), the DOJ and BOP supported proposed legislation to amend the FDPA to allow them to carry out executions under their own procedures.

One bill, for example, would have amended § 3596(a) to provide that the death sentence "shall be implemented pursuant to regulations prescribed by the Attorney General." H.R. 2359, 104th Cong. § 1 (1995). In his written testimony supporting the bill, Assistant Attorney General Andrew Fois wrote that "H.R. 2359 would allow Federal executions to be carried out . . . pursuant to uniform Federal regulations" and that "amending 18 U.S.C. § 3596 [would] allow for the implementation of Federal death sentences pursuant to Federal regulations promulgated by the Attorney General." *Written Testimony on H.R. 2359 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 1 (1995) (Statement of Andrew Fois, Assistant Att'y Gen. of the United States). None of the proposed amendments were enacted, and the FDPA continues to require the federal government to carry out executions in the manner prescribed by the states of conviction.

In 2005, three individuals facing death sentences sued, alleging that their executions were to be administered under an unlawful and unconstitutional execution protocol. *Roane v. Gonzales*, 1:05-cv-02337 (D.D.C.), Doc. #1 ¶ 2. The court preliminarily enjoined their executions. *Roane*, Doc. #5. Three other individuals on death row intervened, and the court enjoined their executions. *See Roane*, Doc. #23, 27, 36, 38, 67, 68. A seventh individual on death row subsequently intervened and had his execution enjoined as well. *See id.* Doc. #333. During this litigation, the government produced a 50-page document ("2004 Main Protocol") outlining BOP execution procedures. *Roane*, Doc. #179–3. The 2004 Main Protocol cites 28 C.F.R. pt. 26 for authority and does not mention the FDPA. *See id.* at 1. The government then produced two three-page addenda to the 2004 Main Protocol. *See Roane*, Doc. #177-1 (Addendum to Protocol, Aug. 1, 2008) (the "2008 Addendum"); *Roane*, Doc. #177-3 (Addendum to Protocol, July 1, 2007) ("2007 Addendum"). In 2011 the DOJ announced that the

BOP did not have the drugs needed to implement the 2008 Addendum. *See* Letter from Office of Attorney General to National Association of Attorneys General, (Mar. 4, 2011), https://files.deathpenaltyinfo.org/legacy/documents/2011.03.04.Holder.Letter.pdf. The government told the court that the BOP "has decided to modify its lethal injection protocol but the protocol revisions have not yet been finalized." *Roane*, Doc. #288 at 2. In response, the court stayed the *Roane* litigation.

No further action was taken in the cases for seven years, until July of this year, when DOJ announced a new addendum to the execution protocol ("2019 Addendum") (Administrative R. at 870–871), that replaces the three-drug protocol of the 2008 Addendum with a single drug: pentobarbital sodium. *See id* at ¶ C. In addition to the 2019 Addendum, the BOP adopted a new protocol to replace the 2004 Main Protocol (the 2019 Main Protocol). (Administrative R. at 1021–1075.)

The court held a status conference in the *Roane* action on August 15, 2019. (*See* Min. Entry, Aug. 15, 2019). In addition to the *Roane* plaintiffs, the court heard from counsel for three other death-row inmates, including Bourgeois, all of whom cited the need for additional discovery on the new protocol. (*See* ECF No. 12 ("Status Hr'g Tr.")). The government indicated that it was unwilling to stay the executions, and the court bifurcated discovery and ordered Plaintiffs to complete 30(b)(6) depositions by February 28, 2020 and to file amended complaints by March 31, 2020. (*See* Min. Entry, Aug. 15, 2019.)

Lee filed a complaint challenging the 2019 Addendum on August 23, 2019 (*see Lee v. Barr*, 1:19-cv-02559 (D.D.C.), Doc. 1), and a motion for a preliminary injunction on September 27, 2019, (Lee Mot. for Prelim. Inj.). On August 29, 2019 Bourgeois moved to preliminarily enjoin his execution. (Bourgeois Mot. for Prelim. Inj.) Honken filed an unopposed motion to

intervene in *Lee v. Barr*, which was granted. (ECF No. 26. ("Honken Mot. to Intervene").) He then filed a motion for a preliminary injunction on November 5, 2019. (Honken Mot. for Prelim. Inj.) Purkey filed a complaint and a motion for preliminary injunction under a separate case number, 1:19-cv-03214, which was consolidated with *Roane*. Thus, the court now has before it four fully briefed motions to preliminarily enjoin the DOJ and BOP from executing Lee, Purkey, Bourgeois, and Honken.

