No. 19-1348

In the Supreme Court of the United States

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

JAMES H. ROANE, JR., ET AL., PETITIONERS

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

(CAPITAL CASE)

1. Whether Congress's direction in the Federal Death Penalty Act of 1994 (FDPA) that federal executions be implemented "in the manner prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a), requires federal compliance with subsidiary procedural details of state execution protocols, including those that do not bind the State.

2. Whether the court of appeals permissibly relied on the text of an execution-procedures protocol issued by the Federal Bureau of Prisons (BOP) in determining whether that protocol complies with the FDPA.

3. Whether BOP's execution protocol, which "explains internal government procedures and does not create any legally enforceable rights or obligations," Pet. App. 144a, is a procedural rule exempt from notice-and-comment rulemaking.

ADDITIONAL RELATED PROCEEDING

Supreme Court of the United States:

Roane v. *Barr (In re Federal Bureau of Prisons' Execution Protocol Cases)*, No. 19A1050 (pending stay application filed June 10, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is reported at 955 F.3d 106. The opinion of the district court (Pet. App. 101a-119a) is not reported in the Federal Supplement but is available at 2019 WL 6691814. An earlier opinion of this Court (Pet. App. 124a-126a) is reported at 140 S. Ct. 353.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. A petition for rehearing was denied on May 15, 2020 (Pet. App. 127a-129a). The petition for a writ of certiorari was filed on June 5, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are four federal death-row inmates, each of whom was "convicted in federal court more than 15 years ago for exceptionally heinous murders" in violation of federal criminal law. 140 S. Ct. 353, 353 (statement of Alito, J.). Petitioner Lee drowned a family, including an eight-year old girl, in a bayou during a robbery to support a white-supremacist racketeering organization. Pet. App. 43a (Katsas, J., concurring). Petitioner Purkey kidnapped, raped, murdered, dismembered, and burned a 16-year-old girl after transporting her across state lines. *Id.* at 44a. Petitioner Honken murdered two prospective federal witnesses, along with one of their girlfriends and her two young daughters. *Ibid.* Petitioner Bourgeois abused, tortured, and murdered his two-year-old daughter on a United States military base. *Id.* at 45a. Petitioners exhausted direct appeals and collateral challenges to their convictions and sentences. See *id.* at 43a-46a. The federal government set their executions for dates in December 2019 and January 2020, but the district court entered a preliminary injunction. *Id.* at 101a-119a. The court of appeals reversed. *Id.* at 1a-100a. Petitioners Lee, Purkey, and Honken are now scheduled to be executed on July 13, 15, and 17, respectively. App., *infra*, 1a-4a.[1]

A. Statutory And Regulatory Background

1. Since the Founding, the federal government has employed capital punishment to deter and punish the most serious federal crimes. The Crimes Act of 1790, passed by the First Congress and signed by President

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[1] As explained further below, petitioners have filed an application for a stay pending disposition of their petition for a writ of certiorari and for an administrative stay. No. 19A1050 (filed June 10, 2020).

Washington, "made a number of" federal offenses "punishable by death." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1122 (2019); see Act of Apr. 30, 1790, ch. 9, §§ 1, 3, 8-10, 1 Stat. 112-114. Congress has since expanded the range of federal crimes punishable by death to some 60 offenses. See U.S. Dep't of Justice, *Criminal Resource Manual* § 69, https://go.usa.gov/xwTXS (Jan. 17, 2020). The United States has used that authority to prosecute and execute the most notorious federal criminals throughout the Nation's history, from pirates and slave traders in the nineteenth century, to spies and murderers in the twentieth century, to Timothy McVeigh in the twenty-first century. See, *e.g.*, U.S. Marshals Service (USMS), *History—Historical Federal Executions*, https://go.usa.gov/xwTnf (USMS History).

2. Just as federal statutes have long permitted capital punishment, they have long prescribed the means for imposing it.

a. 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. It is undisputed that the "'manner'" provision of that statute—which "governed federal executions for over 140 years"—prescribed only the *general method* of execution ("'hanging'"), not subsidiary details like the length of the rope or the placement of the knot. Pet. App. 3a (per curiam) (citation omitted); see *id.* at 16a-18a (Katsas, J., concurring).

b. In 1936, Attorney General Homer Cummings submitted a letter to Congress explaining that many States had "adopted more humane methods" of execution, "such as electrocution." H.R. Rep. No. 164, 75th Cong., 1st Sess. 2 (1937) (1937 Report). He proposed that the federal government "change its law in this respect."

Ibid. Congress responded in 1937 by amending 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. The statute further 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," the sentencing court "shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof." *Ibid.* Congress also authorized the federal government to pay to "use available State or local facilities and the services of an appropriate State or local official." *Ibid.*

c. Congress repealed the 1937 Act as part of broader sentencing reforms in 1984, but "left intact the underlying capital offenses." Pet. App. 3a (per curiam). The Department of Justice responded by issuing a rule providing that "[l]ethal injection will be the method of execution" for federal capital crimes. 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992); see 58 Fed. Reg. 4898 (Jan. 19, 1993); 28 C.F.R. 26.3(a)(4). The Department explained 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," and lethal injection "increasingly is the method of execution in the states." 57 Fed. Reg. at 56,536.

A year after the Department finalized its 1993 rule, Congress enacted the Federal Death Penalty Act of 1994 (FDPA), Pub. L. No. 103-322, Tit. VI, 108 Stat. 1959. As relevant here, the FDPA readopted the 1937 Act's framework for executing federal death sentences.

Specifically, the FDPA provides that "a United States marshal * * * shall supervise implementation of [a federal death] sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). Like the 1937 Act, the FDPA directs 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.* Also like the 1937 Act, 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." 18 U.S.C. 3597(a).

The federal government has executed three inmates since the enactment of the FDPA: Timothy McVeigh and Juan Garza in 2001, and Louis Jones in 2003. See USMS History. Each execution was conducted by lethal injection—the method prescribed by both the 1993 federal regulation and the State in which the respective inmate was convicted and sentenced by a federal court. *Ibid.*; see Okla. Stat. Ann. tit. 22, § 1014(A) (West 1986); Tex. Code Crim. Proc. Ann. art. 43.14 (West 1979); 28 C.F.R. 26.3(a)(4). Each execution occurred in the federal execution chamber at the U.S. Penitentiary in Terre Haute, Indiana, using three drugs: sodium thiopental, pancuronium bromide, and potassium chloride. Pet. App. 133a-134a & n.1; see *Baze* v. *Rees*, 553 U.S. 35, 53 (2008) (plurality opinion). None of the inmates challenged those procedures. Pet. App. 6a (per curiam).

