No. 20A-____

IN THE

Supreme Court of the United States

EARLENE PETERSON, KIMMA GUREL, AND MONICA VEILLETTE,

Petitioners,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, et al.,

Respondents.

On Application for Stay

EMERGENCY APPLICATION TO STAY THE MANDATE AND VACATE THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS PENDING A WRIT OF CERTIORARI

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July 13, 2020

PARTIES TO THE PROCEEDING

Earlene Branch Peterson, Kimma Gurel, and Monica Veillette, petitioners on review, were the plaintiffs-appellees below.

William P. Barr, Attorney General, the U.S. Department of Justice; Michael Carvajal, Director, Federal Bureau of Prisons; and T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute; in their official capacities, are respondents on review.

William P. Barr, Attorney General, the U.S. Department of Justice; Michael Carvajal, Director, Federal Bureau of Prisons; and T.J. Watson, Complex Warden, U.S. Penitentiary Terre Haute; 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).

United States District Court (S.D. Ind.):

Hartkemeyer v. Barr, No. 20-cv-336 (July 2, 2020)

Peterson v. Barr, No. 20-cv-350 (July 10, 2020)

United States Court of Appeals (7th Cir.):

Peterson v. Barr, No. 20-2252 (July 11, 2020)

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Pursuant to this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, Petitioners Earlene Peterson, Kimma Gurel, and Monica Veillette hereby petition this Court for a stay of the court of appeals' order vacating the injunction issued by the district court, which postponed the execution of Daniel Lewis Lee until petitioners' right to safely travel and attend the execution during the resurgent pandemic can be adequately considered.

Petitioners are family to the three people murdered by Daniel Lewis Lee and his accomplice. Earlene Peterson is the mother, mother-in-law and grandmother of the three people who were killed. Kimma Gurel is the sister and aunt of two of the victims. Monica Veillette is their niece and cousin. Mrs. Peterson, Ms. Gurel, and Ms. Veillette need no reminder of the facts of the case or its history. They have lived with the gruesome details of these crimes for the past 20 years.

Earlene Peterson returned to Arkansas when the bodies of her daughter and granddaughter were found in 1996. She attended every day of the 1999 trial of Daniel Lee and codefendant Chevie Kehoe, except for the one day on which she was hospitalized. Kimma Gurel attended with her mother daily. Monica Veillette testified for the prosecution and attended regularly as well. When the prosecutors attempted to drop the death penalty for Lee after Kehoe, the ringleader, was sentenced to life, these are the victims from whom they sought approval. At the close of trial, the women registered with the federal Victim Notification Program so that they might stay apprised of developments in the two cases. For twenty years the authorities have contacted Mrs. Peterson, the head of the family, with updated

information and reports.

When Daniel Lee's execution was set for December of 2019, the Bureau of Prisons (BOP) reached out to all three to ask if they planned to travel to Terre Haute to attend. And when Lee's execution date was rescheduled to June 15, 2020, the BOP reached out to them again. Ms. Veillette, managing the plans for her mother and grandmother as well as herself, immediately asked the liaison what measures the prison would undertake to ensure the safety of family and herself in light of the coronavirus pandemic. She was told that masks would be provided and that the temperature of all visitors would be taken, but social distancing could not be ensured. She continued to press for information but was told she could have nothing in writing to share with her family.

However, the number of coronavirus cases and hospitalizations began to grow dramatically in both Spokane and Arkansas. Ms. Veillette suffers from chronic asthma. Travel from Spokane to Terre Haute would necessitate time in the Spokane airport, on a plane, and in a second airport where a change of flight would be necessary; the Spokane travelers would be picked up at the airport and driven in a van by BOP personnel and would spend two nights in a hotel. Mrs. Peterson was planning to ride to the prison in a car driven by her son Paul Branch with whom she lives who has multiple sclerosis. Although Mrs. Peterson has congestive heart failure, she traveled widely after her heart operation until the pandemic hit in March. All three women have been social distancing and following recommended measures for safety and health.

Notwithstanding the newly resurgent global pandemic that has claimed the lives of more than 135,000 people in the United States and that continues to ravage large swaths of the Nation, the government insists that it must hold the first federal executions of prisoners since 2003 now. Heedless of the risks to vulnerable individuals scheduled to attend the execution due to their status as the families of crime victims—risks that have led the Federal Correctional Facility at Terre Haute, Indiana to close its doors to all visitors—the government insists that the long-delayed execution must be held at 4:00 p.m. on Monday, July 12, 2020.

Ironically, one of the primary reasons the government asserts that it must execute Lee on Monday is to serve "crime victims and their families."[1] But despite repeatedly invoking the interest of victims and their families, the government not only disregards the risks to those families in attending the execution, but cynically asserts that they have no interest in the issue worth pursuing in the courts.