II. ANALYSIS

A preliminary injunction is an "extraordinary remedy" that is "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). Courts consider four factors on a motion for a preliminary injunction: (1) the likelihood of plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff absent an injunction, (3) the balance of equities, and (4) the public interest. *Id.* at 20 (citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau,* 849 F.3d 1129, 1131 (D.C. Cir. 2017). The D.C. Circuit has traditionally evaluated claims for injunctive relief on a sliding scale, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C. Cir. 2011). It has been suggested, however, that a movant's showing regarding success on the merits "is an independent, free-standing requirement for a preliminary injunction." *Id.* at 393 (quoting *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)). Here, Plaintiffs' claims independently satisfy the merits requirement.

A. <u>Likelihood of Success on the Merits</u>

Plaintiffs allege, *inter alia*, that the 2019 Protocol exceeds statutory authority and therefore under the Administrative Procedure Act ("APA"), it must be set aside. Under the APA,

a reviewing court "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Plaintiffs argue that the 2019 Protocol exceeds statutory authority by establishing a single procedure for all federal executions rather than using the FDPA's state-prescribed procedure. (Purkey Mot. for Prelim. Inj. at 16; Honken Mot. for Prelim. Inj. at 34–35; Lee Mot. for Prelim. Inj. at 5–6, 17). Given that the FDPA expressly requires the federal government to implement executions in the manner prescribed by the state of conviction, this court finds Plaintiffs have shown a likelihood of success on the merits as to this claim.

Defendants argue that the 2019 Protocol "is not contrary to the FDPA" because the authority given to DOJ and BOP through § 3596(a) of the FDPA "necessarily includes the authority to specify . . . procedures for carrying out the death sentence." (ECF No. 16 ("Defs. Mot. in Opp. To Lee Mot. for Prelim. Inj.") at 34.) Section 3596(a) states:

> When the [death] 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 the latter State in the manner prescribed by such law.

18 U.S.C. § 3596(a) (emphasis added). Because a United States Marshal is to "supervise" the process, it does appear that at least some authority is granted to the Marshal. But it goes too far to say that such authority necessarily includes the authority to decide procedures without reference to state policy. The statute expressly provides that "the implementation of the sentence" shall be done "in the manner" prescribed by state law. *Id.* Thus, as between states and federal agencies, the FDPA gives decision-making authority regarding "implementation" to the

former. Accordingly, the 2019 Protocol's uniform procedure approach very likely exceeds the authority provided by the FDPA.

Defendants contest the meaning of the words "implementation" and "manner." As they interpret § 3596(a), Congress only gave the states the authority to decide the "method" of execution, e.g., whether to use lethal injection or an alternative, not the authority to decide additional procedural details such as the substance to be injected or the safeguards taken during the injection. The court finds this reading implausible. First, the statute does not refer to the "method" of execution, a word with particular meaning in the death penalty context. *See id.* Instead, it requires that the "implementation" of a death sentence be done in the "manner" prescribed by the state of conviction. *Id.* "Manner" means "a mode of procedure or way of acting." *Manner*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 756 (11th ed. 2014.) The statute's use of the word "manner" thus includes not just execution method but also execution *procedure*. To adopt Defendants' interpretation of "manner" would ignore its plain meaning. As one district court concluded, "the implementation of the death sentence [under the FDPA] involves a process which includes more than just the method of execution utilized." *United States v. Hammer*, 121 F. Supp. 2d 794, 798 (M.D. Pa. 2000). [3]