3. The three-drug combination used by the federal government in the 2001 and 2003 executions became unavailable after "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. The Federal Bureau of Prisons (BOP) then undertook an "extensive study" to identify an alternative. Pet. App. 6a (per curiam). After considering multiple options, BOP adopted an addendum to the federal execution protocol—a lengthy document detailing many aspects of execution procedure, *id.* at 140a-202a—to provide for use of a single drug, pentobarbital, *id.* at 132a-139a. BOP noted that pentobarbital is used in many state lethal-injection protocols that have collectively accounted for more than 100 executions in recent years, that numerous courts (including this Court in *Bucklew*) have upheld use of pentobarbital against Eighth Amendment and related challenges, and that use of pentobarbital has not caused reported complications in state executions. *Id.* at 135a-136a.

In addition to specifying pentobarbital as the lethal agent, the protocol addendum provides details about the personnel conducting the execution, the arrangement of and dosages in the syringes, procedures for strapping the prisoner to the execution table, and instructions for accessing the prisoner's veins. Pet. App. 210a-213a. The addendum states that it may be "modified at the discretion of the" BOP Director "(1) [to] comply with specific judicial orders; (2) based on the recommendation of on-site medical personnel utilizing their clinical judgment; or (3) as may be required by other circumstances." *Id.* at 210a; see *id.* at 144a (similar language applicable to the rest of the protocol).

B. Prior Proceedings

1. After issuing the protocol addendum in July 2019, BOP scheduled petitioners' executions for dates in December 2019 and January 2020. Pet. App. 101a-102a. Petitioners sought to enjoin their executions on multiple grounds, claiming that the amended protocol violates the FDPA's "manner" of execution provision, 18 U.S.C. 3596(a); the notice-and-comment requirement of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*; provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.*, and the Controlled Substances Act, 21 U.S.C. 801 *et seq.*; and the First, Fifth, Sixth, and Eighth Amendments. Pet. App. 8a (per curiam).

On November 20, 2019, the district court granted a preliminary injunction prohibiting the government from executing petitioners. Pet. App. 101a-119a. The court held that petitioners had demonstrated a likelihood of success on a single ground: that the protocol conflicts with the FDPA's requirement that federal executions be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a); see Pet. App. 108a. The court acknowledged that each of the relevant States in petitioners' cases "permit[s] or require[s]"execution by lethal injection, as does the federal protocol. Pet. App. 113a.[2] But

[2] Petitioners Lee, Purkey, and Bourgeois were convicted by federal courts in Arkansas, Missouri, and Texas, respectively. Pet. App. 113a. Each of those States provides for execution by lethal injection. *Ibid.* Petitioner Honken was convicted by a federal court in Iowa, a State that does not have a death penalty. *Id.* at 113a n.4. The sentencing court designated Indiana—which provides for execution by lethal injection—to serve as the "death penalty state" for Honken's execution. *Ibid.*; see 18 U.S.C. 3596(a).

the court interpreted the FDPA to require the federal government not simply to use lethal injection as prescribed by the relevant States, but also to follow all "procedural details" employed by the relevant States in their executions, down to "how the intravenous catheter is to be inserted." *Id.* at 110a, 114a.

2. The government moved for an emergency stay or vacatur of the injunction in the court of appeals, which denied the motion, Pet. App. 122a-123a, and then in this Court, 140 S. Ct. at 353. The Court denied the government's application on December 6, 2019, but expressed its expectation that the court of appeals would render its decision with "appropriate dispatch." *Ibid.*

Justice Alito, joined by Justices Gorsuch and Kavanaugh, issued a statement indicating that the government "has shown that it is very likely to prevail when" the FDPA "question is ultimately decided." 140 S. Ct. at 353. Justice Alito explained that "there is strong evidence that" the district court's "reading is not supported either by the ordinary meaning of" the terms "manner" or "method," or "by the use of the term 'manner' in prior federal death penalty statutes." *Ibid.* He added that the district court's "interpretation would lead to results that Congress is unlikely to have intended." *Ibid.* In particular, he noted that the district court's reading "would require the BOP to follow procedures that have been attacked as less safe than the ones the BOP has devised (after extensive study); it would demand that the BOP pointlessly copy minor details of a State's protocol; and it could well make it impossible to carry out executions of prisoners sentenced in some States." *Ibid.* Justice Alito also stated that he saw "no reason why the Court of Appeals should not be able to

decide this case, one way or the other, within the next 60 days." *Ibid.*

3. On April 7, 2020, the court of appeals vacated the preliminary injunction and directed entry of judgment for the government on petitioners' FDPA and APA notice-and-comment claims. Pet. App. 1a-12a (per curiam). Judges Katsas and Rao issued concurring opinions explaining their reasoning for reaching that result. *Id.* at 13a-48a, 49a-85a. Judge Tatel dissented with respect to petitioners' FDPA claim but did not address the notice-and-comment claim. *Id.* at 86a-100a.[3]

a. Judges Katsas and Rao agreed that "the district court misconstrued the FDPA" by interpreting it to require "the federal government to follow all the subsidiary details set forth in state execution protocols." Pet. App. 2a (per curiam). In Judge Katsas's view, the FDPA's directive that the federal government implement a federal death sentence "in the *manner* prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a) (emphasis added), means that the federal government must "follow the *method of execution* provided by the law of the" relevant State, but "does not require federal executions to follow the 'additional procedural details' invoked by the district court," Pet. App. 15a (emphasis added). Because every State relevant to petitioners' cases provides for lethal injection as a method of execution, Judge Katsas concluded that the federal protocol complies with the FDPA. *Id.* at 14a, 38a.

Judge Rao agreed that the protocol "is consistent with the FDPA" on a different rationale. Pet. App. 49a.

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[3] The court of appeals did not address petitioners' other claims. Pet. App. 12a (per curiam).

In her view, the FDPA requires the government to comply with "execution procedures enacted or promulgated by states *as part of their binding law*," but not "aspects of a state execution procedure that were not formally enacted or promulgated." *Id.* at 57a-58a, 63a (emphasis added). Petitioners' claims fail under her reading, she explained, because "[f]ew of the procedural details" they claim the FDPA incorporates "carry the force of law," and, in any event, the federal protocol "allows departures as needed to comply with state law." *Id.* at 78a, 81a; see *id.* at 210a.