However, petitioners would have faced substantial risks from the unprecedented COVID-19 pandemic had they traveled to attend the execution as matters now stand. Indeed, the Centers for Disease Control has strongly advised against travel and large in-person gatherings. *See* US, CDC

[1] *See, e.g., Executions scheduled for four federal inmates convicted of murdering children*, The United States Department of Justice Office of Public Affairs (June 15, 2020) ("We owe it to the victims … and to the families left behind to carry forward the sentence imposed in our justice system.") (https://www.justice.gov/opa/pr/executions-scheduled-four-federal-inmates-convicted-murdering-children) (last visited July 9, 2020).

https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html (last visited June 28, 2020).

Petitioners do not wish to "set the execution date" as the government has implied in these proceedings. Nor are they obstructionists attempting to disrupt the execution (as the government has also stated). They merely wish to have a reasonable opportunity to attend without imperiling their own health and well-being. The lawful rights they possess are rendered illusory if the execution proceeds today in the midst of a deadly, worsening pandemic when their health and safety cannot be assured.

The district court correctly granted an injunction to preclude the government from carrying out the execution until petitioners' safety can be guaranteed, and the government will not suffer irreparable injury from this decision. The court of appeals incorrectly vacated that injunction, meaning that the case will be mooted at 4:00 p.m. on Monday, July 13, 2020.[2]

OPINIONS BELOW

The Seventh Circuit's order (Appx. 1-10) is unpublished. The District Court's order granting the preliminary injunction (Appx. 11-14) is unpublished.

[2] Because the court of appeals decision was issued at 5:39 p.m. eastern time on July 12, 2020, the exigencies of the situation made it impossible to seek a stay from the court of appeals first. *See, e.g., Western Airlines, Inc. v. Int'l Bhd. of Teamsters*, 480 U.S. 1301, 1304 (1987) (O'Connor, J., in chambers) ("The timing and substance of the Court of Appeal's order under the exigencies of this case made compliance with Rule 44.4 of this Court, requiring that a motion for a stay first be filed with the court below, both virtually impossible and legally futile.").

STATEMENT

A. Lee's Trial and Conviction.

Lee is scheduled to be executed in Terre Haute, Indiana at 4:00 p.m. on July 13, 2020—the first person scheduled for execution at a federal penitentiary in nearly seventeen years. On May 4, 1999, Lee and co-defendant Chevie Kehoe were convicted for conspiracy and violations of the Racketeer Influenced and Corrupt Organizations Act and the murders of William Mueller, Nancy Mueller, and Sarah Powell. Lee and Kehoe were sentenced separately. After Mr. Kehoe received a sentence of life without parole, the U.S. Attorney attempted to withdraw the death notice in Lee's case. *United States v. Lee*, 274 F.3d 485, 488 (8th Cir. 2001). The Department of Justice denied the request and, on May 14, 1999, Lee was sentenced to death.

Lee was previously scheduled to be executed on December 9, 2019. That execution was the subject of a preliminary injunction pending review of litigation regarding lethal injection protocols. That injunction was lifted on Friday, June 12, 2020, and three days later, on Monday, June 15, 2020, the present execution date was set.

B. Current Conditions Due To The COVID-19 Pandemic.

COVID-19 is a highly contagious and deadly respiratory disease that has claimed the lives of more than 552,000 worldwide.[3] Public health officials believe it is spread mainly from person-to-person, including by people who do not exhibit any

[3] *Live updates: Experts call for shutdowns as coronavirus infections and hospitalizations spike in some states* (July 10, 2020), https://www.washingtonpost.com/nation/2020/07/10/coronavirus-live-updates-us/.

symptoms.[4] While the risk of exposure to everyone is great, older adults and individuals with certain underlying medical conditions are at increased risk of severe illness and death.[5] There is currently no vaccine or effective treatment for the virus and public health experts agree that the best preventive measure is to avoid contact with others.

In recent weeks, the U.S. has reported record-breaking increases in new cases,[6] leading many analysts to conclude we are in the grips of a second, and devastating, surge.[7] An all-time high of 68,241 new cases were reported on July 10 and the number is rising daily.[8] Eastern Washington, where two of the petitioners live, is confronted with "exploding case loads."[9] In just the last week, Spokane

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[4] *How to Protect Yourself & Others*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited July 10, 2020).

[5] *People Who Are at Increased Risk for Severe Illness*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fpeople-at-higher-risk.html (last visited July 10, 2020).

[6] *New Coronavirus Cases in U.S. Soar Past 68,000 Shattering Record* (July 10, 2020) https://www.nytimes.com/2020/07/10/world/coronavirus-updates.html.

[7] Robinson Meyer and Alexis Madrigal, *A Devastating New Stage of the Pandemic* (June 25, 2020), https://www.theatlantic.com/science/archive/2020/06/second-coronavirus-surge-here/613522/; Aimee Picchi, *Coronavirus surge: Next bailout could cost $1.5 trillion, Moody's says* (July 10, 2020). https://www.cbsnews.com/news/coronavirus-economic-relief-1-5-trillion-needed-moodys/.

