No. 19-____

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.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(CAPITAL CASE)

1. Whether the phrase "prescribed by the law of the State" in 18 U.S.C. § 3596(a) includes those procedures that state law requires state officials to establish.

2. Whether a court may uphold an agency rule based on an interpretation the agency never advanced when formulating the rule and specifically disclaimed when defending it.

3. Whether a protocol that dictates the manner in which a prisoner will be executed is a "procedural rule" exempt from notice and comment.

PARTIES TO THE PROCEEDING

Alfred Bourgeois, Dustin Lee Honken, Daniel Lewis Lee, and Wesley Purkey, petitioners on review, were the plaintiffs-appellees below.

William P. Barr, Attorney General, the U.S. Department of Justice; Timothy J. Shea, Acting Administrator, Drug Enforcement Administration; Michael Carvajal, Director, Federal Bureau of Prisons; Nicole C. English, Assistant Director, Health Services Division, Federal Bureau of Prisons; Jeffrey E. Krueger, Regional Director, Federal Bureau of Prisons, North Central Region; T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute; William E. Wilson, M.D., Clinical Director, U.S. Penitentiary Terre Haute; Joseph McClain, United States Marshal, Southern District of Indiana; and John Does 1-X, individually and in their official capacities, are respondents on review.

William P. Barr, Attorney General, the U.S. Department of Justice; Uttam Dhillon, (former) Acting Administrator, Drug Enforcement Administration; Michael Carvajal, Director, Federal Bureau of Prisons; Nicole C. English, Assistant Director, Health Services Division, Federal Bureau of Prisons; Jeffrey E. Krueger, Regional Director, Federal Bureau of Prisons, North Central Region; T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute; William E. Wilson, M.D., Clinical Director, U.S. Penitentiary Terre Haute; Joseph McClain, United States Marshal, Southern District of Indiana; and John Does 1-X, individually and in their official capacities, were the defendants-appellants below.

RELATED PROCEEDINGS

There are several related proceedings, as defined in Supreme Court Rule 14.1(b)(iii).

This case has previously been before this Court on the Government's unsuccessful motion for a stay or vacatur of the District Court's preliminary injunction. *See Barr* v. *Roane*, 140 S. Ct. 353 (2019) (mem.).

There are several related cases in the District Court that have been consolidated into the single master case from which this appeal originates. *See* Order, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-mc-145 (D.D.C. Aug. 20, 2019), Dkt. #1 ("Dist. Dkt."). Those related cases are: *Roane* v. *Barr*, No. 05-cv-2337 (D.D.C. filed Dec. 6, 2005); *Robinson* v. *Barr*, No. 07-cv-2145 (D.D.C. filed Nov. 28, 2007); *Bourgeois* v. *U.S. Dep't of Justice*, No. 12-cv-782 (D.D.C. filed May 15, 2012); *Fulks* v. *U.S. Dep't of Justice*, No. 13-cv-938 (D.D.C. filed June 21, 2013); *Lee* v. *Barr*, 19-cv-2559 (D.D.C. filed Aug. 23, 2019); *Purkey* v. *Barr*, No. 19-cv-3214 (D.D.C. filed Oct. 25, 2019); *Holder* v. *Barr*, No. 19-cv-3520 (D.D.C. filed Nov. 22, 2019); *Bernard* v. *Barr*, No. 20-cv-474 (D.D.C. filed Feb. 19, 2020); *Nelson* v. *Barr*, No. 20-cv-557 (D.D.C. filed Feb. 25, 2020).

One of these related District Court cases previously resulted in two appeals to the D.C. Circuit, which were decided on July 6, 2012, and January 24, 2014. *See Roane* v. *Leonhart*, 741 F.3d 147 (D.C. Cir. 2014); *Roane* v. *Tandy*, No. 12-5020, 2012 WL 3068444 (D.C. Cir. July 6, 2012). Neither decision was appealed to this Court.

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PETITION FOR A WRIT OF CERTIORARI

Alfred Bourgeois, Dustin Lee Honken, Daniel Lewis Lee, and Wesley Purkey respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit in this case.

INTRODUCTION

This administrative law case concerns a rule with an extraordinary impact on the rights and interests of those it affects: the federal death-penalty execution protocol. It is also a textbook example of the adage that unusual cases make bad law.

Taking a life is the "most extreme sanction available," *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002), and the States have far more experience in levying that sanction than the federal government. That is why, in both 1937 and 1994, Congress created a federalist scheme: It mandated 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); *see* 18 U.S.C. § 542 (1937).

Yet, in 2019, the Government ignored Congress's directive and instead announced a uniform, nationwide lethal-injection Protocol for all federal executions. As the D.C. Circuit correctly held below, that was error: By referring to the "manner" of execution prescribed by state law, Congress required the federal government to heed the States' experience crafting execution *procedures*. Congress could have required that the Government follow only the States' choice of a particular *method* of execution, like lethal injection or electrocution, while leaving the details to the Government. It did not.

Despite the Government's disregard of Congress's mandate, the panel majority nevertheless upheld the Protocol. In so doing, it committed three key errors and violated bedrock principles of statutory interpretation, federalism, and administrative law.

First, the panel majority committed a fundamental error of statutory interpretation. Instead of looking to the text and context of the FDPA, it relied on unrelated statutes and cases to hold that the very procedures integral to this federalist approach—those contained in state execution protocols—are not

"prescribed by" state law. As even Judge Katsas acknowledged in joining Judge Rao's novel "law of the State" holding, that approach suffers from significant "practical difficulties" and "will be [a] fertile source of litigation" as to how federal executions should proceed. Pet. App. 36a-37a & n.10. Judge Tatel, by contrast, explained that when, "by law," a State "direct[s] its prison officials to develop execution procedures," and "those officials establish[] such procedures and set them forth in execution protocols," those "protocols have been 'prescribed by * * * law.'" *Id.* at 90a (quoting 18 U.S.C. § 3596(a)).

Second, the panel majority disregarded a principle of administrative law settled since the 1940s: It adopted a reading of the Protocol the agency never advanced—or even mentioned in the Administrative Record. *See SEC* v. *Chenery Corp*. (*Chenery II*), 332 U.S. 194, 196 (1947); *SEC* v. *Chenery Corp.* (*Chenery I*), 318 U.S. 80, 87 (1943). Because the Protocol states that the Bureau of Prisons (BOP) may modify its execution procedures as required by "other circumstances," the panel concluded that the Protocol yields to conflicting state law. Yet the Protocol, "on its face, takes no account of these procedures." Pet. App. 87a. Moreover, the Government specifically disclaimed that result, arguing that it would "defy common sense and cannot reflect Congress's design." Gov't C.A. Br. 27.

