

Testimony to the Presidential Commission on the Supreme Court of the United States
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I am honored by the Commission’s invitation to provide written responses (I) to criticisms that some commentators have levelled against the Supreme Court’s emergency-docket orders in recent federal execution litigation, and (II) to procedural modifications for such litigation that some commentators have proposed.¹ During my tenure at the Department of Justice, I worked extensively on the litigation over the thirteen federal executions carried out between July 2020 and January 2021. Acting under the supervision of Attorney General Barr and Deputy Attorney General Rosen, I served on a team of dedicated and conscientious public servants who had the privilege to help ensure that the Nation’s laws governing the federal death penalty were faithfully followed—by both the Executive and Judicial Branches. That experience provided insights about the details of individual cases as well as themes of the overall litigation. Although the information that follows is all based on publicly available records, it has not received much coverage by those commenting on the Court’s death-penalty docket. I hope this analysis will prove helpful to the Commission as it considers the criticisms and proposals that it has heard thus far.

Summary

I. The critical narrative that some have constructed about the Supreme Court’s federal death-penalty orders is belied by the record. The Court did, of course, summarily vacate several last-minute injunctions and stays of executions, based on expedited briefing and generally without providing a written explanation. But the critics err in accusing the Court of having rushed to judgment in derogation of established standards. In particular, they are wrong that the Court vacated lower-court reprieves that were justified by the existence of likely meritorious claims and the need to prevent the irreparable harm of death. That narrative mischaracterizes the strength and nature of the claims asserted, and it also misconstrues the standards governing relief from execution pending further litigation.

Under well-established Supreme Court precedent, to obtain a stay or preliminary injunction of an execution, the inmate must show a likelihood of both success on the merits and irreparable harm absent interim relief, and that showing also must, in a balance of the equities, outweigh the interest of the government and the public in promptly carrying out the execution. As detailed below, however, there was *only one, inmate-specific injunction* entered by the lower courts where some Justices dissented from the Court’s vacatur order on the (later-disproved) ground that the inmate was *likely to succeed* on the claim at issue. Put differently, in the Court’s seven other emergency orders that vacated the lower-court rulings postponing the executions of *12 of the 13 inmates*, the record reveals that no Justice ever actually claimed that any of those inmates had a significant possibility of ultimate success on the claims therein. Indeed, for three of those vacatur orders, no Justice dissented at all (as was also the case for twelve orders that

¹ I have appended to this testimony the specific questions that the Commission posed to me.

merely denied an inmate's application for relief after the court of appeals had already denied relief).²

These stark statistics should not be a surprise. On average, the inmates had been on death row for roughly 18 years by the time their executions were scheduled, and all of their sentences by that point had already been reviewed and upheld multiple times. The inmates thus generally no longer had any realistic basis to continue trying to oppose their executions outright, and they made few serious attempts to do so. Instead, the inmates were left to make procedural objections about the way in which their executions would be carried out. There were a variety of such objections—ranging from important (though unfounded) claims that the lethal-injection protocol would cause them unnecessary harm; to technical (and unpersuasive) claims that the federal death penalty statute required the government to mimic trivial state procedures; to contrived (and immaterial) claims that the federal drug laws required the government to obtain a prescription from a doctor for a drug intended to kill the “patient”; to patently flawed arguments that were sometimes deemed frivolous by courts and often rejected at every level of the federal judiciary.

At the end of the day, none of these claims satisfied the legal and equitable standards necessary to obtain a stay or injunction further delaying these already long-delayed sentences of death for murders that were unusually depraved even by capital standards, including the killings of eight children and a pregnant woman. The granting of relief was especially improper when, as repeatedly occurred during this litigation, it was entered just days (if not hours) before the scheduled execution. The Supreme Court has repeatedly admonished that such last-minute reprieves are inappropriate absent exceptional circumstances, given the risks of abuse and delay that they pose as well as the toll they take on all involved in litigating, administering, and witnessing the executions, including the victim's family members who have traveled to the execution facility. The Court therefore acted appropriately in applying the established standards to reverse lower courts in the eight instances where they erroneously granted relief to the inmates. Indeed, even as to the only one of those orders where some Justices dissented on the ground that the inmate was actually likely to succeed on the merits, the claim there that the inmate did not rationally understand the reason for his execution was later belied by the inmate's own final statement at his execution: he apologized to the victim's family for the pain he had caused, leaving no doubt that he properly understood the basis for his punishment.

It is thus critical to observe that, when some Justices dissented from (only) 4 of the other 7 orders vacating lower-court reprieves, their rationale was that certain questions were sufficiently *novel or significant* that lower courts should have *the discretion to consider them further* if they so wished. In fact, in some instances, those Justices had themselves voted to deny relief on the same claims when the lower courts had done so first. The mere presence, however, of novel or significant questions—let alone as deemed solely by lower courts—is not sufficient to justify stays or injunctions of executions under existing law. As noted, the current standards require the inmate to show a *likelihood* of both success on the merits and irreparable harm absent

² It is possible, I suppose, that one or more Justices may have dissented from these (or other) orders but declined to have their vote publicly noted. But given the death-penalty context and the number and variety of dissenting votes publicly noted in the Court's federal execution orders, it seems extremely likely that the only dissenting votes were the ones publicly noted.

interim relief supporting a favorable balance of the equities. The fact that a question is novel or significant, or that some courts may have genuine doubts about how it should be resolved, does *not* mean that the claim is likely to succeed on the merits. And when a claim is not likely to succeed—especially when it does not even challenge the lawfulness of the sentence or the risk of material harm in how the sentence will be carried out—the execution should not be postponed until the claim is finally rejected due merely to the existence of doubts and questions held by some judges. Postponement for that reason alone would fail to give sufficient weight to the compelling interest of the government and the public in timely executions. Especially given the lengthy delay before an execution is scheduled at all, further delaying an execution even for a limited time in these circumstances essentially undermines for that period the judgment of Congress, the Executive Branch, and the sentencing judge and jury that continued imprisonment is inadequate and only death is sufficient punishment for the most heinous of murders. At a minimum, it is hypocritical for commentators *skeptical of so-called “shadow docket” rulings* to fault the Court for *declining sua sponte to depart from the established standards* governing interim relief in executions.

All that said, I do agree that it would have been valuable for the Court to issue brief written opinions explaining its rationale for the emergency orders affirmatively granting relief. Doing so would have made clear to the litigants, the lower courts, and the public that those orders were fully consistent with the established standards. But while that would have been ideal, there are also significant costs for the Court in doing so in the context of emergency death-penalty litigation. In addition to the time constraints in formalizing a written opinion while a scheduled execution is pending, there is a more fundamental difficulty: the Court’s emergency-docket orders are principally designed to determine whether the pre-litigation state of affairs between specific parties should be judicially altered during the pendency of litigation, not to announce general rules with prospective effect of the type the Court issues after plenary review at the conclusion of litigation. Trying to issue written opinions explaining emergency-docket orders risks doing too much of the latter when the object is to do primarily the former. Although I may have preferred that the Court explain itself more, its judgment not to was a reasonable one.

II. The various modifications proposed by commentators should not be recommended by the Commission because they would put an unwarranted thumb on the scale in favor of capital inmates. The generally applicable standards for granting and reviewing stays and injunctions are already equipped, without the need for specific modifications, to account for the fact that an execution is irreversible. That fact is, of course, quite important as a general matter. But it will not be relevant in all cases (*e.g.*, where the claim does not challenge the validity of the sentence or even the risk of significant harm in carrying it out), and it should not be dispositive in any cases (*e.g.*, where the claim is plainly meritless or where the inmate or lower court has acted in a dilatory fashion to the detriment of the government and appellate courts). Simply put, the slogan that “death is different” cuts both ways: it also captures the unique problem of litigants who are highly motivated to pursue claims without regard for their legal and equitable merit because delay itself is its own form of success for them, though exceedingly harmful to the government and the public.

For example, granting an automatic stay so that every capital inmate receives a full round of litigation on administration-of-execution claims would allow even frivolous claims to cause

unjust delay after decades of appellate and post-conviction proceedings. In fact, of the 25 emergency applications that the Court considered in the federal execution litigation, the inmates' administration-of-execution claims in *10 applications* were rejected *unanimously* by the Justices, including 6 applications where the claims also had been rejected by both lower courts.

Likewise, adopting an absolute or strong presumption against vacating relief that has been entered by lower courts would turn the federal judicial hierarchy on its head. Appellate tribunals consisting of multi-member panels exist precisely because of the risks of erroneous rulings entered by single trial judges. Whether the judiciary should alter the pre-litigation state of affairs during the pendency of the litigation should be determined based on the considered judgment of the highest court to consider the question, not the lowest. To be sure, a persuasive opinion by a lower-court judge may in some circumstances withstand appellate scrutiny in an emergency posture, even if the appellate court thinks the claim may ultimately fail at the end of litigation—*e.g.*, because of the balance of equities, or the need to show at the preliminary stage only a significant possibility of success on the merits, or the deference properly due to trial court factual findings and certain discretionary choices. But there is no evident reason why a lower-court opinion whose reasoning fails to satisfy the requisite standards for interim relief should be blindly accepted by an appellate court. In fact, of the 15 emergency applications *where no Justice dissented*, there were *5 instances where a lower court had granted relief*: three that the Supreme Court itself set aside, and another two where the court of appeals had done so. Moreover, any presumption against vacating relief entered by lower courts would lead to inequitable disparities in the capital context: two inmates might raise the same legal claim in two different lower courts; one court might grant a stay and the other might not; and higher appellate courts would be unable to ensure consistent treatment based on the *proper* application of the stay standards. In fact, this scenario arose in the federal execution litigation, and the Supreme Court vacated the stay that would have granted an unjustified windfall to one inmate based on the same claim unsuccessfully raised by several other inmates who had since been executed.