Judge Tatel agreed with petitioners that the FDPA "requires federal executions to be carried out using the same procedures that states use to execute their own prisoners—procedures set forth not just in statutes and regulations, but also in protocols issued by state prison officials pursuant to state law." Pet. App. 87a. In his view, the state procedures that the federal government must follow in executing a federal inmate include "choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements"—as well as, potentially, "color-coding syringes," although he acknowledged the latter could implicate "line-drawing challenges." *Id.* at 99a.

b. The court of appeals also rejected petitioners' claim that the government was required to conduct notice-and-comment rulemaking before adopting the protocol. Pet. App. 11a-12a (per curiam). Judges Katsas and Rao agreed that the protocol is a "rule[] of agency organization, procedure, or practice exempt from the APA's requirements for notice-and-comment." *Id.* at 12a. Judge Katsas separately concluded that the proto-

col was also exempt from those requirements as a general policy statement. *Id.* at 40a-42a. Judge Tatel did not address the notice-and-comment claim.

c. Judge Katsas concluded that the preliminary injunction should be vacated for the additional reason that "the district court's equitable balancing constituted an abuse of discretion." Pet. App. 42a. He emphasized that "there is no dispute that [petitioners] may be executed by lethal injection, nor any colorable dispute that pentobarbital will cause anything but a swift and painless death." *Id.* at 47a. Petitioners' claims, he concluded, are "designed neither to prevent unnecessary suffering nor to ensure that needles are properly inserted into veins," but rather "to delay lawful executions indefinitely"—an objective federal courts "should not assist." *Id.* at 48a.

4. The court of appeals denied petitioners' request for rehearing en banc on May 15, 2020. Pet. App. 127a-128a. Although no judge called for a vote, Judge Tatel noted that he would have supported en banc review but for this Court's expectation that the appeal would be resolved with dispatch. *Id.* at 129a.

Petitioners asked the court of appeals to stay the mandate for fourteen days pending the filing and disposition of a petition for a writ of certiorari. C.A. Mot. to Stay Mandate 1. Rather than granting that request, the court ordered on May 22, 2020, "that the Clerk is directed to issue the mandate on June 8, 2020." Pet. App. 121a. Petitioners did not seek a stay from this Court during that 17-day period, but instead filed this petition on June 5, 2020. The court of appeals rejected their contention that they were entitled to a continuing stay, explaining that its earlier order "was clear" in granting only an extension of the mandate-issuance period.

19A1050 Appl. App. 1a. The court nevertheless granted an additional four-day extension. *Ibid.*

5. Petitioners filed a stay application in this Court on June 10, 2020 (No. 19A1050). The mandate issued on June 12, see 19A1050 Resp. App. 1a, in accordance with the court of appeals' prior order, 19A1050 Appl. App. 1a. On June 15, BOP scheduled executions for petitioners Lee, Purkey, and Honken on July 13, 15, and 17, respectively. App., *infra*, 1a-4a; see 28 C.F.R. 26.3(a)(1) (directing BOP to "promptly" designate "a new [execution] date" when a "stay is lifted"). Petitioners then moved for expedited consideration of this petition at the Court's conference on June 25. The government consented to that request, and the Court granted it.[4]

ARGUMENT

Petitioners were convicted and sentenced by federal courts for federal capital crimes more than 15 years ago. Their executions were initially scheduled to occur months ago, but they obtained a preliminary injunction on their FDPA claim, and this Court declined to vacate that injunction, thereby allowing the court of appeals to conduct a thorough review. But three Justices indicated the government's reading of the FDPA was "very likely to prevail," 140 S. Ct. at 353 (statement of Alito, J.), and the court of appeals concluded that petitioners'

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[4] Petitioners nevertheless suggest (19A1050 Reply 1) that the government has engaged in "brinksmanship" by seeking to "moot the petition" by executing petitioners. Given the mid-July execution dates, however, the petition will not be moot if the Court considers it at the June 25 Conference. And petitioners will not be executed unless the Court declines to grant their stay application, which the government promptly opposed four weeks in advance of the first scheduled execution. The government is accordingly not "asking this Court to short-circuit review." 19A1050 Reply 15.

claim fails *even on a reading of the FDPA more favorable to them*. That decision does not conflict with any decision of this Court or another court of appeals. And as the extensive briefing on the question in this Court indicates, the court of appeals was correct in rejecting petitioners' claim. No sound basis exists to grant review.

Nor do petitioners' other questions presented warrant certiorari. Both seek review of factbound applications of settled administrative-law principles. On both questions, the court of appeals correctly applied settled law. And this capital case would be an exceptionally poor vehicle for review of general administrative-law issues that arise in many contexts lacking the exigencies of scheduled execution dates. The petition for a writ of certiorari should be denied.

I. PETITIONERS' FDPA CLAIM LACKS MERIT AND DOES NOT WARRANT THIS COURT'S REVIEW

Petitioners' principal claim (Pet. 12) is that the federal government must execute federal prisoners convicted in federal court of federal crimes in compliance with all "execution procedures a State has deemed necessary to the implementation of a death sentence," including procedures so minor that *they do not even bind the State*. That assertion is irreconcilable with the FDPA's text, structure, history, and purpose—as well as practice and common sense. Indeed, no federal execution in the history of the United States has been conducted in accordance with petitioners' position. The court of appeals' rejection of petitioners' claim is plainly correct and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

A. The Court Of Appeals Correctly Rejected Petitioners' FDPA Claim

The key provision of the FDPA requires "implementation of" a federal death "sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). The court of appeals correctly rejected petitioners' reading of that provision to "require[] the federal government to follow all the subsidiary details set forth in state execution protocols—such as, in the case of lethal injection, the method of inserting an intravenous catheter." Pet. App. 2a (per curiam). Although the court reached that result by two separate lines of reasoning, the existence of multiple grounds for rejecting petitioners' FDPA claim only further underscores that it "is without merit." *Id.* at 11a.

1. a. The FDPA's reference to "implementation of" a federal death "sentence in the manner prescribed by the law of the State in which the sentence is imposed," 18 U.S.C. 3596(a), traces its roots to the Crimes Act of 1790, which 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. Petitioners do not dispute that the "manner" provision of that statute—which governed federal executions for nearly 150 years—prescribed only the *general method* of execution ("hanging"), not subsidiary details like the length of the rope or placement of the knot. *Ibid.* That understanding "followed the law of England," where Blackstone equated the "manner" of execution with the general method—*e.g.*, "hanging," "burning[,] or beheading"—rather than "subsidiary details" of the process. Pet. App. 17a (Katsas, J., concurring).