Third, the panel held that the Protocol—which dictates how to levy the "most extreme sanction available," *Atkins*, 536 U.S. at 319, is merely a

procedural rule exempt from notice and comment, Pet. App. 40a-41a, 83a-85a.

The panel's decision, if uncorrected, will have significant effects on both future death-penalty litigation and administrative law more broadly. This case concerns the impending executions of four federal prisoners: Petitioners Alfred Bourgeois, Dustin Lee Honken, Daniel Lewis Lee, and Wesley Purkey. But the decision below will affect every subsequent federal execution. And given the D.C. Circuit's outsized influence on administrative law, the panel's decision will also substantially undercut the *Chenery* doctrine and the Administrative Procedure Act's (APA) notice-and-comment requirement.

The petition should be granted.

OPINIONS BELOW

The D.C. Circuit's decision is reported at 955 F.3d 106 (2020). Pet. App. 1a-100a. The D.C. Circuit's decisions denying rehearing en banc and withholding issuance of the mandate are not reported. *Id.* at 127a-128a. The District Court's order granting the preliminary injunction is reported at 2019 WL 6691814. Pet. App. 101a-119a. This Court's decision denying a stay of the preliminary injunction is reported at 140 S. Ct. 353 (2019) (mem.). Pet. App. 124a-126a. The D.C. Circuit's decision denying a stay of the preliminary injunction is not reported. *Id.* at 120a-123a.

JURISDICTION

The D.C. Circuit entered judgment on April 7, 2020. Petitioners timely sought rehearing en banc, which was denied on May 15, 2020. In response to

Petitioners' timely motion to stay the mandate, the D.C. Circuit withheld its issuance through June 8, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

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

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

The Administrative Procedure Act, 5 U.S.C. § 553(b), provides:

> General notice of proposed rule making shall be published in the Federal Register * * * . Except when notice or hearing is required by statute, this subsection does not apply * * * to * * * rules of agency organization, procedure, or practice * * * .

The Administrative Procedure Act, 5 U.S.C. § 706(2)(C), provides:

> The reviewing court shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * in excess of stat-

utory jurisdiction, authority, or limitations, or short of statutory right * * * .

STATEMENT

A. Statutory and Regulatory Background

Until 1937, federal law mandated that the U.S. Marshals Service (USMS) carry out all federal executions by hanging. *See* An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 33, 1 Stat. 112, 119 (1790). In 1937, however, Congress switched to a federalist approach. Because Congress viewed the States as working to make executions "more humane" at that time, H.R. Rep. No. 75-164, at 2 (1937), Congress required that the USMS carry out executions in the "manner prescribed by the laws of the State within which the sentence is imposed," rather than mandate a uniform federal execution procedure. 18 U.S.C. § 542 (1937) (the "1937 Act").

Congress repealed the 1937 Act in 1984, leaving the federal government without a mechanism for carrying out executions. *See* Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1987 (1984). To address that gap, the Department of Justice (DOJ), after notice and comment, issued a rule in 1993 requiring executions to take place by lethal injection. Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4898-01 (Jan. 19, 1993) (codified at 28 C.F.R. pt. 26).

Congress displaced this regulation the next year with the Federal Death Penalty Act (FDPA). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994),

codified at 18 U.S.C. §§ 3591-3598. The FDPA reverts to the earlier approach of requiring the federal government to follow the States' lead: It directs "a United States Marshal [to] 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).

DOJ understood that the 1994 FDPA would preclude the federal government from implementing a single, uniform set of federal execution procedures. Prior to the FDPA's enactment, then-Attorney General Janet Reno "recommend[ed]" instead "perpetuat[ing] the current approach, under which the execution of capital sentences * * * is carried out * * * pursuant to uniform regulations issued by the Attorney General." *See* H.R. Rep. No. 104-23, at 22 (1995) (quoting Letter from Att'y Gen. Janet Reno to Hon. Joseph R. Biden, Jr., at 3-4 (June 13, 1994)). Congress declined. DOJ has since asked Congress several times to amend the FDPA to grant BOP authority to perform executions "pursuant to uniform regulations." *Id.* Congress has consistently rejected those overtures. *See* Appellees' C.A. Br. 9-10 (collecting examples).

B. Factual and Procedural History

1. In 2004, BOP adopted a protocol detailing a set of uniform federal procedures for carrying out federal executions. *See* Pet. App. 105a. In so doing, BOP purported to rely on the 1993 rule, making no mention of the FDPA's intervening enactment and its contrary requirements. *See id*. at 104a.

The next year, several individuals facing federal death sentences sued to challenge that protocol (the

"*Roane* litigation"). *See id*. During that litigation, BOP issued several "addenda" to the 2004 Protocol, specifying a three-drug protocol for use in federal executions and revising certain requirements for conducting executions. *See id*. at 105a-106a. No executions took place under those addenda.

In 2011, DOJ announced that it lacked the drugs necessary to implement its existing protocol and that it was considering revisions. *See id.* at 106a. As a result, the *Roane* litigation was stayed. *See id.*

Eight years later, on July 25, 2019, DOJ announced that BOP had adopted a new Protocol and Addendum (collectively, the "2019 Protocol" or "Protocol"). *Id.* at 130a-213a. The 2019 Protocol, which was adopted without notice or an opportunity for comment, replaces the prior three-drug protocol with a single, different drug (pentobarbital sodium); modifies requirements for the selection, training, and oversight of the execution team; and makes other relevant changes. *See id.*

At the same time, DOJ scheduled execution dates for Petitioners. *See id.* at 101a.

2. Petitioners brought suit and sought preliminary injunctions against the use of the 2019 Protocol in their executions. *Id.* at 107a; *see* Dist. Dkt. #1 (joining Petitioners' suits with the *Roane* litigation). Petitioners explained, among other grounds, that the 2019 Protocol violates the APA because it (1) exceeds BOP's authority under the FDPA; (2) was adopted in violation of the APA's notice-and-comment requirement; and (3) is arbitrary and capricious.

The District Court preliminarily enjoined the Government from conducting Petitioners' executions under the Protocol, concluding that the FDPA requires the Government to follow execution procedures mandated by state law. Pet. App. 108a-116a. Having held for Petitioners on the FDPA claim, the District Court did not address their remaining claims. *Id.* at 116a. The District Court also found that, absent a preliminary injunction, Petitioners would "be executed under a procedure that may well be unlawful"—a "manifestly irreparable" harm—and that the equities favored Petitioners. *Id.* at 117a.

The Government asked the District Court, the D.C. Circuit, and this Court to stay or vacate the injunction pending appeal. All three declined. *Id.* at 122a-126a; Dist. Dkt. Minute Order (Nov. 22, 2019).