The same basic problems apply, to a lesser degree, to the proposal to reduce the requisite merits showing for interim relief from a likelihood of success to “genuine doubt” as to legality. And it warrants emphasis that the fact that commentators have proposed this as a *procedural reform* confirms that the Supreme Court was applying rather than deviating from existing standards. In all events, the preferable way to address genuine doubts is to resolve them sooner. Inmates should be required to bring their claims as soon as they are available, and courts should be required to prioritize adjudicating requests for interim relief as soon as feasible. In that way, initial doubts can resolve into a determination of whether or not the inmate truly has a significant possibility of success, under the generally applicable standards for interim relief.

Finally, for similar reasons, the Commission should not propose that the Supreme Court reduce the number of votes necessary to stay or enjoin an execution, from a majority of five to a minority of four (whether directly or indirectly through a so-called “courtesy fifth”). Although the Court requires only four votes to grant certiorari, the decision whether to conduct plenary review of a lower-court judgment is an internal matter of judicial administration: deferring to a minority of the Court to make that limited decision does not itself change the legal status quo by altering the rights of litigants through the judicial power of the United States, and it also does not interfere with the right of the majority to resolve the parties' controversy as it deems appropriate.

By contrast, staying or enjoining a federal execution prevents the government from carrying out a death sentence authorized by Congress, obtained and defended by the Executive Branch, and entered by a local court and jury. If the Supreme Court is to take such consequential action, it should be done only if a majority of the Justices vested with the judicial power of the Court actually agrees with that action. To be sure, on a collegial, multi-member court, the persuasively articulated views of a minority may well cause the majority to reconsider their initial views as to the propriety of interim relief based on predictions of likely outcomes. But that practical point runs out where the minority's views, even after being heard and considered, have failed to persuade a majority of the proper disposition of the application under the governing standards.

Background

On July 25, 2019, the federal government announced the adoption of a new lethal-injection protocol. The Department of Justice adopted the protocol—which uses a single dose of pentobarbital—only after extensive study and consultation with medical experts and state execution personnel, including consideration of several alternative means to effectuate death. *See In re FBOP Execution Protocol Cases*, 955 F.3d 106, 110 (D.C. Cir. 2020) (per curiam). And the D.C. District Court twice rejected an arbitrary-and-capricious challenge to the Department's decision-making. *See In re FBOP Execution Protocol Cases*, 2020 WL 5594118, at *9-10 (D.D.C. 2020) (granting summary judgment to the government and describing earlier denial of preliminary injunction). That rejection is particularly notable because, as detailed below, the same court facially enjoined enforcement of the protocol five times on other grounds, all of which were reversed by either the D.C. Circuit (twice) or the Supreme Court (thrice).

Also on July 25, 2019, the government scheduled the first five executions to take place between December 9, 2019, and January 15, 2020. The initial set of inmates selected had all been sentenced to death for murdering children. And the eight other inmates later selected similarly had committed particularly depraved offenses, even assessed within the generally heinous set of federal capital murders. Because the nature of their offenses and the age of their convictions is highly relevant to the balance of equities when a court is considering whether to postpone their death sentences to permit further litigation, *see In re FBOP Execution Cases*, 955 F.3d at 126-28 (Katsas, J., concurring), here is a brief summary of the crimes of all 13 inmates:

- Daniel Lee was sentenced to death in 1999 for drowning an eight-year-old girl and her family during a robbery to fund a white-supremacist organization;
- Wesley Purkey was sentenced to death in 2003 for kidnapping, raping, and murdering a sixteen-year-old girl, after which he dismembered and burned her body;
- Dustin Honken was sentenced to death in 2004 for murdering the six- and ten-year-old daughters of the girlfriend of a witness to his drug trafficking, by lining all four of them up, shooting each one in the head, and then hiding their bodies;
- Lezmond Mitchell was sentenced to death in 2003 for murdering a nine-year-old girl and her 63-year-old grandmother during a carjacking, by first repeatedly stabbing the

grandmother in the girl's presence, then later slitting the girl's throat and crushing her head with rocks, after which he dismembered their bodies;

- Keith Nelson was sentenced to death in 2001 for kidnapping, raping, and murdering a ten-year-old girl, which he did because he expected to go to prison anyway on other charges;
- William LeCroy was sentenced to death in 2004 for raping and murdering a woman as part of a carjacking plan to flee the country to escape the terms of supervised probation after being released from prison for prior offenses;
- Christopher Vialva and Brandon Bernard were sentenced to death in 2000 for murdering two youth ministers as part of a robbery, by placing them in the trunk of their car, after which Vialva shot them both in the head (killing one instantly) and Bernard then lit the car on fire (suffocating the other);
- Orlando Hall was sentenced to death in 1995 for kidnapping, raping, and murdering the sixteen-year-old sister of a man he believed had reneged on a drug deal, by soaking her with gasoline and then burying her alive;
- Alfred Bourgeois was sentenced to death in 2004 for murdering his own two-year-old daughter, after systematically abusing and torturing her;
- Lisa Montgomery was sentenced to death in 2007 for murdering a pregnant woman in the course of cutting her open and kidnapping her baby while she was still alive;
- Cory Johnson was sentenced to death in 1993 for murdering seven people in furtherance of a large drug-trafficking conspiracy;
- Dustin Higgs was sentenced to death in 2000 for kidnapping and murdering three women after one of them rebuffed his advances.

Accordingly, at the time they were finally scheduled for execution, the inmates had already been on death row for between 13 and 27 years—on average, roughly 18 years. And as their dates of sentencing indicate, all were prosecuted during the Clinton or George W. Bush Administrations, and their death sentences were uniformly defended during those Administrations and the Obama and Trump Administrations. Consistent with the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3596(a), all the inmates scheduled for execution had already exhausted their direct appeals and one round of post-conviction review under 28 U.S.C. § 2255. Moreover, Congress has imposed stringent limits on any additional post-conviction review.³

³ See 28 U.S.C. § 2255(h) (permitting such motions only in extremely narrow circumstances); see also *id.* § 2255(e) (permitting a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 only where a § 2255 motion “is inadequate or ineffective to the test the legality of [the] detention”); *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007) (holding that a claim of incompetency to be executed may be brought after a first post-conviction petition is exhausted if brought as soon as it becomes ripe).

Thus, in commencing a third (or more) round of challenges to their executions, the inmates principally raised a variety of claims attacking the procedures the government used to schedule and carry out their death sentences, *not* the validity of those sentences themselves (though some of the latter claims were also brought). Many of the procedural claims were consolidated into a case in the D.C. District Court. *See In re FBOP Execution Protocol Cases*, No. 19-145 (D.D.C.) (Chutkan, J.).

Responses

I. Flawed Criticisms of the Federal Execution Litigation

A. As a threshold matter, the rush-to-judgment narrative fails to account for how the Supreme Court treated the first two challenges to the federal executions. The Court acted in a far more deliberate and transparent matter than its critics acknowledge on what would end up being the two most significant claims raised.

On November 29, 2019, the D.C. District Court issued a preliminary injunction against the executions, on the ground that adopting a uniform federal execution protocol violated the FDPA’s requirement that the Justice Department “shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed,” 18 U.S.C. § 3596(a). *See In re FBOP Execution Protocol Cases*, 2019 WL 6691814, at *3-8 (D.D.C. 2019). Although the government contended that this FDPA “manner of implementation” provision only required adherence to the top-line method of execution under the applicable state law—which was lethal injection in the relevant states—the district court concluded that the provision further incorporated all procedural details contained in state rules and policies. *See id.*

After the D.C. Circuit denied a stay pending appeal of the preliminary injunction, the government sought a stay from the Supreme Court, but on December 6, 2019, the Court *also denied* relief. *See Barr v. Roane*, No. 19A615, 140 S. Ct. 353 (2019) (per curiam). And notably, it did so notwithstanding that three Justices concluded that the government was “very likely to prevail” on the merits. *Id.* (statement of Alito, J., joined by Gorsuch & Kavanaugh, JJ.). The per curiam order did note, however, that the Court “expect[ed] that the Court of Appeals will render its decision [on appeal] with appropriate dispatch.” *Id.* On April 7, 2020, the D.C. Circuit vacated the injunction in a divided opinion. *See In re FBOP Execution Protocol Cases*, 955 F.3d 106, 111-13 (D.C. Cir. 2020) (per curiam). Judge Katsas agreed with the government’s position that the FDPA’s “manner of implementation” provision incorporates only the top-line method of execution under state law, *see id.* at 113-24 (concurring op.), while Judge Rao ruled for the government on the narrower ground that the provision does not incorporate the types of non-binding state policies upon which the inmates had relied to allege a conflict with the federal protocol, *see id.* at 129-44 (concurring op.). Judge Katsas’s concurrence also emphasized that, wholly apart from the merits, he would vacate the preliminary injunction because the balance of equities strongly favored the government. *See id.* at 126-29. By contrast, Judge Tatel would have affirmed the injunction, largely agreeing with the district court’s analysis, at least with respect to state policies concerning the actual effectuation of death. *See id.* at 145-52 (dissenting op.). After unsuccessfully seeking en banc rehearing in the D.C. Circuit, the inmates filed a petition for a writ of certiorari, which the Supreme Court denied on June 29, 2020—after full

briefing from the parties (including robust discussion of the merits), and over the dissents of *only two Justices* (Ginsburg and Sotomayor). See *Bourgeois v. Barr*, No. 19-1348, 141 S. Ct. 180 (2020). Accordingly, on this FDPA claim, the Court did not allow the government to proceed with the executions until the preliminary injunction was vacated through ordinary (albeit expedited) appellate review.