Congress retained the statutory term "manner" in 1937 when it replaced the longstanding directive that

the "manner of inflicting the punishment of death shall be by hanging," 18 U.S.C. 542 (1934), with a provision 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," 50 Stat. 304. There is no indication that Congress broadened the scope of the term "manner" as it had been understood since 1790—*i.e.*, as referring only to the general method of execution—by *retaining* the term in the 1937 Act. To the contrary, "if a word is obviously transplanted from another legal source," it typically "brings the old soil with it." *Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) (citation omitted); cf. Pet. 21 (endorsing that presumption).

The context of the 1937 Act strongly reinforces that presumption. The law was "prompted by the fact that" many States had adopted "'more humane *methods* of execution, such as electrocution, or gas,'" and that it was "'desirable for the Federal Government likewise to change its law *in this respect*.'" *Andres* v. *United States*, 333 U.S. 740, 745 n.6 (1948) (emphases added; citation omitted). This Court has accordingly explained that the 1937 Act adopted "the local mode of execution," understood as the general method of execution—*e.g.*, "death by hanging." *Id.* at 745 & n.6.

b. Historical practice further underscores that reading. When the federal government announced the first executions under the 1937 Act, it made clear that the inmates would "be executed by whatever *method* is prescribed by the law of the State," while the Department of Justice would provide "all U.S. Marshals instructions for carrying out executions" that would govern "[u]nless [a] court specifies otherwise." Associated Press, *U.S. Arranging To Execute Five*, June 17, 1938 (emphasis added); see *ibid.* (citing federal instructions regarding

execution time and number of witnesses).[5] BOP confirmed that understanding in a 1942 manual, explaining that the 1937 Act's "manner" provision "refers to the *method* of imposing death, whether by hanging, electrocution, or otherwise, and *not to other procedures* incident to the execution prescribed by the State law." 19A1050 Resp. App. 3a (emphases added). The manual included regulations providing that a U.S. Marshal would be in "charge of the conduct of executions," which would occur "at the place fixed in the judgment" of the court or "designated by the Department of Justice." *Id.* at 3a-4a. The manual also specified details about the execution date, time, and witnesses. *Ibid.* Thus, while the federal government often chose to carry out executions under the 1937 Act in state facilities in cooperation with state personnel—steps Congress expressly permitted, 50 Stat. 304—the federal government never considered itself *legally obligated* to follow subsidiary details of state execution protocols.[6]

Petitioners' historical examples do not refute that understanding. Petitioners observe that, in "the first execution conducted under the 1937 Act, the federal government hired 'an experienced' hangman, who 'used his own scaffold,' 'trap door,' and procedures," while a "local sheriff pulled the lever." 19A1050 Reply 5 (citation omitted). But the federally-hired hangman's use of "'*his own*' * * * *procedures*," *ibid.* (emphasis added;

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[5] https://access.newspaperarchive.com/us/texas/san-antonio/san-antonio-express/1938/06-18/page-3/.

[6] Petitioners observe (19A1050 Reply 6) that the 1942 BOP manual postdates the 1937 Act. That is unremarkable, as BOP would have had no occasion to apply the statute before it was enacted. Petitioners do not dispute that the BOP manual governed federal executions for most of the 1937 Act's existence.

citation omitted), provides no support for petitioners' view that the 1937 Act required federal compliance with *state execution procedures*, Pet. 18-23. Petitioners' invocation (19A1050 Reply 5) of the Rosenbergs' execution is also unavailing. Although the Rosenbergs were executed "with their rabbi present—as prescribed by state statute," *ibid.*, the 1942 BOP manual likewise provided for the presence of a "spiritual adviser[]" if "requested by the prisoner," 19A1050 Resp. App. 4a. The state statute, however, limited execution attendees to an enumerated list, N.Y. Code Crim. Proc. § 507 (36th ed. 1953), which did not include the U.S. Marshal who was present at the execution under BOP regulations, 19A1050 Resp. App. 3a-4a; see William Conklin, *Pair Silent to End*, N.Y. Times, June 20, 1953.[7] Thus, to the extent the Rosenbergs' execution "followed state procedures," 19A1050 Reply 4, it did so only because those procedures overlapped with federal choices. Other executions under the 1937 Act followed the same pattern. See, *e.g.*, 19A1050 Resp. 26-27.

c. Petitioners acknowledge (Pet. 21) that the FDPA "carries forward th[e] language and purpose" of the 1937 Act. No basis exists to conclude that the statutory meaning of "manner" changed between Congress's use of that term in 1937 and its repetition of the same term in the "virtually identical" provisions of the FDPA. Pet. App. 22a (Katsas, J., concurring); see *id.* at 91a (Tatel, J., dissenting) (acknowledging that the FDPA "replicates nearly word-for-word the" 1937 Act).[8]

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[7] https://search.proquest.com/hnpnewyorktimes/docview/112786383/D93AAAE153CC4E0DPQ/1?accountid=14740.

[8] Although they did not make the argument in their petition or stay application, petitioners briefly assert in their stay application reply (at 5-6) that the FDPA requires compliance with more state

Federal practice under the FDPA further confirms that the statutory term "manner" refers to "a top-line choice among methods such as electrocution, lethal gas, or lethal injection." Pet. App. 23a (Katsas, J., concurring). In the first execution under the FDPA, the federal government executed Timothy McVeigh for bombing the Oklahoma City federal building. The execution was carried out under the 1993 regulation by lethal injection, which is Oklahoma's prescribed method of execution. See p. 5, *supra*. It undisputedly did not rely on subsidiary details of Oklahoma execution procedure.

Petitioners observe (19A1050 Reply 6 n.4) that McVeigh had "dropped his appeals by the time of his execution." But that hardly means he was indifferent to the way his execution was carried out, let alone that BOP's first application of the FDPA "is not instructive." *Ibid.* This Court has long placed "weight" on agency "practice" in interpreting statutes, particularly when the practice "involves a contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933). Moreover, the 2003 federal execution of Louis Jones likewise did not follow subsidiary details of state execution procedure, see p. 5, *supra*, and Jones too did not object, even though he litigated all the way to this Court

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execution procedures than the 1937 Act because it uses the phrase "implementation of the sentence of death," 18 U.S.C. 3596(a), rather than "inflicting the punishment of death," 50 Stat. 304. But as explained further below, see p. 21, *infra*, neither the word "implementation," nor the adoption of that word rather than "inflicting," changes the meaning of the critical statutory term, "manner."

on other FDPA issues, *Jones* v. *United States*, 527 U.S. 373 (1999).[9]

