Nos. 20A11 and 20-23

IN THE SUPREME COURT OF THE UNITED STATES

MARK O'KEEFE AND DALE HARTKEMEYER (AKA SEIGIN), PETITIONERS AND APPLICANTS

v.

WILLIAM P. BARR, ET AL.

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTIONS AND TO PETITION FOR A WRIT OF CERTIORARI

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

IN THE SUPREME COURT OF THE UNITED STATES

_____

Nos. 20A11 and 20-23

_____

MARK O'KEEFE AND DALE HARTKEMEYER (AKA SEIGIN), PETITIONERS AND APPLICANTS

v.

WILLIAM P. BARR, ET AL.

(CAPITAL CASE)

_____

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTIONS AND TO PETITION FOR A WRIT OF CERTIORARI[1]

_____

Wesley Ira Purkey and Dustin Lee Honken were each condemned to death for the brutal murders of children committed well over 20 years ago. Petitioners are two priests designated by Purkey and Honken, respectively, to attend their executions; the first of these executions (Purkey's) execution is currently scheduled to occur at 7 p.m. today, July 15, 2020. Yesterday the District Court for the Southern District of Indiana rejected petitioners' request to enjoin the executions on the unprecedented theory that spiritual advisors permitted to attend an execution have the right under federal law to halt it if they have concerns about attending on

[1] Although petitioners style their request as an "Application for Stay of Execution Pending Appeal," they in fact seek an injunction postponing the executions of third parties pending further proceedings in this Court and the courts of appeals. See p. 12, infra.

the date when it is scheduled. Today, a unanimous panel of the Court of Appeals for the Seventh Circuit -- the same panel that separately granted the stay this Court recently vacated in United States v. Purkey, No. 20A4 -- summarily denied a motion to stay the execution pending appeal in a one-sentence order.

Petitioners now ask this Court to grant the extraordinary relief the lower courts denied. They request what they call a "stay" of the executions -- but what is essentially a preliminary injunction directly from this Court barring the executions from going forward pending further review of the district court's denial of injunctive relief. Moreover, their petition for a writ of certiorari necessarily seeks certiorari before judgment, as the court of appeals has not disposed of their appeal on the merits. Petitioners, however, have not come close to making the showings necessary to warrant these forms of dramatic relief. The decisions below accord with the governing precedent of both this Court and the courts of appeals; the capital sentences at issue here have been repeatedly upheld by federal courts; and the inmates' own efforts to halt their implementation have been rejected recently and repeatedly. Moreover, it would be manifestly inequitable to issue a last-minute injunction preventing the lawful executions of Purkey and Honken at the behest of third parties who allege that an indefinite deferral of those executions is necessary to facilitate their religious exercise.

Indeed, less than 48 hours ago, this Court summarily reversed a district court that had entered a last-minute injunction against another inmate's execution, even though the district court there had relied on the inmate's own Eighth Amendment right against cruel and unusual punishment. Petitioners' third-party request for a same-day injunction from this Court is similarly untenable, both with respect to the merits and the equities.

The two executions petitioners seek to enjoin were originally scheduled for December 2019 and January 2020; after a stay entered by another court was lifted in June 2020, the Federal Bureau of Prisons (BOP) promptly rescheduled them for July 2020. Petitioners contend that this rescheduling decision burdens their religious obligation to attend the executions, arguing that doing so would risk their health given the current COVID-19 pandemic. They therefore assert that they are entitled to an injunction under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb et seq., until a COVID-19 treatment or vaccine has been developed so that they can attend the execution without concern regarding viral exposure.

The decisions below denying emergency relief on that novel claim are clearly correct. The government's decisions regarding the scheduling of someone else's execution have at most an incidental effect on petitioners' religious exercise, and are therefore not the kind of direct compulsion that constitutes a

substantial burden imposed by the government on the exercise of religion. The absence of a substantial burden means that the courts below did not need to perform the compelling-interest and least restrictive means analysis. But even if petitioners' concerns regarding possible viral exposure did somehow amount to a substantial burden under RFRA, the government's extensive array of precautions to mitigate risks to witnesses represents the least restrictive means of achieving the government's compelling interest in the prompt implementation of these lawfully imposed sentences.