[8] *See n.5, supra.*

[9] Lauren Kirschman, *Coronavirus updates: State reaches 35,898 cases with surge in Eastern Washington* (July 5, 2020) https://www.thenewstribune.com/news/coronavirus/article244013177.html (last visited July 1, 2020)

County experienced a "dramatic uptick," with cases rising by roughly 34 percent.[10]

The CDC has advised that "staying home is the best way to protect yourself and others" and has specifically recommended *against* domestic travel, given the increased chances of both getting infected and spreading the disease.[11] Several states have enacted orders requiring production of a negative COVID-19 test or quarantine for domestic travelers upon arrival.[12] Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases, has specifically recommended that elderly persons and those with underlying conditions avoid "large crowds" and "long trips."[13]

Lee's execution is scheduled to take place at USP Terre Haute, which reported its first case of COVID-19 on May 16, 2020.[14] Although BOP data regarding COVID-19 is limited and incomplete, at least ten inmates have tested positive at Terre Haute, and at least one prisoner has died.[15] Outbreaks at other

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[10] Samantha Wohlfeil, *As coronavirus cases spike, Spokane health officer warns first wave could last into another flu season* (July 9, 2020), https://www.inlander.com/spokane/as-coronavirus-cases-spike-spokane-health-officer-warns-first-wave-could-last-into-another-flu-season/Content?oid=19897892.

[11]Considerations for Travelers-Coronavirus in the US, CDC https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html (last visited June 28, 2020).

[12]https://www.travelandleisure.com/travel-news/what-to-know-about-each-state-during-the-coronavirus.

[13] Ben Kamisar, *Fauci: Those 'vulnerable' to coronavirus should limit travel and crowd exposure* (March 8, 2020), https://www.nbcnews.com/politics/meet-the-press/fauci-those-vulnerable-coronavirus-should-limit-travel-crowd-exposure-n1152501.

[14] Lisa Trigg, *Case of COVID-19 Infection Reported at Federal Prison in Terre Haute*, Tribute-Star (May 18, 2020), https://www.tribstar.com/news/case-of-covid-19-infection-reported-at-federal-prison-in-terre-haute/article_85a075ee-9940-11ea-87fe-fb3a2398734d.html.

[15] https://www.bop.gov/coronavirus/ (last visited July 10, 2020); *Terre Haute Prison*

prison facilities have been devastating; an outbreak at a Tennessee prison sickened 583 inmates and led to at least 38 prison staff members contracting the virus.[16]

As a result of the pandemic, BOP has implemented widespread modified operations to mitigate spread, including severely curtailing inmate movement, and suspending tours, staff travel, and training.[17] In addition, *all* visitations to USP Terre Haute have been suspended.[18] But even those have not proved sufficient—indeed, the government notified petitioners yesterday that it learned on July 8, 2020, that a staff member at FCI Terre Haute had been exposed to individuals who tested positive for COVID-19. *See* Dec. of Rick Winter, *Hartkemeyer v. Barr*, No. 20-cv-336 (S.D. Ind. July 12, 2020), Dkt. 77-1. That staff member tested positive on July 11. Between his exposure and July 8, the employee "among other things, attended the law enforcement meeting with outside law enforcement in preparation for the scheduled executions; attended a meeting regarding the handling of demonstrators at the scheduled executions; and attended to an issue at the [Special Confinement Unit]," where the death-row prisoners are housed. *Id.* ¶ 6. He was not wearing "a mask at all times during this period" and the government cannot currently confirm everyone "with whom the staff member was in contact." *Id.* ¶¶ 7, 9. No apparent steps have been taken to institute contact tracing for the employee's

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Inmate With COVID-19 Dies; 3 More Have It, U.S. News (May 26, 2020), https://www.usnews.com/news/best-states/indiana/articles/2020-05-26/3-terre-haute-federal-prison-inmates-positive-for-covid-19.

[16] Bill Hutchinson, *COVID-19 outbreak infecting over 500 prisoners may have come from staff: Medical director* (April 28, 2020), https://abcnews.go.com/US/covid-19-outbreak-infecting-500-prisoners-staff-medical/story?id=70382322.

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

[18] *See* Federal Bureau of Prisons, USP Terre Haute, https://www.bop.gov/locations/institutions/thp/ (last visited July 10, 2020).

interactions or for those of the other BOP staff he came in contact with while presumably infected and contagious. Despite this, the execution is still scheduled to proceed.

C. Petitioners' Complaint And The District Court's Injunction.

On July 8, 2020, petitioners brought this action for declaratory and injunctive relief. In their Complaint, they argued that Defendants had arbitrarily and capriciously selected an execution date. On July 10, 2020, the district court granted petitioners' motion for a preliminary injunction. The court first concluded that petitioners were likely to succeed on the merits. The court rejected the government's contention that the procedures for conducting executions are "committed to agency discretion by law," holding that the Federal Death Penalty Act (FDPA), incorporating "the law of the state in which sentence is imposed," 18 U.S.C. § 3596(a), constrains the government's discretion. Appx. 17-18.

The district court then rejected the government's contention that crime victims and their families are not within the "zone of interests" protected by execution procedures, and therefore are not permitted to sue under the APA. The court noted that under Arkansas law (incorporated by the FDPA) certain relatives of crime victims "shall be present" for the execution if they so choose. The court therefore held that petitioners have a strong likelihood of success on their claim that they are "arguably within the zone of interests" Congress intended to protect. Appx. 19.