3. A divided panel vacated the preliminary injunction.

Judges Rao and Tatel rejected the Government's argument on the merits, concluding that the FDPA requires the Government to comply with more than solely the execution method (i.e., lethal injection) prescribed by state law. Pet. App. 49a, 86a.

But the panel did not hold the Protocol invalid, even though it does not account for *any* conflicting state requirements. Rather, to save the Protocol, Judge Rao adopted a reading of the FDPA and the Protocol that the Government had not advanced and that does not appear in the Administrative Record: The phrase "law of the State" includes only statutes "and binding regulations," which Judge Rao defined by reference to "formal rulemaking" and other procedures outlined in the federal APA. *Id.* at 51a, 60a,

79a. Judge Rao next held that the Protocol contains a broad carve-out that permits BOP to "depart" from it "as necessary to conform to" state procedures. *Id.* at 11a. Finally, Judge Rao concluded that the Protocol is a procedural rule not subject to the APA's notice-and-comment requirement. *Id.* at 83a-85a.

Despite expressing deep reservations about Judge Rao's approach, Judge Katsas joined those portions of her opinion necessary to produce a majority on the interpretation of "law of the State" and the Protocol. *Id.* at 36a-37a & n.10, 42a n.12.[1] Judge Katsas agreed that the Protocol was exempt from notice and comment. *Id.* at 40a-41a.

Judge Tatel dissented. He agreed with Judge Rao that "'manner' refers to more than just general execution method." *Id.* at 87a. But he read the FDPA to "require[] federal executions to be carried out using the same procedures that states use to execute their own prisoners," *id.* at 87a, regardless of "the happenstance of" where the "state chose to write [them] out," *id.* at 91a (internal quotation marks omitted). And because the Government had "insisted that requiring it to comply with state law would * * * hamstring implementation of the federal death penalty," Judge Tatel declined to "rewrite the [P]rotocol" and sustain it based on "a rule which the agency has never adopted at all." *Id.* at 96a (internal quotation marks omitted).

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[1] Judge Katsas accepted the Government's argument that "manner" refers to only the "method" of execution—i.e., lethal injection or hanging.

4. Petitioners sought rehearing en banc, which the D.C. Circuit denied. As Judge Tatel explained, although "this case is en banc worthy," because this Court "directed" the D.C. Circuit "to proceed 'with appropriate dispatch,'" *id.* at 129a (quoting *Barr* v. *Roane*, 140 S. Ct. 353, 353 (2019) (mem.)), "review should be concluded without delay," *id.* (internal quotation marks omitted).

Petitioners sought a stay of the mandate pending the filing of this petition. In response, the D.C. Circuit directed the clerk to withhold issuance of the mandate through June 8 to permit Petitioners to file this petition. *Id.* at 121a.

5. While review of the District Court's preliminary injunction on the FDPA is ongoing, Petitioners have continued to press their remaining claims before the District Court. The amended complaint was filed on June 1; Defendants' response is due July 31. *See* Dist. Dkt. #92, #93; Dist. Dkt. Minute Order (Mar. 18, 2020).

REASONS TO GRANT THE PETITION

The case concerns whether the Government may employ the 2019 Protocol in executing more than sixty prisoners currently under federal sentences of death, including several whose execution dates were announced at the same time as the Protocol itself. In permitting the Government to proceed, the panel majority flouted this Court's precedent and upended key principles of administrative law rooted in the separation of powers. The decision below also raises more questions than it resolves about how to conduct federal executions. Certiorari is warranted.

I. THE DECISION BELOW IS MANIFESTLY INCORRECT.

A. The Panel Erroneously Relied on Unrelated Statutes to Interpret the FDPA, Rather Than the Statute's Text and Context.

In the FDPA, Congress adopted a federalist scheme: A federal death sentence must be "implemented * * * in the manner prescribed by the law of the State in which the sentence is imposed," under the "supervis[ion]" "of a United States marshal." 18 U.S.C. § 3596(a). As Judges Rao and Tatel held, this requires more than simply following the State's "method of execution—i.e., hanging, electrocution, or lethal injection." Pet. App. 50a, 87a. Rather, by using the word "manner," Congress directed the federal government to defer to the States' experience and follow those execution procedures a State has deemed necessary to the implementation of a death sentence.

Relying on cases interpreting unrelated statutes, Judges Rao and Katsas then held that "law of the State" includes only "positive law and binding regulations," which they defined by reference to rulemaking procedures outlined in the APA. *Id.* at 51a; *see id.* at 37a n.10. Applying that *federal* standard, the panel majority concluded that because state "[e]xecution protocols are exempted from many states' administrative procedure acts, including their formal rulemaking requirements," they "do not appear to" qualify as *state* law. *Id.* at 79a-80a & n.15.

That misguided decision conflicts with this Court's precedent, disregards Congress's choice to defer to the States in this important area, and will have severe consequences. It is also wrong on its own terms. As Judge Tatel explained, the FDPA requires the federal government to follow those procedures that officials are directed by state law to implement or establish.

1. When interpreting any statute, a court must "look[] to the text and context of the law in question" and employ "traditional tools of statutory interpretation." *Virginia Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality op.). That includes "'the whole-text canon,'" which "requires consideration of 'the entire text, in view of its structure' and 'logical relation of its many parts.'" *Mont* v. *United States*, 139 S. Ct. 1826, 1833-34 (2019) (quoting A. Scalia & B. Garner, Reading Law 167 (2012)). It also includes evidence about the statute's "purpose and history"; "statutory interpretation" is, at bottom, "a holistic endeavor." *Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019) (plurality op.) (internal quotation marks omitted).

This approach is a requirement, not a suggestion. *See, e.g.*, *Sturgeon* v. *Frost*, 136 S. Ct. 1061, 1070 (2016) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (internal quotation marks omitted)). These tools ensure courts "give the statute the effect" Congress intended, rather than "extend it" to achieve another policy goal. *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). After all, courts "[l]ack[] the expertise or authority to

assess the[] important competing claims" involved in policy disputes, which are "best addressed to the Congress." *Dunn* v. *Commodity Futures Trading Comm'n*, 519 U.S. 465, 480 (1997).