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[3] Defendants cite three cases to suggest that "manner" means "method": *Higgs v. United States*, 711 F. Supp. 2d 479, 556 (D. Md. 2010); *United States v. Bourgeois*, 423 F.3d 501 (5th Cir. 2005); and *United States v. Fell*, No. 5:0-cr-12-01, 2018 WL 7270622 (D. Vt. Aug. 7 2018). *Higgs* interpreted the FDPA to require the federal government to follow a state's chosen method of execution but not to follow any other state procedure. 711 F. Supp. 2d at 556. This interpretation, however, was stated in dicta and is not supported by persuasive reasoning. *Id.* *Bourgeois* did not reach the question of what the words "implementation" and "manner" mean in 18 U.S.C. § 3596(a). 423 F.3d 501 (5th Cir. 2005). Instead, it evaluated only whether the sentence violated Texas law. *Id.* at 509. The opinion appeared to assume that § 3596(a) only requires the federal government to follow the state-prescribed method of execution, but it provided no basis for that assumption. *Id.* at 509. In *Fell*, the district court held that the creation of a federal death chamber does not violate the FDPA. *Fell*, slip op., at 4. This holding affirms the notion that the federal government has some authority in execution procedure (such as the

Moreover, legislative efforts to amend the FDPA further support this court's interpretation of the terms "manner" and "implementation." As noted above, in 1995, the year after the FDPA became law, the DOJ supported bills amending the statute to allow the DOJ and BOP to create a uniform method of execution, indicating that the FDPA as drafted did not permit federal authorities to establish a uniform procedure. The amendments were never enacted.

Defendants argue that reading the FDPA as requiring adherence to more than the state's prescribed method of execution leads to absurd results. (*See, e.g.*, Defs. Mot. in Opp. to Purkey Mot. for Prelim. Inj. at 28.) They contend that if the state's choice of drug is to be followed, the federal government would have to "stock all possible lethal agents used by the States." *Id.* But the FDPA contemplates and provides for this very situation: it permits the United States Marshal to allow the assistance of a state or local official and to use state and local facilities. 18 U.S.C. § 3596(a). Moreover, the practice of following state procedure and using state facilities has a long history in the United States. Before the modern death penalty, the relevant statute provided that 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. The United States marshal charged with the execution of the sentence may use available State or local facilities and the services of an appropriate State or local official . . .

50 Stat. § 304 (former 18 U.S.C. 542 (1937)), recodified as 62 Stat. § 837 (former 18 U.S.C. 3566) (1948). The federal government carried out executions in accordance with this statute for decades, including those of Julius and Ethel Rosenberg in New York's Sing Sing prison, and Victor Feguer in the Iowa State Penitentiary. *See Feguer v. United States,* 302 F.2d 214, 216

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place of execution), but it does not conflict with the proposition that the FDPA requires the federal government to follow state procedure as to more than simply the method of execution.

(8th Cir. 1962) (noting sentence of death by hanging imposed pursuant to § 3566 and Iowa law); *Rosenberg v. Carroll*, 99 F. Supp. 630, 632 (S.D.N.Y. 1951) (applying § 3566 to uphold state law confinement prior to execution). Thus, far from creating absurd results, requiring the federal government to follow more than just the state's method of execution is consistent with other sections of the statute and with historical practices. For all these reasons, this court finds that the FDPA does not authorize the creation of a single implementation procedure for federal executions.

Defendants argue that the 2019 Protocol derives authority from 28 C.F.R. § 26.3(a), which provides that executions are to be carried out at the time and place designated by the Director of the BOP, at a federal penal or correctional institution, and by injection of a lethal substance or substances under the direction of the U.S. Marshal. (Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj. at 31.) However, this argument is undercut by the fact that, as with the 2019 Protocol itself, 28 C.F.R. Pt. 26 also conflicts with the FDPA. As noted above, 28 C.F.R. Pt. 26 was promulgated in 1993 (before the FDPA was enacted) to implement the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e) (the "ADAA"), which does not specify how federal executions are to be carried out. 28 C.F.R. § 26.3(a) filled that gap by providing an implementation procedure. But when Congress passed its own requirements for the implementation procedure in the FDPA, those requirements conflicted with 28 C.F.R. § 26.3(a).

Defendants concede that "where a regulation contradicts a statute, the latter prevails." (Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj. at 31.) They argue instead that the regulation does not conflict with the FDPA as applied to Plaintiffs because lethal injection (the method required by 28 C.F.R. § 26.3(a)(4)) is either permitted or required in the Plaintiffs' states of

conviction (Texas, Arkansas, Missouri, and Indiana[4]). (ECF No. 37 ("Defs. Mot. in Opp. to Purkey Mot. for Prelim. Inj.") at 26–27; ECF No. 36 ("Defs. Mot. in Opp. to Honken Mot. for Prelim. Inj.") at 19–20; Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj at 31–32.)[5] Two of those states—Texas and Missouri—use a single dose of pentobarbital for executions. (Administrative R. at 99, 104.)