The district court then held that petitioners have a strong likelihood of

success on their claim that the government's decision to schedule the execution date during a newly resurgent pandemic is arbitrary and capricious. The court observed that the government had "produced no evidence to show that their decision to conduct an execution during a pandemic accounted for the victims' family's right to be present." Appx. 21. The court also held that the government's claim that petitioners have no right to attend the execution ignored Arkansas law giving family members such a right. Appx. 20-21.

The court went on to find irreparable harm to the petitioners, noting that Mrs. Peterson would be "forced to choose whether being present for the execution of a man responsible for the death of her daughter and granddaughter is worth defying her doctor's orders and risking her own life." Appx. 21. The district court further explained that "petitioners did not unnecessarily delay in bringing their claim." *Id.* at 13. Petitioners filed their complaint in a timely fashion after seeking, unsuccessfully, to "obtain assurances about safety measures from Bureau of Prisons staff." *Id.* at 13-14. And, although the government "has an interest in the prompt and orderly execution of Mr. Lee's death sentence," that "interest is intertwined with—and based in part upon—the victim's interest in timely justice." *Id.* Because the expressed interest of at least three of those victims is in a safe, rather than immediate, execution, the balance of harms weighed in petitioners' favor. Appx. 23.

D. The Court Of Appeals' Order Vacating The Injunction.

On July 11, 2020, the government filed a notice of appeal as well as an emergency motion to vacate or stay the district court's injunction. On July 12, 2020, the court of appeals vacated the injunction. The court held that, while the BOP

regulations concerning the manner of execution are not "entirely unreviewable," this particular decision is wholly committed to agency discretion. Appx. 4. The court also held that petitioners have no right—under either the FDPA, and the state law it incorporates, or federal regulations—to attend the execution. Appx. 6-8.

ARGUMENT

Under this Court's Rule 23 and the All Writs Act, 28 U.S.C. § 1651, a single Justice or the Court may stay an appellate-court's order pending the filing of a petition for a writ of certiorari. *See, e.g., Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (IRAP) (per curiam); *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). "In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice" considers three questions: first, the Justice must "try to predict whether four Justices would vote to grant certiorari" if the court below ultimately rules against the applicant; second, the Justice must "try to predict whether the Court would then set the order aside"; and third, the Justice must "balance the so-called 'stay equities,'" *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (citation omitted), by determining "whether the injury asserted by the applicant outweighs the harm to other parties or to the public," *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *see Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (stay factors). Those standards counsel strongly in favor of a stay here.

I. THERE IS A FAIR PROSPECT THAT THIS COURT WILL GRANT CERTIORARI.

Even though the court of appeals reversed the district court's decision granting an injunction, this Court is likely to grant certiorari. *See Araneta v. United States*, 478 U.S. 1301, 1304 (1986) (Burger, C.J., in chambers) ("such matters cannot be predicted with certainty"); *Bd. of Educ. of City of L.A. v. Super. Ct. of Cal., Cty. of L.A.*, 448 U.S. 1343, 1347 (1980) (Rehnquist, J., in chambers) (comparing this exercise to "the reading of tea leaves"). This case involves a question of exceptional importance: Can the federal government, in imposing the "most extreme sanction available," *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), disregard the rights of crime victims and their families to attend the execution? The government has argued that, despite its repeated statements that death sentences are carried out in large part in the name of the victim and their families, these family members have *no* interest in asserting their right to attend the execution and seeking to postpone the execution until the resurgence of the COVID-19 virus abates and they can travel safely.

This case also presents important questions of administrative law, including: (1) whether the government has unfettered and unreviewable discretion to set an execution date regardless of the rights of crime victims (and in the midst of an unprecedented and resurgent pandemic); and (2) whether crime victims are within the "zone of interests" of the relevant statutes and therefore entitled to assert their rights. In addition, this case presents an important question of statutory interpretation, namely, what procedures are included in "the manner prescribed by" state law, as defined by the Federal Death Penalty Act

(FDPA), 18 U.S.C. § 3596(a), and whether that incorporates binding state statutory law regarding how the execution is to be implemented. *See* Appx. 6-8.

There are similar claims pending on behalf of spiritual advisors. *See, e.g., Hartkemeyer v. Barr*, No. 2:20-cv-00336 (S.D. Ind.). And more claims are likely to arise on behalf of other individuals (e.g., members of the press, or counsel to death-row prisoners), who may seek to bring similar claims based on the same BOP regulations. Therefore, there is a reasonable probability this Court will grant certiorari to resolve these timely questions regarding how the pandemic affects the rights of those uniquely tied to the executions.

II. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL HOLD THAT THE SEVENTH CIRCUIT'S DECISION VACATING THE INJUNCTION WAS ERRONEOUS.