2. In interpreting the phrase "prescribed by the law of the State," Judges Rao and Katsas broke sharply from this interpretive method. To decide what Congress meant when it instructed the USMS to "supervise implementation of" a death sentence as "prescribed by the law of the State," 18 U.S.C. § 3596(a), the panel did not look to the context and history of the FDPA. Instead, it focused exclusively on cases interpreting other statutes. *See* Pet. App. 55a-56a & n.4. That was error. And it produced a decision that is both wrong and suffers from significant shortcomings, a concern Judge Katsas emphasized even as he reluctantly joined this portion of Judge Rao's opinion to produce a majority. *Id.* at 36a-37a & n.10.

a. Most of the cases on which the panel relied involved statutes that did not even mention *state* law; they concerned what is "authorized" or "prescribed" by federal law. *See id.* at 56a & n.4. *Chrysler Corp.* v. *Brown*, for example, asked whether an "officer or employee of the United States" was acting in a manner "authorized by law." 441 U.S. 281, 294 (1979) (quoting 18 U.S.C. § 1905). To determine whether the actions of a federal employee were "authorized by law" within the meaning of the Trade Secrets Act, this Court looked to the text, history, and "evidence of legislative intent." *Id.* at 312; *see id.* at 296-316. Based on those factors, it concluded that there was no evidence Congress intended to deviate

from the usual *federal* standard for determining whether a regulation has the "force and effect of law," as enunciated in the APA. *Id.* at 301; *see also Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92 (2015) (applying APA to regulation issued under Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*); *Samuels* v. *District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985) (assessing whether regulations issued under the United States Housing Act, 42 U.S.C. § 1437 *et seq.*, constitute "federal law" for purposes of 42 U.S.C. § 1983).

As for the cases the panel relied on that concern the effect of *state* law, those only reinforce that this phrase must be read in context. *See* Pet. App. 55a-56a. In *United States* v. *Howard*, the federal government charged Howard with violating the Black Bass Act, which prohibits the transportation of fish in a manner "contrary to the law of the State from which [it] is to be transported." 352 U.S. 212, 213 (1957) (cleaned up) (quoting 16 U.S.C. § 852). The state "law" in question was a Florida Game Commission rule, which Howard argued "lack[ed] sufficient substance and permanence to be the 'law' of Florida." *Id.* at 217. This Court disagreed: It was "beyond question that *the Florida Legislature* * * * intended to and did make infraction of any commission regulation a violation of state law." *Id.* at 217-218 (emphasis added). The Court accordingly held that regulation was a "law of the State" even though it could not "ascertain[] from the record" whether the order was "promulgat[ed]" as required by *Florida* law. *Id.*; *see also United States* v. *Rodriquez*, 553 U.S. 377, 381-383, 390-393 (2008) (relying on earlier, related

statutes and stressing the use of "offense" in holding that "the maximum term * * * prescribed" for "an offense under State law" means the state statutory maximum, not the maximum in the federal sentencing guidelines (quoting 18 U.S.C. § 924(e)(2)(A)(ii)).

The central takeaway from these cases is that text and context matter. The panel's conclusion was the opposite: Because these unrelated cases read other statutes a certain way, the FDPA must be read that way too.

b. That deeply flawed approach to statutory interpretation led to a result riddled with "practical difficulties." Pet. App. 36a. For example, it is unclear what the panel majority counts as "law of the State," and thus how Petitioners must be executed. The panel haphazardly refers to "positive law," "binding regulations," "binding law," "formal rulemaking," and informal notice-and-comment rulemaking. *See id.* at 51a, 55a, 63a, 79a-80a & n.15. Does this include judicial opinions? *Cf. League* v. *Egery*, 65 U.S. 264, 266-267 (1860) ("the opinion of the Supreme Court of Texas [has] a binding force *almost* equivalent to positive law" (emphasis added)). Only regulations issued pursuant to "formal rulemaking"—even though a federal agency can produce a binding regulation without adhering to those trial-like procedures? *See* 1 Admin. L. & Prac. §§ 2:33, 4:10 (3d ed. 2020 update). Only informal notice-and-comment rulemaking—even though a federal agency can produce a binding regulation without adhering to that either? *See id.* § 4:14.

To make matters worse, as a direct result of the panel's unsound interpretive approach, many of

these terms hail from the federal APA.[2] What if the state APA does not match the federal APA? *Compare* 5 U.S.C. § 553(b) (exempting "interpretative rules" from notice and comment), *with* 5 Ill. Comp. Stat. 100/1-70 (subjecting "statements of general applicability that * * * interpret[] * * * law or policy" to notice and comment), *and* Ark. Code §§ 25-15-202(9)(A), 25-15-203 (similar). Or if a State allows for other mechanisms to create binding law? Take Missouri: Although the State's execution protocol is statutorily exempt from notice and comment, it nevertheless imposes a "series of directives." *Middleton* v. *Missouri Dep't of Corr.*, 278 S.W.3d 193, 195 & n.2 (Mo. 2009) (en banc); *see also Directive*, Merriam-Webster Online ("an authoritative order * * * issued by a high-level body or official"). Texas, too, exempts its execution procedure from the state APA. *Foster* v. *Texas Dep't of Criminal Justice*, 344 S.W.3d 543, 545 (Tex. Ct. App. 2011) (citing Tex. Gov. Code § 2001.226). But it still considers that procedure to be a "'rule' under the APA," *id.* at 547, and "administrative rules * * * have the same force as statutes,"

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[2] Even assuming *federal* rulemaking standards are relevant to what a *State* would consider to be part of its law, using the APA to provide those standards is particularly inapt. The phrase "law of the State" originated in the FDPA's 1937 predecessor. The concepts of "formal rulemaking" and "notice and comment" derive from the APA, enacted nine years later. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1651 (1996) (noting that "notice and comment rulemaking" was "born" in the APA and was its "most important advance").

Rodriguez v. *Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

Absent this Court's intervention, the parties will have to litigate whether the binding effect of each State's protocol is a matter of federal or state law, how to determine when something has "binding effect," and how to apply those principles to decide what has been "prescribed by the law of" the relevant State. And these issues may be relitigated every time a State changes its execution statute or protocol, and every time the Government moves to execute a federal prisoner under the law of another State.

3. The panel's faulty approach to statutory interpretation led to an erroneous result. The text, context, and history of the FDPA demonstrate that the Government must follow those procedures that officials are directed by state law to implement or establish. Like other States, Arkansas, Indiana, Missouri, and Texas—whose laws apply to Petitioners—direct state officials to promulgate execution protocols. Thus, BOP must follow those procedures in state statutes and execution protocols that the States have deemed necessary to effectuate a death sentence. Even the Government has acknowledged that it is "incongruous" for the FDPA's meaning to "depend on the happenstance of exactly where in its law or regulation or sub-regulatory guidance a state chose to write out very detailed procedures." C.A. Oral Arg. Tr. 37:15-20.

a. The FDPA instructs the USMS to "supervise implementation" of a death sentence in the manner

"prescribed by the law of the State." 18 U.S.C. § 3596(a).[3] "Prescribed" is a capacious term, encompassing multiple forms of action, including "to lay down as a guide, direction, or rule of action." *Prescribe*, Merriam-Webster's Collegiate Dictionary 921 (10th ed. 1994); *see also Prescribe*, Oxford English Dictionary Online ("[t]o write or lay down as a rule or direction to be followed; to impose authoritatively, to ordain, degree; to assign"). So is "implementation." "In the death penalty context," that term "is commonly used to refer to a range of procedures and safeguards" involved in "carrying out the sentence of death," Pet. App. 59a, including the "choice of lethal substances, dosages, vein-access procedures, and medical-personnel requirements," *id.* at 99a.