Petitioners' inability to show a likelihood of success on the merits is dispositive, but the balance of equities independently weighs against granting petitioners' requested relief. This Court has repeatedly emphasized the government's and the public's "'important interest in the timely enforcement of a [capital] sentence.'" Bucklew v. Precythe, 139 S. Ct. 1112, 1133-1134 (2019) (citation omitted). Petitioners' concerns regarding the possibility of viral exposure do not establish irreparable harm, let alone one that outweighs that governmental and public interest, particularly given the lengthy delay in implementing these sentences and the brutality of the crimes these inmates committed.

STATEMENT

1. a. In January 1998, Wesley Ira Purkey raped and murdered a 16-year-old girl. Purkey v. United States, No.

19-3318, 2020 WL 3603779, at *1 (7th Cir. July 2, 2020). After he stabbed the girl to death, he dismembered her body and disposed of her remains by burning them in a fireplace and dumping them in a septic pond. Id. at *1-*2. Later the same year, Purkey murdered an 80-year-old woman using the claw end of a hammer. Id. at *1. After Purkey was apprehended for that crime and placed into custody, he confessed to the murder of the 16-year-old girl. Ibid. Purkey was then convicted on federal charges of kidnapping, rape, and murder, and he was then sentenced to death. United States v. Purkey, 428 F.3d 738, 744-745 (8th Cir. 2005), cert. denied, 549 U.S. 975 (2006).

Purkey's conviction and sentence were subsequently upheld on direct appeal and in extensive post-conviction proceedings. See Purkey, supra (affirming conviction and sentence on direct appeal); Purkey v. United States, 549 U.S. 975 (2006) (denying certiorari); Purkey v. United States, 2009 WL 3160774, at *6 (rejecting petition for relief under 28 U.S.C. 2255); Purkey v. United States, No. 06-8001, 2009 WL 5176598, at *1 (W.D. Mo. Dec. 22, 2009) (same), aff'd, 729 F.3d 860 (8th Cir. 2013), cert. denied, 574 U.S. 933 (2014); Purkey v. United States, No. 19-cv-414, 2019 WL 6170069, at *12 (S.D. Ind. Nov. 20, 2019) (rejecting

petition for relief under 28 U.S.C. 2241), aff'd, No. 19-3318, 2020 WL 3603779, at *1 (7th Cir. July 2, 2020).[2]

b. In 1993, while Dustin Lee Honken was under indictment for conspiring to manufacture methamphetamine, he murdered two of the witnesses against him. United States v. Honken, 541 F.3d 1146, 1150 (8th Cir. 2008); Honken v. United States, 42 F. Supp. 3d 937, 964 (N.D. Iowa 2013). He also murdered the girlfriend of one of those witnesses and her two young daughters, aged six and ten. Ibid. The bodies of the three adults and two little girls were found buried in holes on a map provided to a government informant by Honken's girlfriend. Honken, 42 F. Supp. 3d at 970. A jury convicted Honken of, among other things, five counts of capital murder; he was sentenced to death in October 2005. Honken, 42 F. Supp. 3d at 997-998. Honken's conviction and sentence were upheld on direct appeal and in post-conviction proceedings. Honken v. United States, 558 U.S. 1091 (2009) (denying a writ of certiorari on direct appeal); Honken v. United States, 139 S. Ct. 29 (2015) (denying a writ of certiorari on habeas review).

2. In July 2019, the government scheduled the executions of Purkey and Honken for December 2019 and January 2020. Purkey and

[2] While the Seventh Circuit affirmed the dismissal of Purkey's petition for a writ of habeas corpus under 28 U.S.C. 2241, it nonetheless entered a stay of his execution date, which "will expire upon the issuance of th[e] court's mandate or as specified in any subsequent order that is issued." 19-3318, C.A. Doc. 36. The Court earlier today granted the government's application to vacate that stay. See United States v. Purkey, No. 20A4 (July 15, 2020).