Meanwhile, on June 15, 2020, the government had re-scheduled three of the inmates for execution the week of July 13, 2020. Yet just six hours before the first execution was scheduled to occur, the D.C. District Court issued a second preliminary injunction against the executions—this time on the theory that the protocol’s use of a single dose of pentobarbital likely violated the Eighth Amendment because it was very likely to cause the inmates extreme and needless suffering. See *In re FBOP Execution Protocol Cases*, 471 F. Supp. 3d 209, 217-25 (D.D.C. 2020). The government immediately sought stays pending appeal from both the D.C. Circuit and the Supreme Court. After the D.C. Circuit denied relief later that day, the Supreme Court vacated the injunction a couple of hours after midnight, and the first execution proceeded slightly thereafter. See *Barr v. Lee*, No. 20A8, 140 S. Ct. 2590 (2020) (per curiam).

Importantly, though, the Court issued a brief per curiam opinion concluding that “[v]acatur of th[e] injunction is appropriate because, among other reasons, the plaintiffs have not established that they are likely to succeed on the merits of their Eighth Amendment claim.” *Lee*, 140 S. Ct. at 2591. The Court was already very familiar with single-dose pentobarbital because, as it explained, it had rejected the previous year an “as applied” Eighth Amendment claim by “a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter.” See *id.*; *Bucklew v. Precythe*, 139 S. Ct. 1112, 1131-33 (2019) (discussing evidence concerning the speed with which single-dose pentobarbital renders the inmate insensate). Indeed, the Court emphasized that single-dose pentobarbital had “become a mainstay of state executions”; “been used to carry out over 100 executions, without incident”; “been upheld by numerous Courts of Appeals against Eighth Amendment challenges similar to the one presented”; and “been repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal injection protocols of other jurisdictions.” *Lee*, 140 S. Ct. at 2591; see *id.* (quoting *Zagorski v. Parker*, 139 S. Ct. 11 (2018) (Sotomayor, J., dissenting) (noting that single-dose pentobarbital “is widely conceded to be able to render a person fully insensate”). Given that “backdrop,” held the Court, the parties’ “competing expert testimony”—about whether pentobarbital might in fact cause prisoners to feel a temporary drowning sensation just before they become fully insensate—was insufficient “to justify last-minute intervention by a Federal Court.” *Id.*; cf. *Bucklew*, 139 S. Ct. at 1125 (requiring a “measure of deference to a State’s choice of execution procedures” and prohibiting courts from acting like “boards of inquiry charged with determining ‘best practices’ for executions”). And more generally, the Court reaffirmed that “[l]ast-minute stays’ like that issued this morning ‘should be the extreme exception, not the norm.’” *Lee*, 140 S. Ct. at 2591 (quoting *Bucklew*, 139 S. Ct. at 1134)).

Although four Justices dissented from the Court’s order summarily vacating the injunction, *none* of them found, contrary to the majority, that the inmates were “likely to succeed” on their Eighth Amendment claim if allowed to litigate it to conclusion. Instead, the dissenters characterized the claim as raising “significant questions,” *id.* at 2592 (Breyer, J., dissenting, joined by Ginsburg, J.), that were “equally serious” as the FDPA claim that had

recently been *rejected*, *id.* at 2594 (Sotomayor, J., dissenting, joined by Ginsburg & Kagan, JJ.); *see also id.* at 2593 (noting that the court of appeals had denied a stay on the ground that the claim raised “‘novel and difficult constitutional questions’ that require[d] the benefit of ‘further factual and legal development’”). That lesser showing was insufficient under existing standards. As then-Judge Kavanaugh has explained, “under the Supreme Court’s precedents, a movant cannot obtain a preliminary injunction without showing *both* a likelihood of success *and* a likelihood of irreparable harm, among other things.” *Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (concurring op.); *see also id.* (explaining that the relevant precedents appeared to render “no longer ... viable” a “sliding-scale approach” employed by some lower courts, pursuant to which a strong irreparable harm somehow “could make up for a failure to show” a significant likelihood of success); *infra*, pp.16-18 (discussing those precedents further).

B. Of course, over the next 6 months and 12 remaining executions, the government continued to prevail in the Court but the Court stopped providing written opinions. In particular, the Court granted 7 more emergency requests by the government to reverse lower-court orders halting executions (thus making 8 total including *Lee*), and it denied 17 emergency requests by inmates to halt their executions after the courts of appeals refused to do so. Even without express explanations, though, it is evident from the face of the orders and claims that the last-minute efforts to halt the executions were inadequate on both legal and equitable grounds.

1. Legal inadequacy

a. Notably, 15 emergency orders were entered with *no dissent* from any Justice. Indeed, 10 of them rejected claims that also had been rejected by *both* lower courts below:

- 1) *Hartkemeyer v. Barr*, No. 20A11, 141 S. Ct. 196 (2020) (denying request for stay of execution claiming that two inmates’ priests did not wish to travel to the execution facility because of the COVID-19 pandemic);
- 2) *LeCroy v. United States*, No. 20A52, 141 S. Ct. 220 (2020) (denying request for stay of execution claiming that two of the inmate’s three attorneys did not wish to travel to the execution facility because of the COVID-19 pandemic);
- 3) *Mitchell v. United States*, No. 20A32, 140 S. Ct. 2624 (2020) (denying request for stay of execution claiming that the FDPA’s “manner of implementation” provision incorporated certain state execution protocols and notice requirements);
- 4) *Vialva v. United States*, No. 20A49, 141 S. Ct. 221 (2020) (denying request for stay of execution claiming that the FDPA’s “manner of implementation” provision incorporated certain state notice requirements);
- 5) *Hall v. Barr*, No. 20A100, 141 S. Ct. 869 (2020) (denying request for stay of execution claiming that the inmate had insufficient time to seek clemency);
- 6) *Purkey v. United States*, No. 20A12, 141 S. Ct. 196 (2020) (denying request for stay of execution that was made just hours after the Court without dissent had

already vacated a stay previously granted by the court of appeals on the same claim, *see infra*, p.11 (¶ 14));

- 7) *Lee v. Watson*, No. 20A7, 141 S. Ct. 195 (2020) (denying request for stay of execution claiming that the initial post-conviction motion under 28 U.S.C. § 2255 had been an “inadequate or ineffective” remedy to raise various trial objections);
- 8) *Hall v. Watson*, No. 20A101, 141 S. Ct. 870 (2020) (denying request for stay of execution claiming that the initial post-conviction motion under 28 U.S.C. § 2255 had been an “inadequate or ineffective” remedy to raise various trial objections);
- 9) *Mitchell v. United States*, No. 20A30, 141 S. Ct. 216 (2020) (denying request for stay of execution seeking to reopen initial post-conviction motion based on inapposite intervening precedent);
- 10) *Hall v. Barr*, No. 20A99, 141 S. Ct. 869 (2020) (for discussion of this case, which involved a recurring but shifting claim under the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 *et seq.*, *see infra*, pp.13-14 (¶ 22)).

There were 2 orders where no Justice dissented *even though the district courts had initially halted the executions* but were then summarily reversed by the courts of appeals:

- 11) *Peterson v. Barr*, No. 20A6, 141 S. Ct. 195 (2020). This order denied a request for a stay of execution claiming that certain family members of the victim *who opposed the execution* and intended to attend *solely as witnesses* did not wish to travel to the execution facility because of the COVID-19 pandemic. A unanimous court of appeals panel had expressly deemed that claim “frivolous” when summarily vacating a preliminary injunction granted by the district court. 965 F.3d 549, 552 (7th Cir. 2020).
- 12) *Montgomery v. Rosen*, No. 20A121, 141 S. Ct. 1144 (2021). This order denied a request for a stay of execution claiming that the government had misinterpreted its own regulation governing the rescheduling of executions. A unanimous court of appeals panel had held that the district court’s adoption of that claim was so contrary to the regulation’s “clear” text as to warrant summary reversal. No. 20-5379, 2021 WL 22316, at *1 (D.C. Cir. 2021) (*per curiam*).⁴

⁴ In particular, the regulation at issue provided that “*if the date designated for execution passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisoners when the stay is lifted.*” 28 C.F.R. § 26.3(a)(1) (emphasis added). As the court of appeals concluded, that regulation unambiguously “did not prohibit” the government from rescheduling an execution after a stay was entered but before the originally scheduled date, “because, at that time, the ‘date designated for execution’ had not yet ‘pass[ed]’” at all, let alone “by reason of [the] stay.” 2021 WL 22316, at *1. (Moreover, in stating that the government “shall” reschedule promptly “when the stay is lifted,” the regulation plainly imposed only a *duty* on the government to redesignate after that point, not a *prohibition* on doing so beforehand.)