Thus, to implement the manner of execution prescribed by the law of the State means to follow those execution procedures the State has "la[id] down as a rule or direction to be followed" and would accordingly give the force of law. *Prescribe*, Oxford English Dictionary Online; *see* Pet. App. 90a. This includes procedures and safeguards created by statute, *see, e.g.*, Ga. Code § 17-10-41 ("[t]here shall be present at the execution of a convicted person * * * at least * * * two physicians"), and those the State has directed its officials, by law, to establish. For as this Court has long held, the "law of the State" includes anything "from whatever source originating, to which *a State*

[3] The Protocol violates the FDPA twice over by relying on *BOP*, not USMS, to impose a uniform federal execution procedure. *See* Appellees' C.A. Br. 36-43.

gives the force of law." *Williams* v. *Bruffy*, 96 U.S. 176, 183-184 (1877) (emphasis added).

As applied to Petitioner Bourgeois, for example, the federal government must look to the "execution procedure[s]" that have been "determined" "by the director of the correctional institutions division of the Texas Department of Criminal Justice." Tex. Code Crim. Proc. art. 43.14(a). That includes the Texas Execution Protocol, which the Director "adopt[ed]" pursuant to this authority. AR84. The same is true for Petitioners Lee, Honken, and Purkey, to whom Arkansas, Indiana, and Missouri law apply, respectively. Ark. Code § 5-4-617(g) ("[t]he director shall develop logistical procedures necessary to carry out the sentence of death"); Ind. Code § 35-38-6-1(d) (authorizing "[t]he department of correction" to "adopt rules * * * necessary to implement [the punishment of death]"); Mo. Rev. Stat. § 546.720(1) ("direct[ing]" the Director of the Department of Corrections "to provide * * * the necessary appliances for carrying into execution the death penalty").

b. Context and history confirm this reading. In 1937, Congress jettisoned the prior uniform approach to federal executions in favor of deferring to the States, directing the federal government to carry out executions "in the manner prescribed by the law[] of the State within which the sentence [was] imposed." 18 U.S.C. § 542 (1937). Congress chose those words carefully. Then, as now, "prescribe" meant "[t]o lay down authoritatively as a guide, direction, or rule." *Prescribe*, Black's Law Dictionary 1405 (3d ed. 1933); *accord Prescribe*, 1 Judicial and Statutory Definitions of Words and Phrases 1154 (2d ed. 1914) (call-

ing this a "well-defined legal meaning"). In other words, Congress in 1937 directed the federal government to follow any execution procedures "la[id] down" according to state law. Consistent with this directive, "almost all federal executions pursuant to the 1937 Act were carried out by state officials, who, supervised by U.S. Marshals, executed federal prisoners in the same 'manner' as they executed their own." Pet. App. 92a.

The FDPA carries forward this language and purpose. *See Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is obviously transplanted from another legal source, it brings the old soil with it." (internal quotation marks omitted)). It too reflects Congress's decision to defer to the States' comparative expertise in this area by adhering to the procedures States use to carry out executions. *See FERC* v. *Mississippi*, 456 U.S. 742, 765 & n.29 (1982) (where Congress could have "pre-empted the field" but did not, it is "evident that Congress intended to defer to state prerogatives—and expertise"). Indeed, the FDPA assigns just three tasks to the federal government: keep custody of death-sentenced prisoners until their appeals are exhausted; release them into USMS custody to implement their sentence as prescribed by state law; and approve the amount the USMS may pay to use state facilities and personnel. *See* 18 U.S.C. §§ 3596(a), 3597(a). The rest it left to the States.

"This Court has long recognized the role of the States as laboratories for devising solutions to difficult legal problems," and how to effectuate a death sentence is foremost among them. *Arizona State*

Legislature v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (internal quotation marks omitted). The choice of lethal injection as opposed to, say, electrocution is just one component. For example, creating a lethal-injection protocol involves several consequential choices, including the composition of the drug formula, the procedures associated with its administration, and the qualifications required of those supervising and performing the execution. Each such decision bears on the risk of a botched execution, the amount of pain and suffering a prisoner will experience, and the public's perception of the execution process. *See Glossip* v. *Gross*, 135 S. Ct. 2726, 2742 (2015).

Take the administration of a lethal drug. That requires an available vein and someone with sufficient experience and training to place the IV catheter. *Cf. Baze* v. *Rees*, 553 U.S. 35, 55 (2008) (plurality op.) ("[t]he most significant" safeguard in Kentucky's protocol is the requirement that "members of the IV team" have sufficient experience). Essential too are a State's backup measures—including, for instance, a second IV, an extra set of lethal-injection drugs, and the presence of others in the execution chamber who can also "watch for signs of IV problems." *Id.* at 55-56; *cf. Glossip*, 135 S. Ct. at 2742 (citing similar requirements to conclude that Oklahoma has "adopted important safeguards to ensure that [the anesthetic] is properly administered"). Indeed, it was only "[i]n light of [such] safeguards" that the *Baze* plurality held that the risks identified by prisoners in that case were not "so substantial or

imminent as to amount to an Eighth Amendment violation." 553 U.S. at 56 (plurality op.).

It is little wonder why Congress left these complicated decisions to the States. Today, just as in 1937 and 1994, they have far more experience with them. From 1927 to 1993, the States collectively carried out more than 4,400 executions[4]; the federal government, thirty-four.[5] Since 1994, the States have conducted another 1,292 executions, compared to BOP's three.[6] State statutes and the execution protocols established under state law, combined, capture the sum-total of this experience.

In short, by relying on a deeply flawed approach to statutory interpretation, the panel reached a decision that disregards the statutory text, and "run[s] contrary" to both the FDPA's "ultimate purpose" and "the means Congress has deemed appropriate for the pursuit of that purpose." Pet. App. 92a-93a (cleaned up). Certiorari should be granted.