There is at least "a fair prospect" that this Court will conclude the Seventh Circuit erred in vacating the district court's injunction. At this stage, petitioners need not show that that outcome is a certainty. The district court correctly granted petitioners' request for a preliminary injunction. In particular, the district court correctly concluded that petitioners are likely to succeed on the merits here.

First, the district court correctly rejected the government's argument that its decision to schedule Lee's execution—in the midst of a pandemic, potentially endangering the lives of participants, witnesses, and the public in general—is committed to agency discretion and therefore unreviewable. The Administrative Procedure Act contains "the strong presumption that Congress intends judicial

review of administrative action." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Although Congress provided an exception for action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), that is "a very narrow exception," *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (internal quotation marks omitted). The exception applies only if there is "no law to apply." *Id.* Moreover, "judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes." *Id.* (*quoting Steenholdt v. FAA*, 314 F.3d 633, 638 (D.C. Cir. 2003) (internal quotation marks and citation omitted)).

Here, there is ample law to apply. The Federal Death Penalty Act (FDPA) states that a sentence of death must be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). Arkansas has a statute which deals strictly with the "manner of execution," providing for execution by lethal injection. Ark. Code §5-4-617. A separate Arkansas statute entitled "Conduct of execution," provides that victims' family members "shall be present" if they so choose. Ark. Code § 16-90-502(e)(1)(C). The rights conferred under this statute do not depend on the method of execution. While the government points to language in the statute that limits the number of family members to "no more than six," the fact that the clear entitlement to attend the execution is limited in number does not establish that the right does not exist.

The court of appeals erred in holding that the FDPA does not incorporate

Arkansas law regarding witnesses because the right of family members to attend does not involve the "manner" of execution. That is true for two separate and independent reasons. First, that holding is inconsistent with the plain meaning of the term "manner." *See, e.g., Merriam-Webster* https://www.merriam-webster.com/dictionary/manner ("a characteristic or customary mode of acting;" "a mode of procedure or way of acting"). BOP regulations include the invitation of witnesses among the "procedures" governing executions. 28 C.F.R. § 26.4. And the Arkansas Code section governs the "*conduct*" of the execution. Ark. Code § 16-90-502(e)(1)(C). That is plainly encompassed in any plain reading of the term "manner."

Second, the FDPA relies on the States to determine which procedures comprise the "manner" of execution. Section 3596(a) provides that the federal government shall "implement[]" a death sentence "in the manner prescribed by the law of the State." Here, Arkansas law prescribes that when implementing an execution, certain relatives of the victim "shall be" present. *See Prescribe*, Merriam-Webster's Collegiate Dictionary 921 (10th ed. 1994) ("to lay down as a guide, direction, or rule of action"); *accord Prescribe*, Oxford English Dictionary Online; *see also In re Bureau of Prisons Execution Protocol Cases*, 955 F.3d 133 (Rao, J., concurring) (explaining that "[i]n the death penalty context, the term 'implementation' is commonly used to refer to a range of procedures . . . surrounding executions"). Thus, when implementing a death sentence under Arkansas law, the FDPA mandates the presence of those relatives.

Judge Rao's controlling opinion in *In re Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020), is not to the contrary. That court held that the FDPA requires the federal government to follow execution procedures "set forth in state statutes and regulations, but not execution procedures set forth in less formal state execution protocols." *Id.* at 112; *see id.* at 130 (Rao, J. Concurring). Judge Rao accordingly held that it is within the State's purview to decide which procedures are necessary to implement a death sentence; she did not limit that holding to only certain kinds of procedures. Judge Tatel agreed that the federal government must adhere to state statutes and regulations (although he would have gone further to require adherence to informal protocols). *Id.* at 146 (Tatel, J., dissenting). Only Judge Katsas read the term "manner" to limit the FDPA's application to the method of execution. *See id.* at 113 (Katsas, J., concurring). There is no question that the Arkansas provisions governing attendance of the victims' family members at executions are statutory, and thus constitute " the positive law and binding regulations of a state." *Id.* at 130 (Rao, J., concurring).

The court of appeals incorrectly read the opinions of both Judges Rao and Tatel as limiting the FDPA to lethal injection procedures. Appx. 9. But the fact that those judges referred to the Arkansas statute governing lethal-injection procedure, and not the statute governing which witnesses shall be present during the execution, is simply because the case before them involved those procedures. And while the judges cautioned that the state law will not govern every nuance of

a federal execution, they did not stray from the key point that state positive law governing the manner of executions is incorporated through the FDPA.[19]

Even apart from Arkansas law, BOP's own regulations, as informed by its protocols, provide law to apply. BOP regulations govern who "shall be present" at the execution. *See* 28 C.F.R. § 26.4. And the Federal Bureau of Prisons' Execution Protocol sets forth precisely who the citizen witnesses provided for in the regulation are intended to be: "in identifying these [eight citizen] individuals, the Warden, no later than 30 days after the setting of an execution date, ***will*** ask the United States Attorney for the jurisdiction in which the inmate was prosecuted to recommend up to *eight individuals who are victims or victim family members to be witnesses of the execution*)." Appx. 70-72 (emphasis added). Thus,

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[19] The government has previously suggested that because petitioners in the D.C. Circuit case read the statute in a particular way, that reading is binding on petitioners. That is wrong twice over. As an initial matter, statements by another party in a different case are not binding on petitioners here, *cf. Taylor v. Sturgell*, 553 U.S. 880, 892-893 (2008), just as the D.C. Circuit's conclusions about the meaning of the FDPA are not binding in the Seventh Circuit or on this Court.