Of special interest are the last 3 orders where no Justice dissented. They are some of the 7 decisive orders (in addition to *Lee*) where the Court has been criticized for *itself summarily vacating* lower-court decrees that otherwise would have halted executions:

- 13) *United States v. Montgomery*, No. 20A125, 141 S. Ct. 1233 (2021). This order vacated a stay of execution granted by the court of appeals *just two hours* before the scheduled execution, based on a claim that the inmate had raised in district court *only two days* prior. Moreover, the dilatory timing rendered particularly implausible the inmate's assertion that her criminal judgment included a provision purportedly granting an automatic stay that extended beyond the exhaustion of appeals and thus still remained in effect twelve years later. Nevertheless, after the district court had confirmed that its own order contained no such indefinite stay, a divided appellate panel had granted the inmate's request for a stay pending appeal in a one-line order containing no reasoning.
- 14) *United States v. Purkey*, No. 20A4, 141 S. Ct. 195 (2020). This order vacated a stay of execution granted by the court of appeals *after* it had ruled *in the government's favor* in the underlying appeal. Notably, the lower court's initial stay order did not find that the inmate was likely to obtain reversal through en banc rehearing or certiorari review; moreover, a subsequent order denying reconsideration of the stay expressly refused to speculate about what the Supreme Court would do.
- 15) *Barr v. Purkey*, No. 20A10, 141 S. Ct. 196 (2020) (for discussion of this case, which involved another instance of the FDCA claim, *see infra*, p.13 (¶ 22)).

b. That leaves the 9 emergency orders (in addition to *Lee*) where at least one Justice dissented. *Only 1* of those orders set aside a lower-court decree halting an execution over an objection by the dissenters that the inmate was likely to succeed on the claim if permitted to continue litigating. It thus bears repeating: for *12 of the 13 inmates* executed, no Justice ever claimed that any of those inmates was *likely to succeed* on any of the claims at issue in the several lower-court orders that the Supreme Court vacated to allow those executions to proceed.

To begin, 5 of the orders with dissents were in cases where *the courts of appeals had denied relief to the inmate* and a majority of the Supreme Court simply declined to take action:

- 16) *Bernard v. United States*, No. 20A110, 141 S. Ct. 504 (2020) (denying request for stay of execution claiming a right to raise in a second round of post-conviction review claims that trial prosecutors had suppressed exculpatory evidence and elicited knowingly false testimony);
- 17) *United States v. Johnson*, No. 20A130, 141 S. Ct. 1233 (2021) (denying request for stay of execution claiming a right to resentencing under the First Step Act and also a right to raise an intellectual-disability claim in a second round of post-conviction review);

- 18) *Bourgeois v. Watson*, No. 20A104, 141 S. Ct. 507 (2020) (denying request for stay of execution claiming a right to raise an intellectual-disability claim in a second round of post-conviction review);
- 19) *Montgomery v. Watson*, No. 20A124, 141 S. Ct. 1232 (2021) (denying request for stay of execution claiming incompetency to be executed);
- 20) *Johnson v. Rosen*, No. 20A131, 141 S. Ct. 1233 (2021) (denying request for stay of execution where inmates diagnosed with COVID-19 raised an as-applied Eighth Amendment claim based on the asserted interaction with pentobarbital).

Because cases in this posture are common in the capital context and do not appear to be the primary target of the criticisms of the Court’s federal execution orders, I will not focus on them further here.⁵

I will focus instead on the final 4 orders, which are the remaining decisive orders where the Court *itself summarily vacated* lower-court decrees that otherwise would have halted executions. These are precisely the orders where the criticisms of the Court would seem to be most relevant, because a divided Court used emergency rulings to clear the path for executions. And yet, as detailed below, for 3 of the 4 orders, the dissenting Justices did not assert that the inmate’s claim was likely to ultimately succeed—in fact, they themselves had *voted against two* of those claims in other orders. With a single exception, the dissenters instead contended only that, because the claims were novel or significant, the Court should allow lower courts to have more time to deliberate if they wished.

- 21) *Rosen v. Montgomery*, No. 20A122, 141 S. Ct. 1232 (2021)

This order involved whether the FDPA’s “manner of implementation” provision incorporates state rules concerning scheduling of executions. After the Supreme Court declined to review the D.C. Circuit’s divided opinion construing that provision, *see supra*, pp.7-8, four other circuit courts all held that the provision is inapplicable to (at least) rules concerning scheduling and other such policies that do not involve the actual effectuation of death, and the Supreme Court without dissent denied stay applications in three of those cases. *See Montgomery v. Rosen*, No. 21-5001, 2021 WL 116391, at *3 (D.C. Cir. 2021) (Katsas, J., concurring); *see supra*, pp.9-10 (¶¶ 3, 4, 11).

In this case, an inmate objected that she had received only 51 days’ notice from the rescheduled execution date (and 88 days from the originally scheduled date), rather than the 90 days that would be required *if* the FDPA incorporated the scheduling rules of the state in which she was sentenced. *See Montgomery*, 2021 WL 116391, at *1 (Katsas, J., concurring). She claimed that this harmed her because she had lost time to prepare a clemency petition and prepare herself for death, *see id.* at *6 (Millett, J., dissenting), notwithstanding the dozen years she had already spent on death row and the multiple prior executions that had been scheduled

⁵ For completeness, though: in the first two cases, both lower courts had denied relief; whereas in the last three cases, the courts of appeals had set aside interim relief granted by the district courts.

over the previous 16 months, *see supra*, pp.5-6. Consistent with the circuit court consensus as to this state-law scheduling rule, the district court rejected the claim, and the majority of an appellate motions panel denied a stay of execution pending appeal. *See* 2021 WL 116391 at *1-4 (Katsas, J., concurring). But one judge dissented, *see id.* at *4-6 (Millett, J., dissenting), and the court of appeals then granted rehearing en banc as well as a stay pending appeal by a 5-4 vote, *less than 24 hours* before the scheduled execution, *see* 2021 WL 112524, *1 (D.C. Cir. 2021) (en banc). Notably, the en banc court did so despite having *denied* en banc rehearing by a 5-4 vote on “the identical question” just a month before when raised by two other inmates (who did not even seek Supreme Court review of the claim and had since been executed). *See Montgomery*, 2021 WL 116391, at *1 (Katsas, J., concurring) (citing prior unpublished order).

The government immediately sought vacatur of the en banc court’s stay, and the Supreme Court granted that relief. *See Rosen v. Montgomery*, No. 20A122, 141 S. Ct. 1232 (2021). Although Justices Breyer, Sotomayor, and Kagan dissented, they did not assert that the FDPA claim was likely to succeed. *See id.* In fact, at the time, they did not explain their reasoning at all, let alone reconcile their votes with their earlier votes to deny stay requests in the cases where other circuit courts had rejected the same claim. *See id.* But in later opinions that generally catalogued their objections to the Court’s treatment of the federal execution litigation, they suggested that they had voted for the stay in this case simply because the issue was a “basic, recurring” one that the D.C. Circuit (belatedly) wanted to “decide ... en banc.” *See United States v. Higgs*, No. 20-927, 141 S. Ct. 645, 648-49 (2021) (Sotomayor, J., dissenting); *see also id.* at 645-46 (Breyer, J., dissenting).

22) *Barr v. Hall*, No. 20A102, 141 S. Ct. 869 (2020).

This order involved the third and final instance of the claim that the federal execution protocol violated the FDCA. It is thus best understood in light of the two orders that preceded it, which demonstrate how the FDCA claim was litigated in these cases.

First, at roughly 5:00 am on July 15, 2020, the morning of the second scheduled execution, the D.C. District Court issued a preliminary injunction based on the FDCA claim. *See In re FBOP Execution Protocol Cases*, 474 F. Supp. 3d 171, 179-185 (D.D.C. 2020). This third injunction by that court against the protocol—after its vacated FDPA and Eighth Amendment injunctions—was issued *roughly 26 hours* after the Supreme Court’s order in *Lee* had reiterated to lower courts that “[l]ast-minute stays’ ... ‘should be the extreme exception, not the norm.’” 140 S. Ct. at 2591 (quoting *Bucklew*, 139 S. Ct. at 1134)). As with *Lee*, the government immediately sought stays pending appeal from both the D.C. Circuit and the Supreme Court. And once again, after the D.C. Circuit denied relief later that day, the Supreme Court summarily vacated the injunction a couple of hours after midnight, and the second execution proceeded. *See Barr v. Purkey*, No. 20A10, 141 S. Ct. 196 (2020). This time, however, the Court did not provide a rationale for its agreement with the government, which again had challenged the injunction on legal, equitable, and timeliness grounds. And in even starker contrast with *Lee*, this time *no Justice dissented*. *See id.*

Second, a couple of months later—and after five more inmates had been executed—the D.C. District Court entered final judgment on the FDCA claim. It granted summary judgment to

the inmates on the merits question whether the execution protocol violated the FDCA's prescription requirements, but denied them an injunction based on their failure to establish irreparable harm from the asserted violation. *See In re FBOP Execution Protocol Cases*, 980 F.3d 123, 129-30 (D.C. Cir. 2020) (per curiam). On appeal, a fractured panel of the D.C. Circuit affirmed in both respects. Judges Millett and Pillard held that circuit precedent compelled the conclusions that lethal-injection drugs are subject to the FDCA's prescription requirements and that the inmates could attack the protocol on that basis despite the FDA's exclusive authority to enforce the FDCA. *See id.* at 135-37. On each of those conclusions, Judge Rao disagreed as to circuit precedent and agreed with the government instead on first principles. *See id.* at 143-47 (op. dissenting in relevant part). Then, however, Judges Millett and Rao affirmed the denial of injunctive relief, emphasizing that the district court had "specifically found" that the inmates' argument for irreparable harm from "the unprescribed use of pentobarbital" was not supported by "the evidence in the record." *See id.* at 137 (per curiam); *see also id.* at 129 (noting that the district court had previously entered an FDCA-based injunction (her fourth) without making any findings of irreparable harm, which the D.C. Circuit had summarily vacated for that reason). Judge Pillard disagreed, arguing that the district court's finding was tainted by an overbroad reading of *Lee* that the panel had rejected in a different part of its opinion reversing the dismissal of the inmate's Eighth Amendment claim at the pleading stage. *See id.* at 139-42. In light of the denial of injunctive relief, the inmates sought a stay of execution from the Supreme Court. But the Court denied relief. *See Hall v. Barr*, No. 20A99, 141 S. Ct. 869 (2020). And once again, *no Justice dissented. See id.* That should have disposed of the FDCA claim.