B. The Panel's Holding Defies *Chenery*.

The *Chenery* doctrine is a cornerstone of administrative law grounded in the separation of powers. Under that iconic pair of cases, a court is "powerless

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[4] *See* Death Penalty Info. Ctr. (DPIC), *Executions in the U.S. 1608-2002: The Espy File*, https://bit.ly/306iyVU (last visited June 4, 2020).

[5] BOP, *Capital Punishment*, https://bit.ly/2A5ek6v (last visited June 4, 2020).

[6] DPIC, *Executions by State and Region Since 1976*, https://bit.ly/2MvHj5S (last visited June 4, 2020); BOP, *supra* n.5.

to affirm [an] administrative action by substituting what it considers to be a more adequate or proper" policy judgment for the one the agency actually made, *Chenery II*, 332 U.S. at 196; it may uphold agency action only on "[t]he grounds * * * upon which the record discloses that [it] was based," *Chenery I*, 318 U.S. at 87.

This doctrine is "simple but fundamental." *Chenery II*, 332 U.S. at 196. It prevents "courts [from] substitut[ing] their or counsel's discretion for that of the [agency]," an outcome that would be "incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 169 (1962). *Chenery*, properly applied, thus ensures the independence of politically accountable decision-makers, which in turn promotes responsibility and protects against arbitrary decision-making.

The decision below directly conflicts with these "settled propositions." *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2573 (2019). The Protocol is devoid of any mention of state law or state procedures; to save it from invalidation, the panel performed what it called a "*de novo*" interpretation of the "words DOJ used in promulgating its [P]rotocol." Pet. App. 82a; *id.* (conducting an "independent assessment" of "the text of the [P]rotocol"). Based on that, it held that BOP included in the Protocol a carve-out that *requires* "the government * * * depart from [it] as necessary" to adhere to execution procedures "prescribed by state law." *Id*. at 81a; *see id.* at 42a n.12 (Katsas, J., joining this portion of Judge

Rao's opinion to produce a majority). That is wrong for two reasons.

First, although a court may review *de novo* the text of a statute, its review of the Protocol—an administrative rule—is cabined by the principles announced in *Chenery*. The panel nevertheless justified its decision to apply that standard of review to the *Protocol* by concluding that "the issue * * * in this case is whether the [Protocol] exceeds the government's authority under the FDPA, and it is entirely appropriate to conduct an independent assessment of all relevant materials—including, in particular, the text of the [P]rotocol—in order to fulfill our duty to say what the law is." *Id.* at 82a.

Not quite. Yes, "the issue in this case" is whether the Protocol violates the FDPA. Yes, to answer it, the court must interpret *de novo* the text of the FDPA, relying on all relevant materials. And yes, it must decide for itself whether the Protocol, an agency regulation, exceeds the statute's limits. *See* 5 U.S.C. § 706(2)(C).[7]

But no, the duty to "say what the law is"—that is, what the *FDPA* requires of the *Protocol*—does not give a court license to rewrite the *Protocol* in a manner contrary to the agency's own design in order to match the text of the *FDPA*. If the text of the Protocol does not comport with the FDPA, the court must hold the Protocol invalid; it may not replace the

[7] The Government has never claimed that its interpretation of the FDPA deserves *Chevron* deference, or that its interpretation of the Protocol is entitled to *Auer* deference.

agency's chosen plan with the *court's* judgment about what is "a more adequate or proper" action. *Chenery II*, 332 U.S. at 196.

Second, although the panel purported to "rest" its "interpretation" of the Protocol "on the words DOJ used," even a cursory analysis betrays that it did, in fact, "rewrite" the Protocol. *See* Pet. App. 81a-82a.

Nothing in the Protocol or the Administrative Record supports the notion that *BOP itself* designed the Protocol to yield when it conflicts with state procedures. The Protocol sets forth mandatory procedures that "shall be" followed, unless "the Director or his/her designee" exercises their "discretion" to modify it "as necessary to (1) 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. The panel concluded that this passing reference to "other circumstances" operates as a vast savings clause that silently—and inadvertently—satisfies the FDPA's command that federal executions be conducted in accordance with the procedures required by state law.

That language does not salvage the panel's decision to defy *Chenery*. There is no indication in the Protocol or the Administrative Record that the Director of BOP or his designee has ordered that the Protocol be modified to accommodate conflicting state law. Moreover, only the third category "could possibly encompass inconsistent state law," but that provision "mentions neither state law nor section 3596(a)." *Id.* at 95a-96a. As this Court explained in *Federal Power Commission* v. *Texaco, Inc.*, general language

stating an agency "shall consider all relevant factors" that does not *itself* "expressly mention the" relevant statutory standard cannot alone "supply the requisite clarity" necessary to confirm the agency took that statutory requirement into account. 417 U.S. 380, 396-397 (1974).

Nor does the Administrative Record here suggest that this "other circumstances" exception would require (or even permit) the Government to follow conflicting state requirements. To the contrary, the Protocol provides that BOP "*must* implement death sentences 'by intravenous injection of a lethal substance,'" and outlines procedures tailored to that execution mechanism. Pet. App. 133a (emphasis added) (quoting 28 C.F.R. § 26.2(a)(2)). BOP was well aware that several States allow for alternative execution methods, for example, but never mentioned whether it would permit a prisoner to make that election, or how it might carry out such a sentence if he did. *E.g.*, Mo. Rev. Stat. § 546.720(1) (lethal gas); S.C. Code § 24-3-530 (electrocution); Va. Code § 53.1-234 (same).

Moreover, the Government has consistently argued that its decision in the Protocol to *displace* any conflicting state requirements serves important policy goals. It told the D.C. Circuit that it chose not to follow state procedures because doing so would "hamstring [it]," Gov't C.A. Reply 13, raise the "specter of state obstructionism," C.A. Oral Arg. Tr. 19:3, and "defy common sense," Gov't C.A. Br. 27; *see also* Gov't S. Ct. Stay Appl. 19 (arguing the Protocol satisfies § 3596(a) "because it prescribes the same 'manner' of implementing a death sentence

as * * * each relevant State"—lethal injection). These statements cannot "substitute" for an explanation from BOP, *NLRB* v. *Metro. Life Ins. Co.*, 380 U.S. 438, 444 (1965), but they offer insight into why BOP did not provide for the Protocol to yield to conflicting state law.

As this Court explained nearly eighty years ago, "[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Chenery I*, 318 U.S. at 88. Had the panel "judged [the Protocol] solely on the basis of" the "grounds upon which [BOP] itself based its action," it would have been "plain[]" that the Protocol, which mandates a uniform procedure for federal executions, "cannot stand." *Id.*

C. The Protocol Is Not a "Procedural Rule" Exempt From Notice and Comment.

The APA is "a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950). Its linchpin is notice and comment: "In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler*, 441 U.S. at 316. By funneling the bulk of agency rulemaking through notice and comment, the APA "assure[s] due deliberation," *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996), "public participation,"

"and fairness," *Batterton* v. *Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).