More fundamentally, the government misconstrues and misquotes the statements in question. Counsel for petitioners argued that whether a physician and other trained medical personnel are present in *the execution chamber* is indeed relevant to the "manner" of execution, but that the specific identity of the persons "who [are] in the chamber" is immaterial. *See* Oral Arg. at 1:01:04-40, No. 19-5322 (D.C. Cir. Jan. 15, 2020). But the execution chamber is not the same as the witness viewing room. As for witnesses, although counsel acknowledged that an inmate would likely not have a right to insist—based on his own preference, not any conflicting state law—that a minor child be present during an execution, *id.* at 1:12:04-:31, or that the government would not have to accommodate conflicting state requirements about the "number of witnesses," Br. for Pls.-Appellees 33, No. 19-5322 (D.C. Cir. Jan. 6, 2020), counsel never said that the federal government could flatly ignore a *mandatory* state law dictating which witnesses "shall be" present.

the discretion identified by the Seventh Circuit, op. at 8, applies only when *more* than eight eligible victims or family members seek to attend. The court of appeals' holding to the contrary did not address the application of this protocol.

Finally, courts historically have played a role in setting execution dates; and they have recently done so, even after the death sentence implementation regulations were promulgated. *See* Order Setting Execution Date, *United States v. Garza*, No. 1:97-cv-00273, Dkt. 18 (S.D. Tex. May 26, 2000); *see also United States v. Hammer*, 121 F. Supp. 2d 794, 796 (M.D. Pa. 2000) (noting court's setting of execution date, and reviewing claims pertaining to execution implementation). Indeed, both 28 C.F.R. § 26.3 and § 26.4 begin with "[e]xcept to the extent a court orders otherwise." There is no reason why the courts cannot review the decision to schedule the execution in a manner that deprives petitioners of their right to attend.

Second, petitioners fall within the zone of interests of the relevant statutes. The Administrative Procedure Act permits an action to be brought by any party who is "adversely affected or aggrieved by agency action . . . ." 5 U.S.C. § 702. Moreover, Congress intended to "make agency action presumptively reviewable" through the APA. *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Given the APA's presumption in favor of judicial review, the "zone of interests" test is "is not meant to be especially demanding." *Patchak*, 567 U.S. at 225 (internal quotation marks omitted); *see Cook Cty., Illinois v. Wolf*, 962 F.3d

208, 211 (7th Cir. 2020). A plaintiff need only be "arguably within the zone of interests" of the relevant statute, and "any doubt goes to the plaintiff." *Patchak*, 567 U.S. at 225. Thus, suit will be permitted unless the plaintiff's interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed" that Congress authorized the plaintiff to sue. *Id.* (internal quotation marks omitted).

Despite repeatedly stating that it was pursuing the execution of Lee on behalf of crime victims and their families—which plainly include petitioners—and invoking their interests throughout their litigation, the government now argues that those victims have no interest in the matter. But petitioners are not outside meddlers. As explained above, they have recognized interests and rights in both the criminal proceedings against Lee[20] as well as the execution of his sentence.

In particular, Arkansas law (as incorporated by the FDPA), provides that a spouse, parent, adult sibling, or adult child of the victim "shall be present" at the execution " if he or she chooses to be present." Ark. Code, § 16-90-502(e)(1)(C). That section covers both Mrs. Peterson and Ms. Gurel. And Arkansas law also recognizes the interests of "[a]ny other adult relative with a close relationship to the victim." *Id.* § 16-90-502(e)(2)(D), (e)(1)(C).

It is therefore not surprising that petitioners have already been selected to attend this execution, as well as the previously scheduled December 2019 execution, pursuant to 28 C.F.R. § 26.4. And, as noted above, BOP's Execution

[20] Crime victims, for instance, have extensive rights to participate in the underlying criminal proceedings. *See* 18 U.S.C. § 3771.

Protocol makes clear that the family members of crime victims must be among the "citizen" witnesses to the execution.

The government has asserted that the Arkansas law does not permit "anyone" to "attend an execution at their preferred time" or require officials to "plan an execution around witness schedules." Govt. Ct. App. Mtn. at 14. But that says nothing about the right of family members to attend the execution. And it ignores the question here: whether petitioners are arguably within the zone of interests of the statute. The Arkansas statutes, along with BOP's regulations and protocols, are more than sufficient to bring them arguably within the zone of interests for the purposes of an APA challenge.

Third, defendants' decision was arbitrary and capricious, and not in accordance with law. A reviewing court must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency decisions must be based on "reasoned decisionmaking." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 52 (1983). An agency decision is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 43.