Honken then joined with a group of other inmates in a suit in federal district court challenging the new execution protocol under which their death sentences would be carried out. See 19-mc-145, D. Ct. Docs. 50, 51 (D.D.C. Nov. 20, 2019). On the inmates' motion, the District Court for the District of Columbia entered a preliminary injunction barring those executions from going forward as scheduled, ibid., which the D.C. Circuit later vacated, Execution Protocol Cases, 955 F.3d 106, 108–113 (per curiam), cert. denied, No. 19-1348 (June 29, 2020). On June 15, 2020, shortly after the D.C. Circuit issued its mandate and thereby lifted the injunction, the government rescheduled Purkey's execution for July 15, 2020 and Honken's execution for July 17, 2020.

3. In March 2020, BOP issued a "Shelter in Place" order in response to the COVID-19 outbreak and suspended religious visits through June 30, 2020. 20-cv-336 D. Ct. Doc. ("D. Ct. Doc.") 1, at 17 (July 2, 2020). Once BOP rescheduled executions, however, it reinstated the affected inmates' visiting privileges, including religious visits with petitioners to resume in the week preceding an execution. D. Ct. Doc. 33-1, at 13 (July 6, 2020). To reduce the possible spread of COVID-19 during this time, BOP took numerous precautions. See D. Ct. Doc. 33-1, at 2; D. Ct. Doc. 65-1, at 2-3 (July 9, 2020). Among them, all BOP staff are instructed to wear face masks and all must pass a temperature check and symptom screening each day upon arrival. D. Ct. Doc. 33-1, at 3. BOP

also permits each inmate's spiritual advisor to visit with the inmate during the week before his execution in the Special Confinement Unit (SCU) of USP Terre Haute, where there are no COVID-19 cases, in a no-contact room that is disinfected after use. Id. at 2-3. BOP provides spiritual advisors with personal protective equipment (PPE), including gloves, a gown, a mask, and a face shield, which they are permitted to don while at the SCU. Ibid. On the day of the execution, BOP allows spiritual advisors to wear PPE, limit their interactions with staff and other visitors, have a pre-execution no-contact visit in a disinfected room with a glass partition in the execution facility, and be in the execution chamber (at a social distance from the inmate and the only two other individuals in the room aside from their BOP security escort) during the proceedings. Id. at 4-5; D. Ct. Doc. 65-1, at 2.

4. On July 2, 2020, petitioner Hartkemeyer filed suit to halt the scheduled July 15 execution of Purkey, for whom Hartkemeyer serves as the Minister of Record under BOP procedures. Hartkemeyer claimed that his religious beliefs compelled him to attend the execution in order to administer final spiritual rites, but that doing so during the current COVID-19 outbreak would endanger his health. D. Ct. Doc. 1, at 19. He therefore asserted that the scheduled execution date would substantially burden the free exercise of his religion in violation of RFRA. Ibid. He

also argued that BOP's decision to move forward with the execution in July was arbitrary and capricious in violation of the APA. Hartkemeyer sought a preliminary injunction "prohibiting the BOP from carrying out the execution" indefinitely, "until treatment or a vaccine is available." D. Ct. Doc. 1, at 23; D. Ct. Doc. 7 (July 2, 2020).

On July 7, Honken's priest, petitioner O'Keefe, moved to intervene in this litigation, D. Ct. Doc. 42, and the district court granted the motion, D. Ct. Doc. 54 (July 8, 2020). O'Keefe then separately sought a preliminary injunction of Honken's execution, adopting and incorporating by reference the arguments raised by Hartkemeyer. D. Ct. Doc. 61, at 2 (July 8, 2020).