Other provisions of the FDPA reinforce that "the manner prescribed by the law of the State," 18 U.S.C. 3596(a), does not include subsidiary details of state execution protocols. The FDPA's next section, 18 U.S.C. 3597(a), provides that a U.S. marshal "may use" (at the federal government's expense) "appropriate State or local facilities" and "the services of an appropriate State or local official" in a federal execution. But if Section 3596(a) required the federal government to follow subsidiary details of state execution protocols—which often require conducting executions in state facilities with state personnel—Section 3597(a)'s conferral of *discretion* for the federal government to use state facilities and personnel would be superfluous, if not conflicting. Pet. App. 26a-27a (Katsas, J., concurring). Petitioners suggest that Section 3597(a) creates an exception giving the federal government the option to use *federal* facilities and personnel notwithstanding contrary state instructions. But Section 3597(a) is not framed as an exception, and petitioners' reading "would be a remarkably clumsy way of permitting the federal government to use *federal* facilities" in federal executions. *Id.* at 27a.

d. Finally, requiring federal compliance with subsidiary details of state execution protocols would "lead to

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[9] BOP's practice at those executions undermines petitioners' suggestion—based on legislative history and unenacted bills, Pet. 7—that the government understood the FDPA in the same way petitioners do. That history instead shows the government understood that it could not conduct executions under the FDPA by lethal injection if a relevant State prescribed a different *method* of execution (*e.g.*, electrocution), as some States did at the time but no longer do. See Pet. App. 32a-33a (Katsas, J., concurring); Gov't C.A. Br. 31-32.

results that Congress is unlikely to have intended." 140 S. Ct. at 353 (statement of Alito, J.). Petitioners dismiss that consideration—articulated by three Justices—as "wrong" and "immaterial," suggesting it is "'properly addressed to Congress, not this Court.'" 19A1050 Reply 6 (citation omitted). But petitioners themselves contend the Court should "'give the [FDPA] the effect' Congress intended." Pet. 13 (citation omitted). And this Court has made clear that practical considerations can be relevant in the death-penalty context. See, *e.g.*, *Baze* v. *Rees*, 553 U.S. 35, 47 (2008) (plurality opinion) ("[Given] that capital punishment is constitutional[,] * * * [i]t necessarily follows that there must be a means of carrying it out.").

It is therefore highly material that petitioners' reading of the FDPA "would require the BOP to follow procedures that have been attacked as less safe than the ones the BOP has devised (after extensive study)," would "demand that the BOP pointlessly copy minor details of a State's protocol," and—perhaps most significantly—"could well make it impossible to carry out executions of prisoners sentenced in some States." 140 S. Ct. at 353 (statement of Alito, J.). Such state obstruction could occur intentionally—*e.g.*, in States like California or Pennsylvania that have imposed moratoria on carrying out their laws providing for implementation of the death penalty. Pet. App. 29a (Katsas, J., concurring). Or it could occur inadvertently—*e.g.*, if a State fails to update an outdated protocol or keeps some execution procedures secret. See *ibid.* Either way, nothing in the text, history, structure, or purpose of the FDPA suggests that Congress allowed a State to block the federal government from executing a federal inmate convicted by a federal court of federal crimes. *Ibid.*

2. Petitioners offer no tenable account of the FDPA's text. They focus on the words "supervise," "implementation," and "prescribed." Pet. 18-20 (citations omitted). But none of those words sheds light on the critical term, "manner." 18 U.S.C. 3596(a). If Congress were to replace the phrase "supervise implementation of the sentence *in the manner* prescribed by the law of the State," *ibid.* (emphasis added), with either "supervise implementation of the sentence *using the general method of execution* prescribed by the law of the State," or "supervise implementation of the sentence *using all execution procedures* prescribed by the law of the State," the meaning of the statute would change markedly depending on Congress's choice. But that would not be because of the words "supervise," "implementation," and "prescribed"; it would be because Congress changed the dispositive phrase, "in the manner." *Ibid.*; see Pet. App. 34a-35a (Katsas, J., concurring) (citing, *e.g.*, *Weyerhaeuser Co.* v. *United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018)).

As explained above, petitioners' reading of the pivotal language in the FDPA is "not supported either by the ordinary meaning of" the terms "manner" or "method," or "by the use of the term 'manner' in prior federal death penalty statutes." 140 S. Ct. at 353 (statement of Alito, J.). Petitioners' position ultimately reduces to the assertion (Pet. 2, 6, 12, 20) that Congress in 1937 created a "federalist" scheme, in which the federal government "defer[s]" to the States to execute federal prisoners not only in compliance with the State's general method of execution, but also with subsidiary details of the State's own execution protocols. But petitioners provide no support for that counterintuitive un-

derstanding. As noted above, the Attorney General under President Franklin Roosevelt proposed amending the manner-of-execution provision because States had adopted "'more humane *methods* of execution, such as electrocution, or gas,'" and it was "'desirable for the Federal Government likewise to change its law *in this respect*.'" *Andres*, 333 U.S. at 745 n.6 (emphases added; citation omitted). Nothing suggests that Congress and President Roosevelt in adopting that proposal ordered a novel and dramatic transfer of responsibility for federal executions from the federal government to the States in *other respects—i.e.*, beyond choice of the general method of execution—while *retaining* the statutory term that had existed since 1790.

Petitioners' reliance on federalism principles, moreover, is fundamentally misplaced. States have no sovereignty over—and no cognizable interest in—federal punishment of federal crimes. Petitioners' reading of the FDPA could nevertheless empower governors or even mid-level state prison officials to "make it impossible" for the federal government to execute, for example, a federal criminal who murdered a federal immigration agent, perpetrated a race-inspired massacre, or sold nuclear secrets to a foreign power. 140 S. Ct. at 353 (statement of Alito, J.). Given the profound federal interest in punishing such quintessentially federal crimes, it would have been a shocking and radical step for Congress and the President in 1937 or 1994 to confine the federal role in federal executions to ministerial functions like transferring the prisoner and "approv[ing] the amount the USMS may pay" to state executioners, while leaving the "rest * * * to the States," Pet. 21. Indeed, petitioners' theory of federalism is par-

ticularly bizarre, because it would require federal officials to adhere to state procedures that lack the force and effect of binding law and thus could be disregarded or altered by their state counterparts. At a minimum, such a significant surrender of federal authority would have to be far clearer than the language of the 1937 Act or the FDPA, which retained statutory language that had corresponded to the general method of execution since the genesis of federal criminal law. Cf. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992).