Although the APA exempts certain rules from notice and comment—including "rules of agency organization, procedure, or practice," 5 U.S.C. § 553(b)(3)(A), known as procedural rules—these exceptions should be "narrowly construed," *e.g.*, *Elec. Privacy Info. Ctr.* v. *U.S. Dep't of Homeland Sec.* (*EPIC*), 653 F.3d 1, 6 (D.C. Cir. 2011) (internal quotation marks omitted). "Congress was alert to the possibility that these exceptions might, if broadly defined and indiscriminately used, defeat the section's purpose." *Am. Bus. Ass'n* v. *United States,* 627 F.2d 525, 528 (D.C. Cir. 1980). The exceptions therefore should not be read to "swallow the APA's well-intentioned directive," *Am. Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987), and unleash the "zeal" the APA was enacted to cabin, *Morton Salt Co.*, 338 U.S. at 644.

The decision below ignores these foundational principles. The panel concluded that the Protocol—an instrument that dictates the manner in which Petitioners will die—is exempt from notice and comment because "any substantive burdens are derived from the FDPA and the state laws it incorporates," and because the Protocol "does nothing to interfere * * * with [Petitioners'] right to have their sentences implemented 'in the manner prescribed by the law of the State.'" Pet. App. 83a-84a (quoting 18 U.S.C.

§ 3596(a)).[8] That approach works a major change in what constitutes a procedural rule and makes a mockery of the idea of a procedural-rule *exception* to the notice-and-comment requirement.

1. Because this Court has never defined a "procedural rule," the D.C. Circuit's law on that subject has taken on outsized importance. *See infra* p.37. Before this case, to distinguish substantive from procedural rules, that court employed a "functional" inquiry, *Chamber of Commerce of U.S.* v. *Dep't of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999), that asked whether the rule "directly and significantly" affects or "alter[s] the [parties'] rights or interests," *EPIC*, 653 F.3d at 5-6 (internal quotation marks omitted), or otherwise "encodes a substantive value judgment," *Bowen*, 834 F.2d at 1047. Although this distinction is "one of degree," the question at bottom has always been "whether the [rule's] substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." *EPIC*, 653 F.3d at 5-6 (internal quotation marks omitted).

Among those rules that qualify as substantive is a rule requiring railroads "to file proposed schedules of rates and tariffs with subscribers," a rule modifying

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[8] Only Judge Katsas accepted the Government's alternative argument that the Protocol is a general statement of policy. Pet. App. 41a. That argument's failure to garner a majority makes sense: The Protocol is not a statement of "policy" because BOP is not "free to ignore" it. *Nat'l Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (internal quotation marks omitted).

food-stamp approval procedures, and a rule changing how motor carriers must pay shippers. *Batterton*, 648 F.2d at 708 (citations omitted). The choice to screen airline passengers using imaging technology instead of a magnetometer is substantive, *EPIC*, 653 F.3d at 6-7, as is the method for calculating labor statistics, *Batterton*, 648 F.3d at 698, 708. Visa procedures for foreign sheepherders are too. *Mendoza* v. *Perez*, 754 F.3d 1002, 1020 (D.C. Cir. 2014).

Under that precedent, the Protocol is a substantive rule. This Court has recognized that execution procedures directly affect what a prisoner will experience during death. *See Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1124-25 (2019). The Protocol operates in this field: It dictates a federal prisoner's manner of death and bears on whether BOP can "perform[]" executions in a manner consistent with the Eighth Amendment, or at least consistent with BOP's stated goal of ensuring "humane" executions. *See Am. Mining Cong.* v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (a rule necessary to "ensure the performance of [an agency's] duties" is substantive); *see, e.g.*, AR3. It thus, at a minimum, "directly and significantly" affects the rights and interests of federal prisoners who will be executed under it. *EPIC*, 653 F.3d at 6.

It also "alter[s] [prisoners'] rights." *Id.* (internal quotation marks omitted). Many state laws permit prisoners to choose whether to be executed using lethal injection or some alternative; the Protocol deprives those prisoners of that choice. *See supra*, p.27. Moreover, by "put[ting] [the] stamp of [agency] approval" on the use of pentobarbital in federal

executions—a choice the FDPA does not dictate—the Protocol "encodes a substantive value judgment." *Bowen*, 834 F.2d at 1047; *see Chamber of Commerce*, 174 F.3d at 211 (a rule makes a value judgement when it requires "more than mere compliance with the [empowering statute]"). Indeed, in emphasizing its view that the Protocol will "produce a humane death," the Government admits as much. Gov't C.A. Br. 9 (quoting AR525).[9]

Notice and comment is particularly important where, as here, the rule will have a "sufficiently grave" effect on issues outside the agency's area of expertise. *See EPIC*, 653 F.3d at 5-6 (internal quotation marks omitted). The Government's own actions confirm this: Its 1993 execution-protocol regulation was subject to notice and comment. "Nearly half the comments" it received "came from medical associations and physicians," and the Government revised the rule in response to their concerns. 58 Fed. Reg. at 4898-01. In contrast, BOP here merely "consulted with two medical experts" and "reviewed" "[p]ublicly available expert testimony" and other reports. AR3. But the point is to ensure the agency considers the views of the public and experts *writ large*, not just those few it has self-selected.

2. The decision below jettisons this jurisprudence in favor of a far broader theory. It holds that the Protocol is procedural because its "substantive burdens

[9] Petitioners do not concede that the procedures in the federal Protocol or the relevant state laws and protocols will "produce a humane death."

are * * * derived from the FDPA and the state laws it incorporates." Pet. App. 84a.[10] That reasoning proves too much. Of course the Protocol's burdens are derived from federal law. *Every* burden a federal agency imposes is derived from federal law.

That standard will "swallow the APA's well-intentioned directive" mandating notice and comment. *Bowen*, 834 F.2d at 1044. To say that the Protocol is procedural because the burdens it imposes are "derived from" federal law is to say that *every* action an agency takes is procedural. It also ignores that the agency action can *itself* alter substantive rights by choosing how to effectuate a "burden" "derived" from federal law, as the Protocol does by selecting a specific lethal-injection drug and mandating certain execution procedures. In other words, effectuating a statutory burden often means imposing a *new* regulatory burden.