On July 12, the district court ordered the government to file a surreply in opposition to petitioners' motions for a preliminary injunction, explaining the degree to which BOP's protocol minimized the risk of COVID-19 transmission to petitioners; the status of the prison's ventilation system; the expert medical or scientific advice that informed the protocol; and any changes to the protocol in response to a recent COVID-19 test result by a BOP staff member. D. Ct. Doc. 79. The government complied with the court's request the next morning, on July 13. D. Ct. Doc. 81. Among other things, the government informed the court that BOP's mitigation measures are consistent with guidelines issued by the Centers for Disease Control and Prevention (CDC) for correctional

facilities and detention centers during the COVID-19 outbreak, id. at 3, and that the World Health Organization has opined that there is little to no potential for airborne transmission of COVID-19 through ventilation systems in settings such as this where a facility has taken the precautions BOP already has put in place. Ibid. Finally, the government assured the court that the BOP staff member who recently tested positive for COVID-19 did not have any contact with the BOP Execution Protocol team, did not visit the execution facility or its adjacent command center, does not recall having contact with the Crisis Support Team (which transports execution witnesses) or any of its transport vehicles, and does not recall being in the witness staging area. Id. at 4. BOP has already taken steps to identify all of the potential individuals with whom the infected staff member may have been in contact and will ensure that those individuals have no contact with any others involved or attending this week's executions. Id. at 5.

On July 14, 2020, the district court denied petitioners' motions for a preliminary injunction. D. Ct. Doc. 84. With respect to RFRA, the court held that petitioners have no more than a "negligible" likelihood of success of meeting RFRA's substantial burden requirement, id. at 5, which demands that a plaintiff identify "some government action with a 'tendency to coerce individuals into acting contrary to their religious beliefs.'" Id. at 4 (quoting Lyng v. Northwest Indian Cemetery Protective

Ass'n, 485 U.S. 439, 450 (1988)). Petitioners likely cannot meet that obligation here, the court explained, because "the mere scheduling of an execution imposes no obligation or restriction on the religious advisor whom the condemned prisoner has selected to attend." Ibid. (noting the government's argument that the petitioners are "not themselves the subject of government regulation," and that "[t]he only impediment Rev. Hartkemeyer identifies -- the global pandemic -- is not one of the Government's making"). The court further observed that while petitioners allege the government's COVID-19 precautions are insufficient to protect them, their complaints only challenged the scheduling of the executions; petitioners did not seek an injunction requiring the government to provide any additional safety measures. See id. at 5. The court therefore denied injunctive relief on the RFRA claim.[3]

5. On the night of July 14, petitioners asked the Seventh Circuit to grant a stay of Purkey's and Honken's executions pending their appeal of the district court's order. Earlier today, a unanimous Seventh Circuit panel summarily denied the request in a

[3] The district court also held that petitioners had not shown more than a negligible likelihood of success on their APA claim, observing that the Seventh Circuit had recently held that where, as here, BOP complies with the applicable regulatory requirements, BOP has "'unconstrained discretion'" to set an execution date. D. Ct. Doc. 84, at 5-6 (quoting Peterson v. Barr, No. 20-2252, 2020 WL 3955951, at *2 (7th Cir. Jul. 12, 2020)). Petitioners do not challenge that holding in their petition and application.

one sentence order. 20-2262 C.A. Doc. 18 (July 15, 2020). The panel took no action on petitioners' underlying appeal, which has been neither briefed nor decided.

ARGUMENT

While petitioners purport to be seeking a stay of the execution pending appeal (Appl. 3), they are in fact seeking a preliminary injunction pending appeal. They are not challenging the validity of their own death sentences; rather they are seeking injunctive relief postponing the executions of two third parties. See D. Ct. Doc. 1, at 29 (seeking injunctive relief deferring executions until there is a vaccine or cure for COVID-19). Accordingly, to obtain the emergency relief they seek, they must satisfy an exceedingly high standard. This Court typically issues an injunction pending appeal only where it is "(1) "[n]ecessary or appropriate in aid of [its] jurisdictio[n]," 28 U.S.C. 1651(a), and (2) the legal rights at issue are 'indisputably clear.'" Brown v. Gilmore, 533 U.S. 1301, 1303, (2001) (Rehnquist, C.J., in chambers).[4]

[4] Similarly, while petitioners purport to seek certiorari review of the Seventh Circuit's decision, the court of appeals has not yet decided the merits of petitioners' appeal; it has merely issued an order denying their request for injunctive relief pending appeal. 20-2262 C.A. Doc. 18. This Court will grant certiorari before a court of appeals has rendered judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice." Sup. Ct. R. 11. Because petitioners' RFRA claim would not even warrant certiorari under the normal standard, it certainly cannot meet the higher bar for review.