3. Petitioners also emphasize (Pet. 12-18) Judge Rao's conclusion that the FDPA requires the federal government to comply with more than a State's chosen execution method if the State prescribes additional procedural details in its binding "law." 18 U.S.C. 3596(a). But that interpretation does not help petitioners, because Judge Rao agreed with Judge Katsas that the federal protocol "is consistent with the FDPA." Pet. App. 49a, 81a (Rao, J., concurring). Judge Rao's opinion thus underscores that petitioners' FDPA claim fails even under a statutory reading more favorable to them.

Petitioners contest the position, adopted by both Judges Katsas and Rao, that the "law of the State" referenced by the FDPA, 18 U.S.C. 3596(a), is limited to "binding law"—*i.e.*, state "statutes and regulations carrying the force of law," Pet. App. 55a (Rao, J., concurring); accord *id.* at 37a n.10 (Katsas, J., concurring). But that understanding comes directly from this Court's cases equating federal statutory references to "law" with *binding* law under "the deep-rooted conception of law as fixed and binding." *Id.* at 55a-56a (Rao, J., concurring) (citing cases). Contrary to petitioners' suggestion (Pet. 14-17), such cases are not confined to the APA context, see, *e.g.*, *United States* v. *Howard*, 352

U.S. 212, 216-217 (1957); *Baltimore & Ohio R.R. Co.* v. *Baugh*, 149 U.S. 368, 398 (1893), and petitioners' own definitions and cases likewise limit "law" to state prescriptions having the "force of law," Pet. 19-20 (citation omitted).

Although petitioners claim (Pet. 35) that federal statutes refer more than a thousand times to "law" in analogous ways, they "fail[] to identify a single case" in which such a statute has been construed to include *nonbinding* prescriptions. Pet. App. 80a n.15 (Rao, J., concurring). That is unsurprising, as such a construction would "deprive[] the phrase 'prescribed *by* . . . *law*' of all meaning," *id.* at 77a n.15 (emphasis added), and impute to Congress the implausible view that the federal government is bound to follow state prescriptions that States do not even make binding on themselves. Petitioners suggest (Pet. 18) that nonbinding state prescriptions nevertheless constitute "law" if state officials are "directed by state law" to issue them. But this Court has rejected the parallel contention that "the word 'law' includes at least those regulations that were 'promulgated pursuant to an express congressional directive.'" *Department of Homeland Sec.* v. *MacLean*, 574 U.S. 383, 394 (2015) (citation omitted); see *ibid.* (noting the absence of "a single example of the word 'law' being used in that way"). In sum, under either Judge Katsas's or Judge Rao's reading, petitioners' "FDPA claim is without merit." Pet. App. 11a (per curiam).

B. Petitioners' FDPA Claim Does Not Warrant Review

In addition to failing to show any error in the court of appeals' decision, petitioners likewise fail to show that it warrants this Court's review.

1. Petitioners do not suggest that the court of appeals' decision conflicts with any decision of this Court

or another court of appeals. Nor do they contend that review in this case is necessary to preserve this Court's ability to address the question presented at some point. To the contrary, they acknowledge (Pet. 34) that the question could arise in "future executions carried out under th[e] protocol." They also acknowledge (19A1050 Appl. 14) that such "challenges may be filed outside the D.C. Circuit"—for example, by another federal death-row inmate in Indiana suing "a BOP warden" there. Petitioners observe (19A1050 Reply 10) that review in a future case would not help them, but this Court does not grant certiorari in every capital case involving a question on which it could someday grant review. See, *e.g.*, 19A615 Appl. 35 & n.5 (collecting cases). The conceded absence of a present conflict, along with the conceded possibility of a future one, counsels against review.

2. Petitioners also suggest (Pet. 35-36) that the Court should grant review in light of the different reasoning adopted in the concurring opinions by Judges Katsas and Rao. This Court, however, "does not review lower courts' opinions, but their *judgments*." *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015). And as noted, Judges Katsas and Rao agree on the judgment: "On either of their views, [petitioners'] FDPA claim is without merit." Pet. App. 11a (per curiam).

Petitioners' reliance (Pet. 35-36) on asserted indeterminacy in Judge Rao's view as a basis for review is also flawed. As "a practical matter," Judge Rao's reading of the FDPA will rarely require the government to comply with more than a State's general method of execution, because the "[s]tate execution statutes" and binding regulations the government must follow under her position "tend to be rather brief, specifying lethal injection without adding further details," while subsidiary

details are "generally found in informal state policies and protocols" that the government need not follow under her approach. Pet. App. 78a-79a (Rao, J., concurring). Judge Rao, moreover, specifically confirmed that the federal protocol is consistent with the laws of the four States at issue in this case. *Id.* at 78a-82a. If questions arise in a future case about whether the federal government can "execute a federal prisoner under the law of *another* State" in keeping with Judge Rao's position, 19A1050 Appl. 14 (emphasis added), that case would be the appropriate vehicle for considering such a question. Similarly, to the extent Judge Rao's position might present difficulty for the *government*, see Pet. 36, the government is the proper party to consider seeking review.

3. Finally, the correctness of the government's position on the merits counsels strongly against review. Petitioners were convicted more than 15 years ago, and their executions have already been rescheduled once. The court of appeals has rejected their FDPA claim, and the question has been thoroughly briefed in this Court. No reason exists to grant review when the ultimate outcome of the case is clear, particularly given the public's "important interest in the timely enforcement of a [death] sentence." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1133 (2019) (citation omitted).

II. PETITIONERS' OTHER QUESTIONS PRESENTED LACK MERIT AND DO NOT WARRANT REVIEW

Petitioners' other two questions presented involve factbound applications of settled administrative-law principles. On both questions, the court of appeals applied settled law correctly, and petitioners fail to establish any conflict among the circuits or any other basis for this Court's review. At a minimum, this capital

case is not the proper vehicle for review of general administrative-law questions that could arise in many other less-exigent contexts.

A. The Court of Appeals Properly Relied On The Text Of The Protocol And Its Decision Does Not Warrant Review

1. Petitioners contend (Pet. 23-28, 36-37) that the court of appeals misread the federal protocol as open to modification to comply with other legal obligations, and that the court's reading cannot support a decision in the government's favor under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943). Both contentions are mistaken.

a. Petitioners' argument (Pet. 26) that BOP did not "design[] the [p]rotocol to yield when it conflicts with state procedures" BOP is required by law to follow is at odds with the text of the protocol itself. The protocol states that its procedures "should be observed * * * unless deviation or adjustment is required," and may be "modified at the discretion of the Director or his/her designee" in order to "comply with specific judicial orders" or "as may be required by other circumstances." Pet. App. 144a, 210a. The court was thus plainly correct that the protocol "allows departures as needed to comply with state law" and is therefore "consistent with the FDPA." *Id.* at 81a (Rao, J., concurring); accord *id.* at 42a n.12 (Katsas, J., concurring).