Indeed, if the Protocol is not substantive, it is difficult to fathom what would be. Consider a rule prohibiting the transfer of a firearm from one non-prohibited person to another. Under the D.C. Circuit's logic, that could escape notice and comment

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[10] Judge Katsas also concluded in two sentences that the Protocol was a procedural rule, based on his unfounded belief that condemned persons' rights are "all but extinguished." Pet. App. 40a. Because Judge Rao's opinion "presents the narrowest grounds of the opinions forming a majority," it is "the controlling opinion" on this issue. *Stephens* v. *U.S. Airways Grp.*, 644 F.3d 437, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring in the judgment) (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977)).

because the "substantive burden" on firearms owners is ultimately derived from the Gun Control Act, 18 U.S.C. § 922. That question, and many more like it, will swiftly arise in this decision's wake, as one agency after another walks through the gate the panel majority opened and promulgates without notice and comment significant—but nominally "procedural"—federal rules.

II. THIS CASE WARRANTS CERTIORARI.

The panel's decision violates fundamental tenets of statutory interpretation, federalism, and administrative law. That is reason enough to grant certiorari. This Court's review is all the more important because of the nature of the administrative action in question: deciding which procedures the federal government will use to effectuate the deaths of Petitioners and all future executions carried out under this Protocol. There is no more significant act of the Government than the deliberate taking of human life, *see Atkins*, 536 U.S. at 319; absent this Court's intervention, that action may take place pursuant to an unlawful Protocol. That would be an "irremediable" harm. *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.).

1. The panel's erroneous approach to interpreting the phrase "prescribed by the law of the State" warrants certiorari. It substitutes, without justification, a federal court's view for Congress's choice. *Supra* pp.17-23. It also displaces a State's right, consistent with its role in the federal system, to "prescribe" law as it sees fit. *Id.* Legislators, not judges, are entrusted with "deciding what competing values will or will not be sacrificed to the achieve-

ment of a particular objective." *Pension Ben. Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)).

The majority's rigid view of what is "prescribed by law" also leaves little room for nuance in the many statutes employing similar language. *See* Pet. App. 93a (counting over 1,000 references). Consider the Voting Rights Act, 52 U.S.C. § 10502(c), which allows a citizen to vote by absentee ballot in certain national elections if she complies "with the requirements prescribed by the law of such State * * * providing for the casting of absentee ballots in such election." Suppose a State, by law, permits the governor to issue emergency orders without going through rulemaking procedures, and that the governor exercises that power to delay the statutory deadline for absentee-voting in response to COVID-19. *Cf.* N.Y. Exec. Order No. 202.26 (May 1, 2020), https://on.ny.gov/36YjJbs; Conn. Exec. Order No. 7QQ (May 20, 2020), https://bit.ly/2z1knIE; Me. Exec. Order No. 39 FY 19/20 (Apr. 10, 2020), https://bit.ly/3gUIAkT. Was an absentee ballot cast *after* the original statutory date but *before* the delayed date "cast[]" in accordance "with the requirements prescribed by the law of [the] State?" The majority's approach suggests not.

And there is a practical angle as well. As Judge Katsas points out, the portion of Judge Rao's opinion that constitutes a majority holding raises more questions than it answers about what constitutes "law of the State." *See* Pet. App. 36a-37a & n.10 (expressing concern that the opinion imposes "practi-

cal, and perhaps insurmountable, difficulties to the implementation of federal death sentences[]" (internal quotation marks omitted)). And even if the answer is only "state statutes and regulations," those often "contain many granular details" such that "[a]ssimilating [them] will present significant logistical challenges" subject to "last-minute * * * litigation." *Id.* at 36a (collecting examples). The Government, too, has recognized that the controlling opinion could spawn additional "rounds of litigation." Opp'n to Mot. to Stay Issuance of the Mandate 6 (internal quotation marks omitted). An authoritative answer from this Court now will facilitate resolution of these and future cases.

2. The panel's cobbled-together majority announces sweeping principles that will reshape administrative practice if they take root. The D.C. Circuit is viewed by other courts as a leading voice in administrative law. *See, e.g.*, *Slater Park Land & Livestock, LLC* v. *U.S. Army Corps of Eng'rs*, 423 F. Supp. 3d 1076, 1079 n.2 (D. Colo. 2019) ("[T]he D.C. Circuit is a leading authority on Administrative Law questions."); *see generally The Contribution of the D.C. Circuit to Administrative Law*, 40 Admin. L. Rev. 507, 508-530 (1988) (remarks by then-Chief Judge Wald). Thus, even in jurisdictions where this decision does not control, it will likely have outsized ripple effects.

a. The panel's decision creates a massive loophole in the *Chenery* doctrine, authorizing courts to "interpret" agency rules to mean something the agency has never claimed and to achieve results the administrative record expressly repudiates. The panel's opinion

therefore does exactly what *Chenery* prohibits. It could also prove limitless: Any court reviewing an agency action can claim a similar justification to reinterpret the agency's decision in favor of the policy choice *the court* thinks the agency *should have made*. And agencies may well include similar "catch-all" exceptions in the future to allow the reviewing court space to read in any exception necessary to uphold that policy.

The panel's decision could have effects in other areas of administrative law, too. *Chenery* provides a "necessary condition for *Chevron* deference": A court can only "defer to an agency's construction of a statute at *Chevron* Step Two" if there is something to defer to—if an agency "embraced that construction at the time it acted." Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952, 1004-05 (2007). But the majority's holding allows a court to create for itself the construction to which it defers.

b. The same is true for notice and comment. Absent instruction from this Court, other courts look to the D.C. Circuit for guidance. *See, e.g.*, *Time Warner Cable Inc.* v. *FCC*, 729 F.3d 137, 168 (2d Cir. 2013); *Chao* v. *Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003). Even the Fifth Circuit, which considers only whether the rule "has a substantial impact on the regulated industry," relies on D.C. Circuit precedent to confirm its own conclusions. *U.S. Dep't of Labor* v. *Kast*

Metals Corp., 744 F.2d 1145, 1153 (5th Cir. 1984) (internal quotation marks omitted).[11]

This Court should grant certiorari to clarify the standard for "procedural rules." The notable conflict between the panel's decision and prior precedent will sow confusion in the D.C. Circuit, and all the circuits that follow its lead. In an ordinary case, that conflict would likely have provoked en banc review. Here, that was not a viable option in light of this Court's admonition to resolve the case "with appropriate dispatch." Pet. App. 129a (statement of Tatel, J.) (quoting *Roane*, 140 S. Ct. at 353). It is vital that this Court step in.

[11] The D.C. Circuit "has expressly rejected [the Fifth Circuit's] standard." *Kaspar Wire Works, Inc.* v. *Sec'y of Labor*, 268 F.3d 1123, 1132 (D.C. Cir. 2001). This disagreement further counsels in favor of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

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