Under that high standard (or indeed, under any standard), petitioners' request for injunctive relief should be denied. The court of appeals correctly refused to enjoin the executions pending appeal of the district court's order; petitioners have no likelihood of success on the merits; and the equities counsel strongly against the relief petitioners request.

I. PETITIONERS HAVE NOT DEMONSTRATED A REASONABLE LIKELIHOOD OF SUCCESS ON THEIR RFRA CLAIM, LET ALONE A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI BEFORE JUDGMENT AND REVERSE

The district court correctly held that petitioners have no more than a "negligible" likelihood of success on their RFRA claim. D. Ct. Doc. 84, at 5 (July 14, 2020). RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1(a), (b). As the court recognized, the government's scheduling of these capital sentences does not substantially burden petitioners' religious exercise. As a result, the court had no need to consider whether the government has chosen the least restrictive means of furthering its compelling interest in carrying out these long-delayed sentences. But the government also satisfies that requirement, providing yet another

reason petitioners cannot prevail. Petitioners' arguments to the contrary are unavailing.

A. The Government's Execution Schedule Imposes No Substantial Burden On Petitioners' Exercise Of Religion

1. As the district court correctly observed, "to show a government-created substantial burden, a plaintiff must identify some government action with a 'tendency to coerce individuals into acting contrary to their religious beliefs.'" D. Ct. Doc. 84, at 4 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)). The free exercise of religion "affords an individual protection from certain forms of government compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." Bowen v. Roy, 476 U.S. 693, 700 (1986) (emphasis added).

The district court rightly concluded that petitioners here cannot show any government compulsion, as the "mere scheduling of an execution imposes no obligation or restriction on the religious advisor whom the condemned prisoner has selected to attend." D. Ct. Doc. 84, at 4. The "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not constitute a substantial burden on the free exercise of religion, whether or not the government "bring[s] forward a compelling justification for its otherwise lawful actions." Lyng, 485 U.S at 450-451.

Petitioners' RFRA claim fails under that rule. Scheduling -- or rescheduling -- decisions regarding the execution of others' sentences are precisely the type of "internal affairs" that the government is not obliged to alter to "comport with the religious beliefs of particular citizens." Bowen, 476 U.S. at 699. In that respect, petitioners' claims mirror those of the petitioners in Lyng, where the Court held that the government was not required to alter its intended use of its own land in response to the assertion of certain Indian tribes that the intended use would "clearly render any meaningful continuation of traditional [religious] practices impossible." 485 U.S. at 451 (emphasis added).

As the district court explained, the government's scheduling decisions do not involve any compulsive measures touching on petitioners' free exercise of religion. See D. Ct. Doc. 84, at 4 (noting that "[t]he mere scheduling of an execution imposes no obligation or restriction on the religious advisor whom the condemned prisoner has selected to attend"). The government obviously has not imposed any penalty on petitioner's religious exercise. At most, the government's execution timeline imposes an "incidental interference with [petitioners' individual] spiritual activities," without "penaliz[ing] religious activity by denying any person equal rights, benefits, [or] privileges." Lyng, 485 U.S at 449-450; see Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, No. 19-431 (U.S. Jul. 8, 2020), slip op. 6

n.5 (Alito & Gorsuch, JJ., concurring) (noting that "in Bowen, the objecting individuals were not faced with penalties or 'coerced by the Governmen[t] into violating their religious beliefs'") (citation omitted).