Petitioners assert (Pet. 26) that "[t]here is no indication in the [p]rotocol or the Administrative Record that" government officials have "ordered that the [p]rotocol be modified to accommodate conflicting state law." This is unsurprising; the government does not read the FDPA to incorporate state law beyond the general method of execution, so it had no occasion to order modification of the protocol before the decision below. But

the government's interpretation of the *statute* is separate from its interpretation of the *protocol*. The protocol's unequivocal language shows that BOP did contemplate the possibility that aspects of the protocol could become impracticable or deemed unlawful, and expressly designed the protocol to yield to the degree necessary—not fall entirely—if such a circumstance precluded adherence to every procedure therein. Pet. App. 144a, 201a. Petitioners' suggestion (Pet. 26-27) that BOP did not contemplate *specifically* that a court might differ in its view of the government's legal obligations is belied by the protocol's explicit authorization of departures necessary to comply with "specific judicial orders"—a portion of the protocol petitioners do not discuss. Pet. App. 210a; see *id.* at 81a (Rao, J., concurring). No precedent suggests that an agency's contemplation of departures to comply with judicial orders is invalid absent clairvoyance regarding the precise basis for such orders. Petitioners invoke (Pet. 26-27) this Court's decision in *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380 (1974), but that case held only that an agency could not rely on "generalities" in its order to show it had made a specific, statutorily required determination, *id.* at 397.

b. For similar reasons, the court of appeals' reliance on the protocol's plain text does not "defy" *Chenery* and its progeny. Pet. 26. Those cases instruct that courts may not rely on post hoc rationalizations of agency action. See *Chenery*, 318 U.S. at 92-94. Far from precluding courts from looking to the language of the agency's own rule or decision, *Chenery* principles *require* such scrutiny of the agency's own words. See *id.* at 95. That is precisely what the court of appeals did by relying "on the words [BOP] used in promulgating its protocol."

Pet. App. 82a (Rao, J., concurring); see *ibid.* (relying on "the text of the protocol"); accord *id.* at 42a n.12 (Katsas, J., concurring).

Indeed, petitioners turn *Chenery* on its head by invoking (Pet. 27-28) the government's position in litigation to purportedly limit the protocol's scope. *Chenery* teaches that statements by litigators *cannot* change the meaning of an agency's action. 318 U.S. at 92-93. And in any event, petitioners misstate the government's litigating position. The government never argued that the protocol "displace[s] any conflicting state requirements," Pet. 27 (emphasis omitted), or precludes deviation to comply with judicial interpretations of the FDPA. Quite the contrary, the government read the protocol to be open to adaption if needed, but urged that no adaption was necessary. See Gov't C.A. Br. 32-34.

2. In addition to being correct, the court of appeals' interpretation of the protocol's provisions regarding modification provides no basis for further review. The court's decision on this point depends entirely on the particular language of the BOP protocol, and this Court does not typically grant certiorari to address the proper reading of a non-binding agency policy. Nor does the court's straightforward application of settled administrative-law principles to the agency document at issue here threaten the creation of a "massive loophole" or other far-reaching effects petitioners imagine. Pet. 36. Petitioners do not cite any decision by another court suggesting that *Chenery* somehow precludes judicial reliance "on the words [an agency] used in promulgating" a challenged policy, Pet. App. 82a (Rao, J., concurring), and no other ground for review exists.

B. The Court of Appeals Properly Concluded That The Protocol Is Not Subject To The Notice-And-Comment Requirement And Its Decision Does Not Warrant Review

Petitioners fare no better in challenging (Pet. 28-34) the court of appeals' unremarkable application of its long-existing jurisprudence regarding the procedural-rule exception to the APA's notice-and-comment requirements. 5 U.S.C. 553(b)(2)(A). The court's holding that the nonbinding execution-procedures protocol is a procedural rule, Pet. App. 11a-12a (per curiam), is correct, prompted no dissent, and does not warrant review.

1. Petitioners do not dispute that "[t]he critical feature of a procedural rule is that it covers agency actions that do not themselves alter the rights or interests of parties." *National Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (Kavanaugh, J.) (citation and internal quotation marks omitted). That readily describes the federal execution protocol, which outlines in great detail the procedures for conducting an execution, Pet. App. 140a-213a, but alters nothing about petitioners' sentences, the FDPA requirements regarding the "manner" of execution, or the federal regulation requiring use of lethal injection, 18 U.S.C. 3596(a); 28 C.F.R. 26.3(a)(4); Pet. App. 40a-41a (Katsas, J., concurring).

Indeed, the protocol states specifically that it "explains internal government procedures and does not create any legally enforceable rights or obligations." Pet. App. 144a. The protocol thus bears "all the hallmarks of 'internal house-keeping measures organizing [BOP's] activities' with respect to preparing for and conducting executions," and falls squarely within the definition of a procedural rule. *Id.* at 84a (Rao, J., concurring) (quoting *American Hosp. Ass'n* v. *Bowen*,

834 F.2d 1037, 1045 (D.C. Cir. 1987)); see *id.* at 40a-41a (Katsas, J., concurring).

Petitioners rely (Pet. 31) heavily on the fact that the protocol "operates" in the "field" of the death penalty, an undoubtedly serious matter. But an agency rule does not become substantive for purposes of the APA's notice-and-comment requirement simply because it pertains to a significant topic or has "a 'substantial impact' upon the persons subject to it." *Electronic Privacy Info. Ctr.* v. *U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011) (*EPIC*). Rather, the critical question is whether the rule "impose[s] new substantive burdens," as opposed to merely procedural ones. *Ibid.* (citation omitted); see *ibid.* (stating that a rule may be substantive when "the *substantive effect* is sufficiently grave") (emphasis added; citation omitted).