The Attorney General's decision to schedule Lee's execution in the midst of

a resurgent global pandemic is arbitrary and capricious. The Attorney General chose to schedule the first federal execution in 17 years at a time when it is not only dangerous to travel but goes against guidance from the federal government's own public health agency. At a time when the courts are not holding in-person proceedings and the lawyers with cases before those courts are working safely from home, the government presses ahead.

The government failed to consider the consequences of scheduling this execution in the midst of the most devastating global pandemic in the past century. Defendants' decision not only puts petitioners at risk of a potentially fatal illness, it imposes the same grave risk on everyone petitioners come into contact with, including the health care workers who routinely care for Mrs. Peterson.

The government points to safety measures that have been instituted for those who attend and participate in the execution. But at no point does the government address the risks of traveling to the execution. Indeed, the government's motion belittles both petitioners and their safety concerns by referring to their purported travel "preferences" and supposed "willingness" to attend the execution. Motion, at 1. But petitioners are willing to attend the execution. Ms. Gurel and Ms. Veillette were ready to travel in December when final arrangements had been made. As Mrs. Peterson stated, she prays daily for her lost daughter and granddaughter and hopes to find peace in attending. Dkt. 17-1, at 4. But attempting to travel from Arkansas—where COVID-19 cases

currently are spiking—to Indiana for the execution will expose her to undue risk.

The court of appeals reasoned that petitioners' claim fails because no federal statute or regulation gives them the right to attend the execution. Leaving aside Arkansas law and the BOP's mandatory protocol, the court of appeals' reasoning fails to consider that petitioners, as close family members of the victim, had already been invited to attend the execution. This case is not just about *scheduling*; it is about the duty to keep those exercising their right to act as witnesses safe. Just as it would be arbitrary and capricious for the government to schedule an execution during a prison riot, endangering staff and witnesses, so it is arbitrary and capricious to do so during a pandemic, when witnesses, staff, and the public will be endangered.

The government attempts to portray the district court's ruling as allowing any potential witness to dictate the Attorney General's choice of a date for an execution. The district court's ruling suggests nothing of the sort. All the court's decision requires is that the government consider the danger to close family members of the victims from traveling and attending an execution to which they have already been invited.

The safety measures touted by the government are of little comfort to petitioners. Not only do those measures fail to address the dangers of travel, but they are wholly insufficient to protect petitioners, particularly in light of petitioners' serious medical conditions. For instance, the Mr. Winter stated that FCC Terre Haute staff are required to undergo daily temperature checks and

symptom screenings. However, he specified no similar measures that will be taken with regard to the many others who will be present for Lee's execution, or to those who might be asymptomatic, and even stated that BOP had "no plans to conduct COVID testing on individuals involved in the execution in advance of the execution." *See id.* ¶7. That is particularly concerning in light of the government's revelation, just a day ago, that a Terre Haute staff member has tested positive for COVID-19; that he interacted with prison officials and went to the death-row facility after the time of his exposure; that he was not wearing a mask at all times; and that the government cannot confirm everyone with whom he came into contact. *See* Dec. of Rick Winter, *Hartkemeyer v. Barr*, No. 20-cv-336 (S.D. Ind. July 12, 2020), Dkt. 77-1 ¶¶ 6, 7, 9.

Nor can the government reconcile the fact that BOP has suspended all visitation, including legal visits, at the FCC Terre Haute complex due to the dangers of COVID-19, with its decision to proceed with an event requiring an influx of people all at one time traveling from all over the country. The death toll from COVID-19 has significantly increased in the past few weeks; FCC Terre Haute is currently experiencing a known outbreak of the virus; and the country is now in the midst of another surge in infections that has caused numerous states to pause their reopenings and health experts to warn of the renewed risk of virus spread. It is arbitrary for Defendants to insist on a random date of execution that so clearly poses entirely unnecessary risks both on petitioners and the broader public.

III. PETITIONERS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

There is a clear "likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010). Petitioners face the unacceptable choice between exercising their right to witness the execution and risking exposure to a deadly disease. If they attend, they risk exposure to a disease that has already killed more than 130,000 people in the United States, and that currently is accelerating at an alarming rate. The risk is particularly acute for Mrs. Peterson, whose age and medical condition significantly endanger her health should she be exposed to the virus. Because petitioners cannot currently safely attend, if Lee's execution goes forward today, petitioners will effectively be denied their right to be present. That is an "irremediable" harm. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986); *cf.* *Hollingsworth* v. *Perry*, 558 U.S. 183, 193-195 (2010) (per curiam) (staying adoption of a new judicial rule in part based on the absence of "a meaningful comment period").

The government dismisses the risk as "the mere 'possibility'" that petitioners will be exposed to COVID-19. But the government is wrong when it says that the petitioners must prove that it is "likely" they will be exposed to the virus. The unacceptable risk of being exposed to a virus that is ravaging the United States, including the Federal Correctional Facility at Terre Haute, is an injury in itself.