But this overlap does not, in and of itself, reconcile 28 C.F.R. pt. 26 with the FDPA. 28 C.F.R. Pt. 26 remains inconsistent with the FDPA because it establishes a single federal procedure, while the FDPA requires state-prescribed procedures. In addition, 28 C.F.R. § 26.3(a)(2) requires use of a federal facility, while the FDPA permits the use of state facilities. *Compare* 28 C.F.R. § 26.3(a)(2) *with* 18 U.S.C. § 3597. There are also inconsistencies between the FDPA's required state procedures and the 2019 Protocol. For example, states of conviction establish specific and varied safeguards on how the intravenous catheter is to be inserted.[6] The 2019 Protocol, however, provides only that the method for insertion of the IV is to be selected based on the training, experience, or recommendation of execution personnel. (Administrative R. at 872.) Thus, the fact that the states of conviction and 28 C.F.R. § 26.3(a) all prescribe lethal injection as the method of execution is not enough to establish that the regulation is valid as applied to Plaintiffs.

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[4] Honken was convicted in Iowa, which does not have a death penalty. The FDPA requires a court to designate a death penalty state for any individual convicted in a state without the death penalty, and the court designated Indiana. (Honken Mot. for Prelim. Inj. at 37.)

[5] Defendants do not assert this argument as to Bourgeois (likely because he did not raise 28 C.F.R. Part 26 in his motions), but does include Texas' execution protocol—which requires lethal injection—in the Administrative Record. (Administrative R. at 83-91.)

[6] *See, e.g.*, Administrative R. at 90-91 (Texas); Administrative R. at 70-71 (Missouri); Honken Mot. for Prelim. Inj. Ex. 6 at 16–17 (Indiana).

Defendants further argue that even if 28 C.F.R. § 26.3(a) did not conflict with the FDPA by requiring lethal injection, the DOJ would still adopt lethal injection as its method of execution for these Plaintiffs. (*See e.g.*, Defs. Mot. in Opp. to Lee Mot. for Prelim. Inj at 32–33.) On this basis, they ask the court to sever section 26.3(a)(4)—which establishes lethal injection as the federal method—and affirm the rest of 28 C.F.R. § 26.3(a). *Id.* Defendants cite *Am. Petroleum Inst. V. EPA*, 862 F.3d 50 (D.C. Cir. 2017), for the proposition that the court "will sever and affirm a portion of an administrative regulation" if it can say "*without any substantial doubt* that the agency would have adopted the severed portion on its own." *Id.* at 71 (emphasis added). The court declines to take this approach for several reasons. First, it is premised on the strained reading of the FDPA that this court has already rejected. Moreover, the court cannot say "without any substantial doubt" that DOJ "would have adopted the severed portion on its own." *Id.* Even were the court to engage in such speculation, it seems plausible that if 28 C.F.R. § 26.3(a) instructed the BOP to follow state procedure, rather than to implement lethal injection, that BOP would in fact adopt whatever specific procedures were required by each state. Finally, even if the court severed the language in 28 C.F.R. § 26.3(a) that conflicts with the FDPA, another problem would arise: that is the very language that purportedly authorizes the creation of a single federal procedure. If the court severs it, then 28 C.F.R. § 26.3(a) would no longer contain the support for a single federal procedure that Defendants claim it does.

More importantly, Defendants' arguments regarding the regulation's applicability to these Plaintiffs take us far afield from the task at hand. The arguments do not control the court's inquiry of whether the 2019 Protocol exceeds statutory authority. Based on the reasoning set forth above, this court finds that insofar as the 2019 Protocol creates a single implementation procedure it is not authorized by the FDPA. This court further finds that because 28 C.F.R. §

26.3 directly conflicts with the FDPA, it does not provide the necessary authority for the 2019 Protocol's uniform procedure. There is no statute that gives the BOP or DOJ the authority to establish a single implementation procedure for all federal executions. To the contrary, Congress, through the FDPA, expressly reserved those decisions for the states of conviction. Thus, Plaintiffs have established a likelihood of success on the merits of their claim that the 2019 Protocol exceeds statutory authority. Given this finding, the court need not reach Plaintiffs' other claims.