But even though the D.C. Circuit had affirmed the denial of injunctive relief just the day before, the D.C. District Court reversed course and *granted* an FDCA-based stay of execution *less than three hours* before the next scheduled execution. *See In re FBOP Execution Protocol Cases*, 2020 WL 6799129, at *1 (D.D.C. 2020). This fifth order barring enforcement of the protocol was based on the district court's desire for time to "reconsider[]" its own finding of lack of irreparable harm based on its assertion that the inmates had established a significant possibility of showing that it had previously erred by relying on a flawed view of the Eighth Amendment. *See id.* at *3. In other words, the district court wanted to consider granting injunctive relief based on the very argument in Judge Pillard's dissent that Judges Millett and Rao had *rejected* in affirming the denial of injunctive relief. In addition to flouting the D.C. Circuit's mandate, the court provided no explanation of how the appellate court's reversal of the dismissal of the Eighth Amendment claim at the *pleading stage* could somehow rehabilitate the inmates' prior failure to establish irreparable harm *after a full evidentiary hearing*, let alone justify a last-minute "stay" that *still* failed to make the contrary finding. *See id.* Upon the government's motion, the Supreme Court summarily vacated that remarkable order. *See Barr v. Hall*, No. 20A102, 141 S. Ct. 869 (2020). But this third time around, Justices Breyer, Sotomayor, and Kagan dissented. *See id.* The order provides no explanation for their change in position. Nor do they ever mention the FDCA trilogy in their *Higgs* dissents. *See* 141 S. Ct. at 645-47 (Breyer, J., dissenting); *id.* at 647-52 (Sotomayor, J., dissenting).

23) *United States v. Higgs*, 20A134, 141 S. Ct. 645 (2021).

This order involved a different aspect of the FDPA's "manner of implementation" provision. An inmate had been sentenced to death in Maryland federal district court, but the

State of Maryland had since repealed its own death penalty and thus its law no longer “prescribed” a “manner” for “implementation of the sentence” at all. *See* 18 U.S.C. § 3596(a). Congress anticipated this potential problem in the FDPA, and so it mandated designation of an alternate State’s law: “If the law of the State [of sentencing] does not provide for the implementation of a sentence of death, the [sentencing] court shall designate another State, the law of which does provide for the implementation of a sentence of death.” *See id.*

Accordingly, on August 4, 2020, the government filed a motion asking the Maryland district court to designate Indiana (where the federal execution chamber is located) as the alternate State under the FDPA. Five months later, on December 29, 2020—less than three weeks before the scheduled execution date of January 15, 2021—the district court denied the motion. Although the court acknowledged that “Indiana is an appropriate place to carry out the execution,” the court nevertheless held that it lacked authority to designate an alternate State *after the sentence became final*, even though Section 3596(a)’s alternate-designation provision does not expressly contain any such temporal limitation. *See United States v. Higgs*, No. 98-520, 2020 WL 7707165, at *3-7 (D. Md. 2020). The court acknowledged that its construction of the FDPA would mean that the State of Maryland’s repeal of its own death penalty also had effectively nullified existing *federal* death sentences in the State—a result that the court did not dispute would provide the inmate with an “absurd” “windfall.” *See id.* at *7.

The government immediately sought appellate relief in the court of appeals and negotiated a schedule with the inmate that would allow the case to be decided before the scheduled execution. But then, on January 7 and 8, the appellate panel, over the repeated dissents of Judge Richardson, scheduled oral argument for January 27 and declined to resolve the case before January 15. *See United States v. Higgs*, No. 20-18, Dkt. 15, 28 (4th Cir.).

In these circumstances, the government filed a petition for a writ of certiorari before judgment, asking the Supreme Court to summarily reverse the district court and direct it to comply with its duty under the FDPA to designate Indiana as the alternate State. The government argued that such extraordinary relief was warranted in light of the clear error by the district court, the unnecessary delay by both lower courts, and the government’s compelling interest in timely implementation of death sentences. *See* S. Ct. Rule 11. The Court granted the government’s request. *See Higgs*, 141 S. Ct. at 645. Justices Breyer, Sotomayor, and Kagan dissented, but their disagreement was limited in a critical respect. Although they objected to resolving the alternate-designation question in this emergency posture, *see id.* at 646-47 (Breyer, J., dissenting); *id.* at 647-48 (Sotomayor, J., dissenting), they did not dispute that the government’s likelihood of success on the merits was very high. They said only that the question was “open and novel,” *id.* at 648 (Sotomayor, J., dissenting), and that the inmate’s position was “complex” and not “frivolous,” *id.* at 645-46 (Breyer, J., dissenting).

24) *Barr v. Purkey*, No. 20A9, 140 S. Ct. 2594 (2020).

Finally, this was the *only* order where the Court vacated a lower-court decree halting an execution over the objection of dissenting Justices who asserted that the inmate was likely to succeed on the claim at issue. In particular, the D.C. District Court had issued a preliminary injunction on an inmate’s claim that he was incompetent to be executed—an injunction that the

court issued on the morning of the scheduled execution and at roughly the same time as its first FDCA injunction. *See Purkey v. Barr*, 474 F. Supp. 3d 1, 8-12 (D.D.C. 2020); *supra*, p.13 (¶ 22). After the D.C. Circuit denied a stay pending appeal, the Supreme Court summarily vacated the injunction. *See Barr v. Purkey*, No. 20A9, 140 S. Ct. 2594 (2020). This time, however, Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, issued a written dissent. After describing the government’s procedural and substantive objections, the opinion laid out the reasons why the dissenters concluded that the inmate was likely correct and would of course suffer irreparable harm if executed despite being incompetent. *See id.* at 2597-99. In particular, the dissent heavily emphasized the testimony of a psychiatrist that, while the inmate could “recite the fact that his execution is for the murder of Jennifer Long,” he nevertheless “lacks rational understanding of that fact” and can only “parro[t]” it. *See id.* at 2599. Yet that testimony was later contradicted by the fact that, when asked at the time of execution “if he wanted to make a statement before the lethal injection, [the inmate] apologized to both Long’s family and his daughter, saying he ‘deeply’ regretted the pain he caused to all of them.” https://www.washingtonpost.com/national/wesley-purkey-execution-terre-haute-supreme-court/2020/07/16/e074dbca-c75f-11ea-b037-f9711f89ee46_story.html.

c. As demonstrated above, the Supreme Court did not repeatedly set aside lower-court orders blocking executions over objections by dissenting Justices that the inmates were likely to succeed on the claims at issue. Rather, the dissenters’ objection was that the Court should allow lower-court judges to delay executions while further considering claims that *they deemed important or difficult*. As Justice Sotomayor acknowledged, “[w]ith due judicial consideration, . . . some or even many of these executions may have ultimately been allowed to proceed.” *Higgs*, 141 S. Ct. at 648 (dissenting op.). Nevertheless, she and Justice Breyer insisted that (some of) the government’s applications should have been denied simply because they presented “novel or significant legal question[s]” that lower courts should have been allowed to consider further if they wished. *Id.* at 646 (Breyer, J., dissenting); *see id.* at 647-49, 649-50 (Sotomayor, J., dissenting). But even if a claim is difficult or important, that alone does not mean it has a *significant possibility of success*. The dissenters’ suggestion that the executions should have been postponed anyway is contrary to established law and would have been a major change for the Court to adopt in any circumstance, let alone in an emergency-docket order.

Under well-established, generally-applicable standards governing interim relief pending litigation, the desire to give further consideration to claims that do not at least have a significant possibility of success on the merits is a legally insufficient justification to postpone an execution. To obtain either a stay or a preliminary injunction of an execution, the inmate must show (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent interim relief; and (3) a balance of equities in which the harm to the inmate if interim relief is denied outweighs the harms to the government and the public if interim relief is granted. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Winter v. NRDC*, 555 U.S. 7, 20 (2008).⁶ The Supreme Court has made clear

⁶ As a technical matter, the distinction between a “stay” and a “preliminary injunction” is that “a stay operates upon the judicial proceeding itself . . . by temporarily divesting an order of enforceability,” whereas an “injunction” is “directed at someone[] and governs that party’s conduct.” *Nken*, 556 U.S. at 428. Thus, in the capital context, when an inmate is challenging the validity of the death sentence itself, he may seek a stay of the sentence pending litigation, so long as he has properly invoked the specific scheme of post-conviction remedies that Congress has provided. *See Hill v. McDonough*, 547 U.S. 573,

time and again that “a strong showing that [the applicant] is likely to succeed on the merits” is “critical,” such that “[m]ore than a mere ‘possibility’ of relief is required.” *Nken*, 556 U.S. at 434; accord *Davis*, 571 F.3d at 1295-96 (Kavanaugh, J., concurring) (citing *Nken*; *Winter*, 555 U.S. at 20-24; and *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)).