Here, the protocol's provisions are obviously procedural. They include "checklists" for the Warden and BOP staff to follow before, during, and after an execution, Pet. App. 149a-178a; directions to create "contingency plans," *id.* at 179a-183a; procedures for handling stays, *id.* at 199a-202a; and—with the addition of the addendum in 2019—the name and dosages of the lethal agent to be used, *id.* at 212a-213a; see *id.* at 5a (per curiam) (describing the protocol as a "50-page document address[ing], among other things, witnesses for the execution, the prisoner's final meal and final statement, strapping the prisoner to the gurney, opening and closing the drapes to the execution chamber, injecting the lethal substances, and disposing of the prisoner's body and property"). Some of those procedures might have some "impact" on petitioners, even a "substantial" one. *EPIC*, 653 F.3d at 5. But they do not "themselves alter the rights or interests of parties," *McCarthy*, 758 F.3d

at 250 (citation omitted); accord *EPIC*, 653 F.3d at 5, and therefore do not constitute a substantive rule, see, *e.g.*, *James V. Hurson Assocs., Inc.* v. *Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) (explaining that "an otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it" has a "'substantial impact on the rights of individuals'") (citation omitted).

Petitioners' approach, by contrast, would seemingly require notice-and-comment rulemaking for any procedural directive that "operates" in the "field" of the death penalty. Pet. 31; see Pet. 3, 29. Under that sweeping theory, even the smallest change to execution procedures could be subject to time-consuming notice-and-comment rulemaking requirements. Thus, any amendment to the detailed federal execution protocol—a "50-page document" that has never been subject to notice-and-comment procedures, Pet. App. 5a (per curiam)—would freeze all executions for months or more. While petitioners' proposed doctrine would no doubt prove a fruitful source of litigation-related delay, it has no footing in existing APA jurisprudence, as evidenced by the lack of a panel dissent on the question.

2. No basis exists to review the panel's application of APA principles. Petitioners contend primarily (Pet. 37-38) that the panel decision conflicts with other D.C. Circuit precedent. But the panel relied extensively on the court's own precedent; no judge on the panel identified a conflict; the court denied rehearing without any judge's calling for a vote, Pet. App. 127a-129a; and any intra-circuit conflict would in any event not warrant this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). To the extent the line between procedural and substantive rules may be less

than bright, that has been true for decades, see, *e.g.*, *Community Nutrition Inst.* v. *Young*, 818 F.2d 943, 946 (D.C. Cir. 1987), and this Court has not intervened. The issue, moreover, arises routinely in a wide variety of cases, see Pet. 30-31 (noting cases involving railroad tariffs, food-stamp approval processes, and motor carrier payments to shippers), any of which could present an opportunity for this Court's review. Even if the Court were to someday conclude that the issue warrants clarification, it should grant review in a case that does not involve the exigencies of a capital sentence with scheduled execution dates. See *Bucklew*, 139 S. Ct. at 1133.

In addition, the court of appeals' procedural-rule holding is not even dispositive of the APA issue. As Judge Katsas explained, the protocol also falls within the APA's independent exception to notice-and-comment procedures for "general statements of policy." 5 U.S.C. 553(b)(3)(A); see Pet. 41a-42a. In determining whether an agency action qualifies for that exception, the "most important" factor is "whether the action has binding effect." *Clarian Health West, LLC* v. *Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017). The protocol undisputedly lacks such binding effect, as it states expressly that it "explains internal government procedures and does not create any legally enforceable rights or obligations." Pet. App. 144a. Judge Katsas was accordingly correct that the protocol is exempt from the notice-and-comment requirement under that separate exception, which further counsels against reviewing whether the protocol "is a 'procedural rule.'" Pet i.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2020

APPENDIX

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Monday, June 15, 2020

Executions Scheduled for Four Federal Inmates Convicted of Murdering Children

Attorney General William P. Barr today directed the Federal Bureau of Prisons (BOP) to schedule the executions of four federal death-row inmates who were convicted of murdering children in violation of federal law and who, in two cases, raped the children they murdered.

In July 2019, Attorney General Barr directed the BOP to revise the Federal Execution Protocol to provide for the use of a single-drug, pentobarbital—similar to protocols used in hundreds of state executions and repeatedly upheld by federal courts, including the Supreme Court, as consistent with the Eighth Amendment. A district court's preliminary injunction prevented BOP from carrying out executions under the revised protocol, but the U.S. Court of Appeals for the D.C. Circuit vacated that injunction—clearing the way for the federal government to resume capital punishment after a nearly two-decade hiatus.

"The American people, acting through Congress and Presidents of both political parties, have long instructed that defendants convicted of the most heinous crimes should be subject to a sentence of death," said Attorney General William P. Barr. "The four murderers whose executions are scheduled today have received full and fair proceedings under our Constitution and laws. We owe it to the victims of these horrific crimes, and to the families left behind, to carry forward the sentence imposed by our justice system."

In accordance with 28 C.F.R. Part 26, the BOP has scheduled executions for the following death-sentenced inmates:

- Daniel Lewis Lee, a member of a white supremacist group, murdered a family of three, including an eight-year-old girl. After robbing and shooting the victims with a stun gun, Lee covered their heads with plastic bags, sealed the bags with duct tape, weighed down each victim with rocks, and threw the family of three into the Illinois bayou. On May 4, 1999, a jury in the U.S. District Court for the Eastern District of Arkansas found Lee guilty of numerous offenses, including three counts of murder in aid of racketeering, and he was sentenced to death. Lee's execution is scheduled to occur on July 13, 2020.
- Wesley Ira Purkey violently raped and murdered a 16-year-old girl, and then dismembered, burned, and dumped the young girl's body in a septic pond. He also was convicted in state court for using a claw hammer to bludgeon to death an 80-year-old woman who suffered from polio and walked with a cane. On November 5, 2003, a

jury in the U.S. District Court for the Western District of Missouri found Purkey guilty of kidnapping a child resulting in the child's death, and he was sentenced to death. Purkey's execution is scheduled to occur on July 15, 2020.

- Dustin Lee Honken shot and killed five people—two men who planned to testify against him, and a single, working mother and her ten-year-old and six-year-old daughters. On October 14, 2004, a jury in the U.S. District Court for the Northern District of Iowa found Honken guilty of numerous offenses, including five counts of murder during the course of a continuing criminal enterprise, and he was sentenced to death. Honken's execution is scheduled to occur on July 17, 2020.
- Keith Dwayne Nelson kidnapped a 10-year-old girl rollerblading in front of her home, and in a forest behind a church, raped her and strangled her to death with a wire. On October 25, 2001, Nelson pled guilty in the U.S. District Court for the Western District of Missouri to the kidnapping and unlawful interstate transportation of a child for the purpose of sexual abuse which resulted in death, and he was sentenced to death. Nelson's execution is scheduled to occur on August 28, 2020.

Each of these inmates has exhausted appellate and post-conviction remedies, and no legal impediments prevent their executions, which will take place at U.S. Peniten-

tiary Terre Haute, Indiana. Additional executions will be scheduled at a later date.

Component(s):
Office of the Attorney General

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