To the contrary, the government has granted extensive access to plaintiff priests to provide pastoral care in connection with inmates' executions, see D. Ct. Doc. 33-1, at 4-5; D. Ct. Doc. 52-1, ¶ 7, and undertaken robust measures to facilitate their attendance by taking numerous steps to minimize COVID-19 risks in accordance with CDC guidance. See supra, pp. 7-8. Such actions bear no resemblance to the coercive governmental policies directly regulating RFRA claimants in the cases petitioners have cited. For example, petitioners can derive no support from Sherbert v. Verner, 374 U.S. 398 (1963), as the government there was directly regulating the plaintiff, by denying her application for benefits because of her refusal to work on Saturdays. See, e.g., Hobbie v. Unemployment Appeals Commm'n, 480 U.S. 136 (1987) (similar); Thomas v. Review Bd. of Ind. Employment Div., 450 U.S. 707, 718 (1981). Here, again, the government is not substantially burdening petitioners' religion, but merely carrying out its internal affairs in scheduling the Purkey and Honken executions. Any effect petitioners feel is purely incidental to those internal tasks and thus insufficient to satisfy RFRA's substantial-burden requirement. See Lyng, 485 U.S at 450-451.

Moreover, petitioners' position would necessarily lead to absurd consequences. For example, petitioners do not address why they could not assert a RFRA claim if they happened to be unavailable to attend the executions on the date the government has chosen for personal or other reasons beyond the government's control. Nor can they explain why their RFRA claim would be limited to ministers, without extending, for example, to any and all individuals who have a sincere religious belief that they should oppose executions by traveling to the prison to pray outside of it.

2. Petitioners' attempts to defend their position are unpersuasive. They contend (Appl. 5) that there is no "meaningful distinction" between cases like Sherbert where the government is directly regulating parties and cases like this one where an individual is complaining of the incidental effects of the government's decision as to how to structure its own affairs. But that is precisely the line drawn in Lyng and Bowen. As the Lyng Court explained, in both cases the plaintiffs' claims failed because the government action was not itself compelling them to violate their religious beliefs or "penaliz[ing] religious activity." 485 U.S. at 449. Thus, Lyng observed that the challenged actions were meaningfully distinct from, for example, a law that effectively imposes "a fine" on religious observance,

id. at 451, or one explicitly "prohibiting" the religious activity in question, id. at 453.

Petitioners also assert (Appl. 7) that they cannot be deemed "incidental" bystanders to the executions because BOP regulations give them a right to be present, but that contention is doubly wrong.

First, Bowen and Lyng make clear that whether petitioners are "incidentally" burdened does not turn on whether it is foreseeable that they might be affected; rather, it turns on whether the government is directly prohibiting or penalizing their conduct. For example, in Lyng, the government did not dispute that the government's use of its own land "could have devastating effects on traditional Indian religious practices." 485 U.S. at 451.

Second, the Seventh Circuit's recent decision in Peterson v. Barr, No. 20-2252, 2020 WL 3955951 (July 12, 2020) -- which this Court declined to stay in connection with the recent execution of Daniel Lee -- forecloses petitioners' contention that BOP regulations grant them an entitlement to attend the executions. As Peterson explained, 28 C.F.R. 26.4 -- which governs all witnesses, including an inmate's "friends or relatives," id. -- merely "specifies who may be permitted by the Warden to attend an execution," 2020 WL 3955951, at *3.[5] The regulation thus reflects

[5] That petitioners' claim here involves religious or spiritual advisers that the prisoners selected to attend, rather than citizens selected by the Warden (as in Peterson), does not

"a limitation on, not an entitlement to, witness attendance," and nothing therein "gives the petitioners a right to require the BOP to schedule [the] executions at a time when [petitioners] are willing to able to attend" or "require their attendance before the execution may proceed." Ibid. (rejecting as "frivolous" claims to halt an execution by putative witnesses brought pursuant to the APA). Petitioners' interpretation would convert the permissive regulation into a license for a spiritual advisor to obstruct an execution by asserting an inability to attend.

Petitioners attempt (Appl. 7-8) to bolster their reliance on the regulations by invoking the free-exercise rights of the inmates. But petitioners obviously cannot advance these rights in place of the inmates. See Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Accordingly, both Murphy v. Collier, 139 S. Ct. 1475 (2019) and Gutierrez v. Saenz, No. 19-8695, 2020 WL 3248349 (U.S. June 16, 2020), are inapposite, as both cases involved condemned inmates' challenges to state policies denying or limiting the presence of religious advisors in the execution room during the execution. Here, the government will not prevent petitioners from being present during the executions.