The Supreme Court also has clarified that the requirement is no less stringent in the capital context: “like other stay applicants, inmates seeking time to challenge the manner in which the [government] plans to execute them must ... [make] a showing of a significant possibility of success on the merits.” *Hill v. McDonough*, 547 U.S. 573, 579 (2006). Indeed, the indispensability of likelihood of success is, if anything, *more* important for stays and injunctions of executions. “[T]he decision that capital punishment [is] the appropriate sanction” in a particular federal prosecution “is an expression of the community’s belief”—shared by the Nation’s politically accountable officials—“that certain crimes are themselves so grievous an affront to humanity that the only adequate response [is] the penalty of death” rather than even life imprisonment. *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (plurality op.). The Court thus has recognized that, because even continued imprisonment fails to implement the proper punishment for the crime, “the [government] and the victims of crime have an important interest in the *timely* enforcement of [the death] sentence.” *Hill*, 547 U.S. at 584 (emphasis added); cf. *Higgs*, 141 S. Ct. at 646 (Breyer, J., dissenting) (objecting that “the basic penological justifications for imposing the death penalty in the first place” are “weake[ned]” by protracted “delay”). Thus, while death is of course irreversible, that alone does not warrant delaying an execution to adjudicate legal claims that lack any significant prospect of ultimate success.

Nor should the analysis generally change when an appellate court is deciding whether to vacate or stay the previous entry of a stay or preliminary injunction by a lower court. “In assessing [a] lower court[’s] exercise of equitable discretion, [an appellate court] bring[s] to bear an equitable judgment of [its] own.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam) (citing *Nken*). Thus, as the Court’s citation to *Nken* makes clear, the question for an appellate court is simply whether the party challenging the stay or preliminary injunction itself has a likelihood of success in that challenge, irreparable harm from the order, and a favorable balance of equities. To be sure, the lower court’s grant of relief is not irrelevant to the analysis. Persuasive legal reasoning, key factual findings, and reasonable discretionary judgments will of course affect whether the government can satisfy its burden under *Nken* to demonstrate a likelihood of success on appeal. But there is no evident reason why an appellate court, let alone the Supreme Court, should defer to a lower court’s interim ruling *even when it is otherwise persuaded* that the government has satisfied the *Nken* standard.

To the contrary, in one significant respect, it is *easier* for the government to satisfy the *Nken* standard on appeal than in district court. Because “a movant cannot obtain a preliminary injunction [or a stay] without showing *both* a likelihood of success *and* a likelihood of

579 (2006). By contrast, when an inmate challenges only the way in which a lawful death sentence will be carried out, he may file an ordinary civil suit to permanently enjoin the relevant official from engaging in the challenged action and may seek a preliminary injunction in the interim. See *id.* At least in district court, the standards essentially overlap, see *Nken*, 556 U.S. at 434 (citing *Winter*, 555 U.S. at 24), though there are potentially significant procedural distinctions on appeal, see *infra*, p.18 n.7.

irreparable injury” that supports a favorable “balancing of the equities,” *Davis*, 571 F.3d at 1288 (Kavanaugh, J., concurring), it follows that the government can demonstrate a likelihood of success on appeal by showing that the inmate likely failed to meet its burden on *either* ground below, *In re FBOP Execution Protocol Cases*, 955 F.3d at 126 (Katsas, J., concurring) (“appellate courts may reverse preliminary injunctions where, apart from the merits, the district court’s equitable balancing constituted an abuse of discretion”) (citing *Winter*, 555 U.S. at 24-26)); *see Winter*, 555 U.S. at 32 (emphasizing that a favorable “balance of equities” is required even for a “permanent” injunction, which “is a matter of equitable discretion” and “does not follow from success on the merits as a matter of course”).⁷

Again, the Supreme Court has made clear that appellate principles apply the same in the capital context. For example, when a district court “enjoined [an inmate’s] execution without finding that he ha[d] a significant possibility of success on the merits,” the Court deemed that a *per se* abuse of discretion under *Hill* and summarily vacated the injunction. *See Dunn v. McNabb*, 138 S. Ct. 369 (2017); *see also Brewer v. Landrigan*, 562 U.S. 996 (2010) (summarily vacating an order that restrained an execution even though gaps in the evidentiary record “left [the district court] to speculate as to the risk of harm” in an Eighth Amendment challenge).⁸

Especially in light of settled precedent, it was appropriate for a majority of the Court to reject the dissenting Justices’ implicit request to loosen the established standards governing interim relief from execution. Procedurally, shifting the rules on the eve of scheduled executions would have been *exactly* the type of avulsive legal change that critics insist should *not* occur

⁷ There is one additional way in which the standard on appeal is properly more onerous for inmates than the government. When an inmate has failed to obtain interim relief in district court, it may not be able to seek a “stay” because there may be no “order” that it can “divest . . . of enforceability,” *Nken*, 556 U.S. at 428, to obtain relief: in particular, “staying” the *denial* of relief accomplishes nothing, and the inmate will be unable to stay the underlying *death sentence* unless it is challenging the validity of the sentence itself and has invoked the proper post-conviction remedies to do so, *Hill*, 547 U.S. at 579. So when instead the inmate is challenging only the way in which a lawful death sentence is being carried out, and he has failed to obtain a preliminary injunction in district court, the only proper remedy is an injunction pending appeal. And critically, an appellate injunction “demands a significantly higher justification than a request for a stay, because unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010) (quotation marks omitted); *see Wisconsin Right to Life, Inc. v. FEC*, 542 U.S. 1305 (2004) (Rehnquist, J.) (noting that the Supreme Court’s power to issue injunctions pending appeal is “only appropriately exercised” where legal rights are “indisputably clear”). That higher standard is relevant here because, in some of the cases, the lower courts rejected the inmates’ challenges to the way their death sentences were being carried out—and thus the inmates’ applications for appellate relief were actually subject to the appellate-injunction standard, even though inmates and courts sometimes mislabeled the applications as requests for “stays.”

⁸ Technically, these orders by the Supreme Court, like the ones in the federal execution litigation, did not just “stay” the lower-court reprieves, but vacated them outright. Arguably, that requires a greater showing than under *Nken*—namely, that the government *actually* succeeded on the merits of its appeal, on legal and/or equitable grounds. But the distinction is essentially academic in this context: the government’s appellate arguments did not depend on *Nken*’s lower “likelihood” standard; moreover, even if the lower-court order were only “stayed,” the ensuing execution would moot that order and require it to be vacated then. *See United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950).

through emergency-docket rulings lacking full briefing and argument. And substantively, when no significant likelihood of success exists, forcing the government to postpone the execution until the claim is eventually but predictably denied causes delay that is needless and harmful. *See supra*, p.17; *infra*, pp.22-24.

2. Equitable inadequacy

As just discussed, equitable considerations are an important part of the balance when granting and reviewing interim relief. Yet the critical narrative about the Supreme Court's death-penalty orders also has distorted the true equitable balance. On one hand, the asserted harms to the inmates were much less serious than suggested: most of the claims were not challenging the substantive validity of the death sentence itself, but rather were asserting procedural objections to the administration of the sentence that, even if correct, would not be likely to prevent any material concrete harm. And on the other hand, further postponing already long-delayed executions is no minor matter of timing: it imposes significant harms on the government and the public, especially when it occurs at the last minute.

It thus warrants considerable emphasis that death itself was not the asserted harm that flowed from most of the legal violations claimed. As noted, federal executions are not scheduled until after the inmate has already exhausted a direct appeal and one round of post-conviction review, and Congress has imposed stringent limits on any further post-conviction review. *See supra*, p.6 & n.3. Accordingly, most of the execution challenges that were raised at this third, post-scheduling stage no longer challenged the validity of the underlying death sentence at all, let alone in any serious way. As detailed above, of the 25 emergency applications: 7 involved validity claims that had been rejected by the court of appeals, *see supra*, pp.10-12 (¶¶ 7-9, 16-19); and 2 involved a single validity claim where the court of appeals initially rejected the claim but nevertheless granted a stay, which was vacated by the Supreme Court with no dissent from any Justice, and then a stay was denied by both courts when the inmate tried to re-raise the claim, *see supra*, p.9, 11 (¶¶ 6, 14). The only remaining validity claim was the competency claim in *Purkey*. *See supra*, pp.15-16 (¶ 24). So, here too, that claim is the *sole instance* where the Court set aside a lower-court order blocking a possibly invalid death sentence—and again, the inmate's own final statement demonstrates that the sentence was valid.⁹

The 15 remaining emergency applications involved claims that challenged only various procedures for scheduling and implementing the executions. I described the full set of claims above, but it suffices here to observe that the claims spanned an equitable spectrum. On one end, inmates raised claims based on exceedingly technical (and tendentious) readings of the government's obligations that presented no serious allegations of material harm from the asserted violations. For example, the inmates claimed (erroneously) that the FDCA prohibited carrying out their executions using pentobarbital unless the government took the step of getting a doctor

⁹ Technically, the *Higgs* claim—that Maryland's repeal of its own death penalty had effectively nullified the government's ability to carry out the inmate's valid federal death sentence, *see supra*, pp.14-15 (¶ 23)—was also seeking to bar execution entirely. But that claim, which concededly rested on an “absurd,” “windfall”-creating (mis)interpretation of the FDPA, is not remotely comparable as an equitable matter to a claim that an inmate's death sentence is *itself* invalid. And in all events, the claim was so meritless that the Supreme Court granted certiorari before judgment to summarily reverse it.

to write a prescription for a substance intended to kill the “patient”—and they continuously pressed this claim notwithstanding their repeated failure to establish any irreparable harm from the unprescribed use of pentobarbital. *See supra*, pp.13-14 (¶ 22). Likewise, the inmates claimed (erroneously) that the FDPA prohibited carrying out their executions unless they got the same amount of notice as they would have received if convicted in state court—and they continuously pressed this claim even though it objected only to the loss of a few days’ or weeks’ earlier notice of the scheduled date, which was not actually material to their ability to bring any final challenges or otherwise order their affairs. *See supra*, pp.12-13 (¶ 21). And even on the other end of the spectrum, where inmates raised Eighth Amendment objections to the lethal-injection protocol that at least tried to allege a serious risk of harm, they produced only contested evidence that failed to persuade. *See supra*, pp.8-9. In short, especially given the weakness of the claims, neither abstract technical objections divorced from concrete material harm nor debates between experts about physiological effects came close to outweighing the significant harms to the government and the public from even a short postponement of these executions.