In contrast, the government cannot show that it will suffer irreparable

injury from postponing the execution of Lee until it is safe for petitioners to attend. The government faces no deadline, nor can it articulate any significant damage from postponing the execution. There is no justifiable reason to carry out Lee's execution in the midst of a global, newly resurgent pandemic, when close family members of the victims in the case, on whose behalf the government has claimed to be acting for twenty years—cannot safely attend.

The government fails to explain why its interest requires the sentence to be carried out now, during a time of spiking COVID-19 cases. Indeed, the government has invoked the need for finality to benefit the victims and their families. And the Supreme Court has recognized that the government's interest in carrying out the sentence is based in part on the interest of the victims and their families. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019). That interest can be served once the families of the victims can safely travel and attend the execution.

Second, failure to stay the mandate risks "foreclos[ing] . . . certiorari review by this Court," which itself constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984); *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309. "Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of ap- peals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *John Doe Agency*, 488 U.S. at 1309 (alteration in original) (quoting *New York* v. *Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers)). Allowing

the Government to proceed with the execution of Lee without allowing petitioners the ability to attend would "effectively deprive this Court of jurisdiction to consider the petition for writ of certiorari." *Garrison*, 468 U.S. at 1302. Because "'the normal course of appellate review might otherwise cause the case to become moot,' issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)); *see also Chafin* v. *Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course").

IV. THE BALANCE OF EQUITIES AND RELATIVE HARMS WEIGH STRONGLY IN FAVOR OF GRANTING A STAY.

In addition to the stay factors identified above,"'in a close case it may be appropriate to balance the equities,' to assess the relative harms to the parties, 'as well as the interests of the public at large.'" *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 960 (2009) (quoting *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009)). Because the other factors plainly point in favor of granting the requested stay, this Court need not consider the balance of equities here. But, if it does, this additional factor reinforces that result.

First, "[r]efusing a stay may visit an irreversible harm on [petitioners], but granting it will * * * do no permanent injury to respondents." *Philip Morris USA Inc.*, 561 U.S. at 1305. Granting a stay does not prevent the Government from executing Lee. It will merely allow petitioners and the Government sufficient time to litigate the legality of BOP's decision to schedule an execution in the midst of a surging pandemic when petitioners are unable to exercise their right to

attend.

The public interest also supports the district court's decision. The government has repeatedly invoked the interest of petitioners as a justification for carrying out Lee's execution. When the Attorney General announced Lee's current execution date, among others, he stated: "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." *See* n. 1, supra. If the public interest in achieving closure for "the families left behind" is fostered by carrying out the sentence, that interest is undermined by scheduling the execution during a global pandemic that will not allow those families to attend without undue risk.

Carrying out the sentence threatens harm not just to families, but also threatens to spread infection to the broader community. The government's action places at risk for infection and illness a broad population, including BOP staff, other witnesses of the execution, prisoners, and community members. A peer-reviewed study recently released in *Health Affairs* found, for example, that "cycling [individuals] through Cook County Jail is associated with a 15.9 percent of all documented COVID-19 cases in Chicago and 15.7 percent of cases in Illinois."[21] Another study, released in April before the current COVID-19 resurgence, showed that "community spread from infections in jails could add

[21] *Spread of COVID-19 From Jail Represents 15.9 Percent of Chicago Community Cases*, Health Affairs (June 4, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200604.336387/full/.

between 99,000 and 188,000 people to the virus' U.S. death toll."[22] Indeed, after the only execution to take place during the pandemic (in May), the facility where it took place reported an outbreak of 21 confirmed COVID-19 cases one month later.[23]

It is not in the public interest to send travelers to a prison, where the virus is known to quickly proliferate—particularly a prison with several active cases, including a staff member who recently tested positive and was exposed to others while not wearing proper PPE—and then back out into airports and hotels and their home communities and their families. Delaying Lee's execution until a time when the dangerously resurgent new perils of the COVID-19 pandemic have abated will not only protect those interests, it will also prevent grave, potentially fatal, health consequences to the petitioners, family members in their care, and the general public.

On balance, a stay is therefore warranted. Failure to grant one "may have the practical consequence of rendering the proceeding moot" or otherwise cause irreparable harm to petitioners. *Mikutaitis* v. *United States*, 478 U.S. 1306, 1309 (1986) (Stevens, J., in chambers).

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[22] Michael Ollove, *How COVID-19 in jails and prisons threatens nearby communities, GCN* (July 10, 2020), https://gcn.com/articles/2020/07/10/covid-spread-prison-communities.aspx.

[23] *See* Radford, *COVID-19 Outbreak Confirmed at Prison in Bonne Terre,* Daily Journal Online (June 19, 2020), https://dailyjournalonline.com/news/local/govt-and-politics/covid-19-outbreak-confirmed-at-prison-in-bonne-terre/article_c7222072-e242-513d-871a-c63a9c30cfbc.html.

CONCLUSION

For all of these reasons, petitioners respectfully request that this Court stay the order of the Seventh Circuit pending petitioners' forthcoming petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29.5, I, Matthew Collette, hereby certify that a copy of the foregoing was served via e-mail and USPS mail on July 13, 2020 to:

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