---

change the analysis. "[C]itizens" and "spiritual adviser[s]" are addressed in parallel and successive provisions of the regulation, and both are subject to numerical caps: each prisoner may select "[n]ot more than * * * [o]ne spiritual adviser," just as the Warden may select "[n]ot more than * * * [e]ight citizens." 28 C.F.R. 26.4(c). Petitioners can therefore offer no meaningful way in which the text distinguishes between the two types of witnesses.

B. The Current Execution Schedule And Protective Measures Are The Least Restrictive Means To Accomplish A Compelling Government Interest

Because petitioners cannot establish that BOP's scheduling of these executions imposes a substantial burden on their religious exercise, their RFRA claims fail and the analysis could stop there. See, e.g., Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014)(recognizing that a court must find that the government action "imposes a substantial burden" before "mov[ing] on" to decide whether the action "'is the least restrictive means of furthering a compelling governmental interest.'" (internal quotation marks omitted)). But petitioners cannot satisfy RFRA's other requirements either because the scheduling decision here satisfies strict scrutiny.

1. As this Court has repeatedly emphasized, the government has a compelling interest in the timely enforcement of a capital sentence. See, e.g., Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019). That significant interest is "frustrated" by extensive delays, id., which can even "'undermine [capital punishment's] jurisprudential rationale' by reducing its deterrent effect and retributive value," id. at 1144 (Breyer, J., dissenting) (brackets in original; citation omitted). The relevant regulations underscore that interest, by contemplating that any stayed executions will be rescheduled "promptly." 28 C.F.R. 26.3(a)(1).

Petitioners assert (Pet. 28) that the government lacks a compelling interest in proceeding because it did not schedule these executions immediately after petitioners exhausted their post-conviction proceedings in 2014 and 2015. As of 2011, however, one of the lethal-injection drugs that the government had been using for federal executions was no longer available, and the government properly "took time to study the successful track record of pentobarbital before adopting a protocol utilizing it." Execution Protocol Cases, 955 F.3d at 128 (Katsas, J., concurring). The government "can hardly be faulted for proceeding with caution," id., and carefully attending to the important task of ensuring a humane execution method. Moreover, the government initially scheduled these executions for December 2019 and January 2020, before the pandemic. Through no fault of the government's, that execution date was stayed until June 12, 2020. And once the stay was lifted, BOP promptly rescheduled the executions, consistent with the applicable regulation. See 28 C.F.R. 26.3(a)(1).

Petitioners also argue (Pet. 28-29) that the government's interest in the timely enforcement of these death sentences is less than compelling because of the need to protect the health of federal inmates, BOP staff, visitors, and members of the public. As explained, however, the government has adopted extensive safety protocols, and in any event, nothing in RFRA permits a court to

ignore a compelling governmental interest on the ground that other interests may be in play.

2. Combined with the implementation of its robust safety measures, the current execution schedule is the least restrictive means to accomplish the government's compelling interest in carrying out these long-delayed sentences. Petitioners assert (COA Reply 4) that the "least restrictive means * * * is to delay the executions until the pandemic is under control, such as when a cure, vaccine, or effective course of treatment is available." But RFRA's least-restrictive-means requirement does not compel the government to abandon "achieving its desired goal." Hobby Lobby, 573 U.S. at 728. Because the pandemic's duration -- not to mention the timing of a vaccine or a cure -- is unknown, petitioners' requested alternative would amount to an indefinite stay of execution. That result would altogether defeat the government's compelling interest in the timely enforcement of these capital sentences. Cf. Ryan v. Gonzalez, 568 U.S. 57, 76 (2013) (noting, in denying request for indefinite stay of execution, that absence of time limits could allow petitioners to "drag[]out indefinitely their federal habeas review").

Petitioners contend (Pet. 31) that the propriety of their request is demonstrated by Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), where this Court required the Nebraska Supreme

Court to consider postponing a high-profile trial until media attention had died down in order to avoid infringing a "fundamental right." But here the government has not substantially burdened petitioners' rights, and the uncertainty regarding when scientists will develop a cure or vaccine for a novel virus is obviously much greater than the uncertainty regarding when the media's attention will shift from one event to another.

In their court of appeals briefing and again before this Court (Pet. 30-31), petitioners also belatedly assert an alternative argument that the government could hold the executions if they took certain additional protective measures, such as overhauling the prison's ventilation system. As the district court observed, however, the only relief plaintiffs requested in their complaint was the postponement of the Purkey and Honken executions until a COVID-19 treatment or vaccine is widely available. See D. Ct. Doc. 84, at 5. Petitioners may not propose an exceptionally difficult form of alternate relief for the first time in their appellate briefing and then chide the government for failing to adopt it.

II. THE EQUITIES STRONGLY COUNSEL AGAINST A STAY

Petitioners' inability to show a likelihood of success on the merits is sufficient to foreclose their request for this Court to

"stay" the impending executions, but petitioners are also unable to satisfy the other requirements for such dramatic relief.

This Court has emphasized that "a preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). Regardless of whether petitioners have shown a likelihood of success on the merits of their statutory claim, they must still must show that the balance of equities supports an injunction by establishing that they are "likely" to experience an irreparable harm that is greater than the harms the injunction will inflict on the government and the public. Id. at 22. Petitioners cannot make that showing.

Petitioners contend that they will experience irreparable harm from possible exposure to the COVID-19 virus if they attend the executions. But the mere "possibility" of viral exposure does not "demonstrate that irreparable injury is likely in the absence of an injunction," Winter, 555 U.S. 7, 22 (2008), especially given the virus-related precautions BOP has taken and offered petitioners. And petitioners' assertion of harm is diminished by their delay in making the extraordinary request that the inmates' executions be halted "until treatment or a vaccine is available." D. Ct. Doc. 1, at 29. The Hartkemeyer complaint was not filed until July 2, D. Ct. Doc. 6, and the O'Keefe intervention motion was not filed until July 8, D. Ct. Doc. 60.

Moreover, whatever harms flow from petitioners' individual decisions regarding attendance, they do not outweigh the government's interest in carrying out scheduled executions after lengthy post-conviction review periods. As the Winter Court explained, a showing of irreparable harm is insufficient where the government and public will experience greater harms if the injunction is imposed. 555 U.S. at 22 (2008). Accordingly, Winter held that a violation of an environmental statute did not justify enjoining a military exercise where the public interest and the military interest in training sailors outweighed any irreparable harm to the petitioners. The same is true here, as this Court has repeatedly recognized that "[b]oth the [government] and [all] the victims of crime have an important interest in the timely enforcement of a sentence." Hill v. McDonough, 547 U.S. 573, 584 (2006).

Indeed, even where an inmate himself directly challenges the method of execution, this Court has warned that courts must "police carefully against attempts to use such challenges as tools to interpose unjustified delay." Bucklew, 139 S. Ct. at 1134. Moreover, once post-conviction proceedings "have run their course," as they have here, "an assurance of real finality" is necessary for the government to "execute its moral judgment." Calderon v. Thompson, 523 U.S. 538, 556 (1998). As this Court recently noted, "'[l]ast minute stays' . . . 'should be the extreme

exception, not the norm,'" given the courts' "responsibility 'to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously.'" Barr v. Lee, No. 20A8 (Jul. 14, 2020), slip op. 3. If that is true for an Eighth Amendment claim by the inmates themselves, it is true a fortiori for a RFRA claim by the inmates' ministers.

Finally, the government's interest in implementing these sentences is "magnified by the heinous nature" of these inmates' offenses, which include raping, murdering, and dismembering children. See Execution Protocol Cases, 955 F.3d at 127 (Katsas, J., concurring) (discussing these inmates' crimes); See also Barr v. Roane, 140 S. Ct. 353 (2019) (statement of Alito, J.) (noting these inmates' "exceptionally heinous murders"). Petitioners' interest in ministering to the condemned and witnessing the executions that will redress these terrible crimes cannot outweigh the government's interest in actually conducting them.

CONCLUSION

The petition for a writ of certiorari and accompanying stay application should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JULY 2020