The 13 inmates had exhausted decades of due process in challenging the judgment of Congress, the Department of Justice, and a jury of their peers that death, rather than life imprisonment, was the appropriate punishment for their crimes, which were shockingly extreme, cruel, and gratuitous even as capital murders go, *see supra*, pp.5-6. As Judge Katsas put the point, even if the length of additional delay from further litigation would not be a long amount of time considered in isolation, “decades of litigation-driven delay” had already significantly frustrated the “important interest in the timely enforcement” of these death sentences—it would have turned equity on its head to allow these brutal murderers to “continue to litigate with a vengeance, ostensibly over the manner of their executions, but with the obvious and intended effect of delaying them indefinitely.” *See In re FBOP Execution Cases*, 955 F.3d at 126-28 (concurring op.). All the more so to the extent that their (legally dubious) claims were not even objecting to “execut[ion] by lethal injection” or persuasively seeking “to prevent unnecessary suffering,” but merely insisting, for example, that “the federal government replicate[] every jot-and-tittle of the relevant state execution protocols.” *See id.* at 128-29.

Finally, the harms to the government are especially acute for “last-minute” reprieves, which were “the norm” rather than “the extreme exception” throughout the litigation. *Compare Lee*, 140 S. Ct. at 2591, *with supra*, pp.8, 11-16 (¶¶ 13, 21, 22, 24) (citing at least six orders entered less than 24 hours before scheduled executions, including three less than 6 hours). Such “last-minute attempts to manipulate the judicial process” can be “abusive.” *Gomez v. U.S. Dist. Ct. for N.D. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam). Claims by an inmate or conclusions by a district court that may appear colorable or even strong on cursory inspection may well fall apart once the government and appellate courts have time to review them, but the delay itself will have been worth it for a capital inmate. For that reason, the Supreme Court has mandated that, even apart from the merits, there is “a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.” *Hill*, 547 U.S. at 584. And the same should go where, as in *Lee* itself, a district court does not decide a previously filed claim until the last minute: although the inmate is not necessarily at fault in that scenario, neither is the government, and putting the onus on the inmate to demand an expeditious ruling (including by seeking a writ of mandamus if necessary) is the best way to counteract a capital defendant’s inherent incentive to draw out eve-

of-execution litigation. Moreover, and perhaps even more importantly, last-minute reprieves are harmful to the participants in an execution. To carry out the solemn task of executing inmates in a safe and dignified matter, government personnel, members of the victim's family, and other attendees must travel from across the country to the federal lethal-injection chamber in Indiana. A string of last-minute stays and vacatur, often coming just hours before the scheduled time and pushing the execution deep into the night, is both physically and mentally exhausting for all involved. They "deserve better." *Bucklew*, 139 S. Ct. at 1134.

C. All that said, there is one criticism of the emergency death-penalty orders with which I partially agree in theory, though ultimately not very much in practice: the concern that the Supreme Court's orders affirmatively granting relief did not include written opinions explaining their rationale.

In theory, it would have been ideal for the Court to have provided at least a short written summary confirming its reasoning for the seven other orders besides *Lee* in which it altered the lower courts' disposition of the case. Precisely because the Court's orders were all consistent with the governing legal and equitable standards, it would have provided a valuable benefit to the litigants, the lower courts, and the public to make even a brief showing along those lines, as the Court did in *Lee*. And indeed, it would have been a benefit to the Court itself, by foreclosing the accusations that these orders departed from established procedural standards, when instead they merely applied those standards in ways with which some critics substantively disagree.

But what is ideal in theory is not always reasonable in practice, and so it seems here as an external observer. The Court was under incredible time constraints in these cases, because lower-court rulings were frequently issued just hours before the scheduled execution. And those time constraints presented both obvious and subtle difficulties with providing a written opinion. Issuing written opinions significantly increases the length of time for the Court to issue orders, because of logistical differences in the publication review process, not to mention the key substantive difference of needing to circulate precise language among the Justices for approval. More consequential is the fact that even Justices who agreed with the government's application may well have had varying views as to the precise legal and/or equitable grounds for that result. Even setting aside the time that would be required either to determine a common rationale or issue a splintered opinion, the Court may well have desired *not* to keep issuing the type of clear pronouncement in *Lee* that would have significant prospective effects.

It is important to recognize a critical feature about the Court's emergency docket that applies not just to executions but to all other types of applications the Court considers: Unlike the Court's plenary docket, which is principally designed to establish *important legal precedent of nationwide consequence*, the Court's emergency docket is principally designed to assess whether *the pre-litigation state of affairs between specific parties* should be judicially altered during the pendency of litigation. It is, in other words, an exercise of the Court's supervisory jurisdiction over the federal judiciary, to make sure that, where sufficiently important laws or policies are at stake, the Court itself retains the final word over whether or not they can take effect despite litigation that challenges them. So understood, providing clear guidance about the Court's legal and equitable rationale is not the point—and indeed may be the opposite of the point. The Court's principal objective is to determine the party-specific question whether it is

appropriate, under the governing standards, for the judiciary to alter the pre-litigation state of affairs during the pendency of the litigation, without necessarily determining, or even unduly influencing, how the general legal question should ultimately be resolved after plenary review. To be sure, in the execution context, the pre-litigation state of affairs is that the government has the right to execute the inmate pursuant to the capital judgment, so declining to judicially alter that relationship may well moot the claim. But the fundamental point remains the same: whether or not the Court may ultimately resolve the general legal question on plenary review at some later time (*e.g.*, because an order delaying the execution is granted on other claims, or because the claim can be litigated outside the posture of a pending execution), the Court at this time may just want to ensure that lower courts are acting consistently with its own view of the party-specific question whether judicial alteration of the pre-litigation state of affairs is warranted in this important type of case.

Accordingly, an erroneous lower-court order on a stay or injunction presents a dilemma for the Court. It has three options, with varying benefits and costs: (1) The Court can set aside the order with a written opinion explaining why the order was erroneous—that achieves the appropriate party-specific result, and it does so in the most defensible fashion, but it may end up having a greater effect on lower-court litigation and the Court’s own future plenary review than is desirable. (2) The Court can set aside those rulings but say nothing—that also achieves the appropriate party-specific result, but is subject to criticism for the lack of explanation. (3) Or the Court can simply deny relief—that tolerates an erroneous judicial alteration of the pre-litigation state of affairs between the parties, in order to avoid making too much law before the Court is ready to do so, much as it declines to exercise plenary review over erroneous decisions even for discretionary reasons. In my view, the third option should be off the table in the emergency-application context, especially for executions: Whatever the appropriate standard is for granting or reviewing interim orders involving executions, the Court should apply that standard internally and rule on applications accordingly. At that point, the choice between the first and second options—whether and how to publicly explain its ruling—comes down to weighing the benefits and costs in a particular case of making pronouncements about the applicable legal and equitable factors that will have prospective consequences beyond ensuring the appropriate party-specific result in the matter at hand. While I may wish the Court weighed that balance in favor of a few more opinions like *Lee*, its contrary decision is certainly reasonable given the posture and timing.

II. Misguided Proposals to Modify Litigation Standards

In my opening summary, I laid out the reasons (A) that the generally applicable standards for interim relief already properly account for the ways that the uniqueness of death may, depending on the circumstances, either cut in favor of *or* against the entry of a stay or injunction of execution; and (B) that each of the proposals to add a thumb on the scale in favor of capital inmates is unsound in theory and imprudent in practice. *See supra*, pp.3-5. Below, I will elaborate on some of those points, using the federal execution litigation to illustrate.¹⁰

¹⁰ Of course, most, if not all, of the concerns discussed would also apply to state executions if the Commission chooses to address them too. Indeed, the concerns would apply with even greater strength, given the added federalism objections in that context.

First, the proposal for an automatic stay so that every capital inmate receives a full round of litigation on administration-of-execution claims, after having already had two rounds of appellate and post-conviction proceedings, would have led to further lengthy delay for claims so weak that there were 10 such applications rejected unanimously by the Justices, including 6 that were also rejected by both lower courts. *See supra*, pp.9-11 (¶¶ 1-5, 10-13, 15). Moreover, given that the federal government does not frequently change its execution practices, an automatic stay would reward capital inmates for either re-raising old claims under the pretense of seeking a change in precedent or else making progressively weaker new claims that have not yet been raised for good reason. In addition, it is unclear how an automatic stay would even work with respect to claims that, by definition, arise only shortly before the actual time of execution—e.g., the unavailability of the inmate’s priest or the rules for rescheduling dates. *See supra*, pp.9-10 (¶¶ 1, 12). Providing a *second* automatic stay for a *fourth* round of litigation would be especially inequitable, and if the ordinary stay standard can be applied to such claims, then there is no reason that it cannot likewise be applied to *all* administration-of-execution claims.

Second, the proposal for an absolute or strong presumption against vacating relief that has been entered by lower courts would potentially have shielded from appellate reversal 5 lower-court orders where no Justice dissented when either the Supreme Court itself or the court of appeals vacated that relief. *See supra*, pp.10-11 (¶¶ 11-15). For example, the Seventh Circuit might not have been able to vacate the “frivolous” injunction based on the claim that witnesses to the execution could seek to postpone it based on their unavailability on the scheduled date, *see supra*, p.10 (¶ 11); likewise, the Supreme Court might not have been able to vacate the unreasoned stay (entered by a divided appellate panel just two hours before an execution) that was based on a claim (raised two days before the execution) that contended the criminal judgment had contained an automatic, indefinite stay for the past twelve years, even though the district court that entered the judgment quickly confirmed that it did no such thing, *see supra*, p.11 (¶ 13). To be sure, those claims were so weak that even a “strong” (though not “absolute” presumption) should have been overcome, but it is not evident what serious benefit is gained in this particular context by requiring appellate panels to distinguish between whether the government is “likely,” or instead “really likely,” to succeed in obtaining reversal of the order halting the execution. The probable result would be a greater proliferation of “weak,” but not “frivolous,” claims pressed by inmates and accepted by some lower courts. Yet critically, not *all* lower courts would accept such claims, at which point intolerable inequities would arise if a higher court could not ensure consistent and correct application of the stay standards to a particular claim. For example, four circuit courts denied relief on the FDPA scheduling claim, but the en banc D.C. Circuit granted a stay to one inmate by a 5-4 vote less than 24 hours before her execution, after having denied a stay to two other inmates the prior month by a different 5-4 vote; the Supreme Court was able to vacate the outlier ruling and thereby avoid a capricious result, but it could not have done so under the proposed presumption if the D.C. Circuit’s shift were deemed only “likely wrong,” not “clearly wrong.” *See supra* pp.12-13 (¶ 21).

Third, turning to the “genuine doubt as to legality of the execution” proposal, there is a threshold ambiguity: Is the proposal limited to the legality of the *death sentence itself* or does it also extend to the legality of the *procedures for administering* the execution? If the former, then it may be a solution in search of a problem, given the infrequency of serious challenges to the validity of the death sentence after multiple rounds of appellate and post-conviction proceedings

have already been exhausted. *See supra*, p.19. Regardless, there is no sound reason to grant reprieves from execution merely for “genuine doubts” that fall short of a “likelihood of success.” It should not matter that some judges had doubts about whether the FDPA caused existing federal death sentences to be effectively nullified when the State of Maryland repealed its own death penalty, or whether the FDPA requires the government to mimic state rules concerning the scheduling of executions, or whether the FDCA requires the government to obtain a prescription from a doctor for a drug intended to kill the “patient,” or whether the Eighth Amendment prohibits the single-dose pentobarbital protocol that has been used widely by States in carrying out executions without incident. *See supra*, pp.8-9, 12-15 (¶¶ 21-23). Given that *not a single Justice* asserted that any of those claims was *ultimately likely to succeed*, the government and the public should not have been forced to further postpone these already-decades-old death sentences merely so that the inmates could litigate to a final loss. And if the problem is that some judges lacked sufficient time to form a view as to the inmates’ likelihood of success, then the solution is to insist that capital inmates file their claims as soon as they are available and that courts prioritize adjudicating requests for interim relief as soon as feasible. Given the compelling interest in the timely execution of death sentences, and the serious incentives that capital defendants have to delay for its own sake, expediting interim adjudication to ensure adequate information is the far preferable solution to delaying executions based on early uncertainty.

Finally, for similar reasons, the proposal that the Supreme Court should adopt a “rule of four” for stays or injunctions of executions—whether directly or indirectly through a “courtesy fifth” practice—makes little sense. Under the existing majority-vote requirement, if four Justices wish to hear an inmate’s claim on the merits but the claim will be mooted by the scheduled execution, they need only persuade one of their colleagues that there is at least a reasonable likelihood that, after plenary review, he or she may ultimately agree that the inmate’s claim satisfies the legal and equitable standards for relief. And if their arguments are persuasive, they may well succeed in that effort, particularly on a collegial court. But when their efforts fail, because the other five Justices remain convinced that there is no reasonable likelihood that the inmate is entitled to relief, that is and should be the end of the matter. Unlike the decision to grant certiorari—an internal matter of judicial administration—orders that wield the Court’s judicial power to alter the status quo by granting substantive relief should reflect the views of the majority of the Court’s judicial officers. Again, consider the claims discussed in the preceding paragraph: if a majority of the Court was firmly convinced that it would not provide relief to those legal claims in this equitable posture—as it appears to have been—then it was both pointless for the Court, and harmful to the government and the public, to delay the executions in order to conduct plenary review with a pre-ordained result. *Cf. American Tradition Partnership v. Bullock*, 567 U.S. 516, 517-18 (2012) (Breyer, J., joined by Ginsburg, Sotomayor, Kagan, JJ., dissenting) (four Justices explaining that, while they would have been inclined to grant a petition for a writ of certiorari to reconsider a prior precedent, they declined to vote for plenary review because it was clear that the majority would not overrule that precedent and was intent on summarily reversing the lower court for failing to adhere to that precedent). Indeed, it seems that the Court has been of the same view for at least some time now: it appears that five Justices have been *vacating lower-court* stays or injunctions over the objection of four Justices for at least a decade before the recent federal execution litigation, *see, e.g., Brewer*, 562 U.S. at 996 (2010), which makes it highly unlikely that there have been instances where only four Justices were treated as functionally sufficient for “the Court” *itself* to stay or enjoin an execution.

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In closing, I wish to reiterate my sincere gratitude to the Commission for the invitation to comment on this important topic. I also would be pleased to provide any follow-up that would be helpful to the Commission.

September 15, 2021

APPENDIX – QUESTIONS POSED BY THE COMMISSION

I. Federal Executions

Commentators, including witnesses before the Commission, have been critical of the Court's handling of litigation surrounding the thirteen federal executions carried out by the federal government in the last six months of the Trump administration. They make the following basic claims. These federal executions were conducted pursuant to a recently adopted execution protocol, and implicated a set of governing federal statutes that had not previously been examined closely by the courts. In multiple instances, lower federal trial and appellate courts stayed the executions after concluding that these legal challenges raised significant and complex issues and that the challengers were likely to succeed on the merits. In each of the thirteen cases, the Supreme Court received requests for emergency relief, sometimes from the government and sometimes from the person condemned to die. The Court ruled in ways that permitted all thirteen people to be executed without delay, often in unreasoned orders that gave no rationale for its decision. In multiple instances, the Court vacated lower-court stays even though the courts of appeals had set expedited briefing schedules to resolve the cases promptly.

Justices have also been critical of these practices. In *United States v. Higgs*, Justice Sotomayor reflected back on the full series of cases as follows:

This unprecedented rush of federal executions has predictably given rise to many difficult legal disputes.... Throughout this expedited spree of executions, this Court has consistently rejected inmates' credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale. This is not justice.

Justice Breyer was similarly critical in *Higgs*: "None of these legal questions is frivolous. What are courts to do when faced with legal questions of this kind? Are they simply to ignore them? Or are they, as in this case, to 'hurry up, hurry up'? That is no solution."

We would appreciate your thoughts on these criticisms.

II. Procedural Reform for Capital Cases

We would also appreciate your thoughts on various reforms that have been proposed to the Commission:

1. In light of the fact that an execution contrary to law is not reversible, some witnesses before the Commission have argued for an asymmetrical standard for staying executions, with a presumption in favor of staying an execution when there is genuine doubt as to its legality. Relatedly, some have argued for a strong and perhaps even absolute presumption against vacating stays when lower courts have issued them. The argument

here is that a legal error prejudicing the condemned person is both irreversible and severe, whereas the injury to the state (delaying a scheduled execution) is comparatively less severe or irreversible. Critics maintained to the Commission that this imbalance is especially pronounced when a lower court has already concluded that the person condemned to death raises a substantial legal issue or one with a likelihood of success (i.e., cases where a lower-court stay is already in place).

2. Some have raised the concern that in the death penalty context as in others, four Justices might be considering granting certiorari, and yet the case will become moot due to the execution unless five Justices vote to stay the execution. One proposal is that the Court should follow a rule that only four votes would suffice for issuing a stay in such cases.

3. Another proposal, serving a similar purpose, would be for the Justices to adopt a variation of the “courtesy fifth” norm (at least in such capital cases), providing an additional vote for stays whenever four Justices wish to call for the views of the Solicitor General or otherwise request more time to consider whether certiorari should be granted. *See Dunn v. Price*, 587 U.S. __ (2019) (Breyer, J., dissenting) (“I requested that the Court take no action until tomorrow, when the matter could be discussed at Conference”); *Medellin v. Texas*, 554 U.S. 759, 765-66 (2008) (Breyer, J., dissenting). The argument advanced by critics is that the spirit of the Court’s “rule of four” militates in favor of staying an execution when four Justices are actively considering granting certiorari but need more time to decide.

4. We would also welcome any thoughts you may have about the “courtesy fifth” as normally understood, in which a Justice as a matter of course provides a fifth vote for a stay when four Justices vote to grant certiorari. Do you know if this practice reflects a norm of the Court? Commentators have suggested uncertainty on this point, and have argued that the Court should firmly commit to staying any execution once four votes for certiorari have been cast.

5. One Commission witness urged a variation of the “automatic stay” that Justices Blackmun, Stevens and Ginsburg, among others, have advocated in the past: Congress, this witness proposed, should pass a statute stating that every person with a pending execution date shall have at least one full opportunity to litigate any challenges to the state’s proposed method or administration of execution, beginning in the lower courts and proceeding to the Supreme Court via a mandatory direct appeal, with an automatic bar on the execution taking place until the Supreme Court resolves the matter on review of final lower court orders.