B. Irreparable Harm

To constitute irreparable harm, "the harm must be certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm," and it "must be beyond remediation." *League of Women Voters of U.S. v. Newby,* 838 F. 3d 1, 7–8 (D.C. Cir. 2016) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)) (internal quotation marks and brackets omitted). Here, absent a preliminary injunction, Plaintiffs would be unable to pursue their claims, including the claim that the 2019 Protocol lacks statutory authority, and would therefore be executed under a procedure that may well be unlawful. This harm is manifestly irreparable.

Other courts in this Circuit have found irreparable harm in similar circumstances. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (finding irreparable injury where plaintiffs faced detention under challenged regulations); *Stellar IT Sols., Inc. v. U.S.C.I.S.*, Civ. A. No. 18-2015 (RC), 2018 WL 6047413, at *11 (D.D.C. Nov. 19, 2018) (finding irreparable injury where plaintiff would be forced to leave the country under challenged regulations); *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 126–27 (D.D.C. 2015) (finding irreparable injury where challenged regulations would threaten company's existence); *N. Mariana Islands v. United*

States, 686 F. Supp. 2d 7, 19 (D.D.C. 2009) (finding irreparable injury when challenged regulations would limit guest workers).

Plaintiffs have clearly shown that, absent injunctive relief, they will suffer the irreparable harm of being executed under a potentially unlawful procedure before their claims can be fully adjudicated. Given this showing, the court need not reach the various other irreparable harms that Plaintiffs allege.

C. Balance of Equities

Defendants assert that if the court preliminarily enjoins the 2019 Protocol they will suffer the harm of a delayed execution date. (*See, e.g.*, Def. Mot. in Opp. to Purkey Mot. for Prelim. Inj. at 43.) While the government does have a legitimate interest in the finality of criminal proceedings, the eight years that it waited to establish a new protocol undermines its arguments regarding the urgency and weight of that interest. Other courts have found "little potential for injury" as a result of a delayed execution date. *See, e.g.*, *Harris v. Johnson*, 323 F. Supp. 2d 797, 809 (S.D. Tex. 2004). This court agrees that the potential harm to the government caused by a delayed execution is not substantial.

D. Public Interest

The public interest is not served by executing individuals before they have had the opportunity to avail themselves of legitimate procedures to challenge the legality of their executions. On the other hand, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands,* 686 F. Supp. 2d at 21. Accordingly, this court finds that the public interest is served by preliminarily enjoining the execution of the four Plaintiffs because it will allow them to determine whether administrative agencies acted within their delegated authority, and to ensure that they do so in the future.

III. CONCLUSION

This court finds that at least one of Plaintiffs' claims has a likelihood of success on the merits and that absent a preliminary injunction, they will suffer irreparable harm. It further finds that the likely harm that Plaintiffs would suffer if this court does not grant injunctive relief far outweighs any potential harm to the Defendants. Finally, because the public is not served by short-circuiting legitimate judicial process, and is greatly served by attempting to ensure that the most serious punishment is imposed lawfully, this court finds that it is in the public interest to issue a preliminary injunction. Accordingly, each of Plaintiffs' motions for preliminary injunctions is hereby GRANTED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, LEAD CASE: *Roane et al. v. Barr* THIS DOCUMENT RELATES TO: *Bourgeois v. U.S. Dep't of Justice, et al.*, 12-cv-0782 *Lee v. Barr*, 19-cv-2559 *Purkey v. Barr, et al.*, 19-cv-03214	Case No. 19-mc-145 (TSC)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the court hereby GRANTS the Motions for Preliminary Injunction filed by the following individuals: Alfred Bourgeois (ECF No. 2), Dustin Lee Honken (ECF No. 29), Daniel Lewis Lee (ECF No. 13), and Wesley Ira Purkey (ECF No. 34).

It is hereby ORDERED that Defendants (along with their respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them) are enjoined from executing Plaintiffs until further order of this court.

Date: November 20, 2019

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge