EXECUTIONS SCHEDULED FOR JANUARY 14 & 15, 2021 AT 6:00 P.M. E.T.

No. 20A131

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN HIGGS AND COREY JOHNSON,
Petitioners,

v.

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

CAPITAL CASE

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF EXECUTION OF DUSTIN HIGGS AND COREY JOHNSON

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Petitioners Corey Johnson and Dustin Higgs file this Reply in support of their Emergency Application for a stay of their executions.

ARGUMENT

I. Suffering The Conscious Experience Of Waterboarding Constitutes An Eighth Amendment Violation

Citing *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Government argues that the Eighth Amendment is indifferent to a "brief" period of excruciating pain, including "at most around two minutes" of conscious drowning. Opp. 18-19. The Government misreads *Bucklew*. At no point did *Bucklew* hold that any particular period of excruciating suffering is a non-event for Eighth Amendment purposes, including the 20-30 second period that the Court considered there. The Court ruled only that the prisoner's alternative (nitrogen hypoxia) did not appreciably reduce the duration of suffering, not that the suffering itself was constitutionally inconsequential. *See id.* at 1132.

The Government argues that flash pulmonary edema is no worse than hanging, which has been constitutional for centuries. Opp. 18-19 (citing *Bucklew*, 139 S. Ct. at 1124; *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020)). But *Bucklew* explained that hanging "was not considered cruel because that risk was thought – by comparison to other known methods – to involve no more pain that was reasonably necessary to impose a lawful death sentence. *Bucklew*, 139 S. Ct. at 1127. In *Lee*, the Court implied that hanging does involve more pain than is reasonably necessary, explaining that lethal injection was "thought to be less painful and more humane than traditional methods, like hanging." *Lee*, 140 S. Ct.

at 2591. Here, when compared to the proffered alternatives, i.e., addition of an analgesic, the administration of five grams of pentobarbital, which the district court found will cause minutes of "drowning akin to waterboarding[,]" cruelly superadds pain. And while hanging caused death "sometimes through 'suffocation, which could take several minutes,'" Opp. 19, the district court found that it is certain that execution by the lethal injection protocol will subject Petitioners to the conscious experience of minutes of flash pulmonary edema.

Nor does it help the Government to rely on the Sixth Circuit's opinion in *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 298 (6th Cir. 2019), Opp. 19, for the proposition that the Eighth Amendment is indifferent to flash pulmonary edema because it resembles the effects of botched hangings that the courts have tolerated. For one thing, other court precedent is to the contrary. *See, e.g., Execution Protocol Cases*, 980 F.3d at 132 (holding that flash pulmonary edema may give rise to an Eighth Amendment claim). For another, the Government misreads the Sixth Circuit's ruling. The court's casual remark that the sensation of drowning and asphyxiation "looks a lot like the risks of pain associated with hanging" does not establish that flash pulmonary edema is per se constitutional. *See Ohio Execution Protocol*, 946 F.3d at 290.

II. The District Court's Factual Findings Are Owed Substantial Deference

A. Petitioners' Entitlement to Relief Does Not Depend on "Close Questions of Scientific Fact"

The D.C. Circuit concluded that the district court improperly granted a preliminary injunction based on its evaluation of "competing expert testimony on

close questions of scientific fact." App. 4. The court's decision, however, both understates key *undisputed* facts and wholly mischaracterizes aspects of the factual record before the district court.

Far from hearing "sharply contrasting expert testimony on virtually every major point," Opp. at 9, the district court relied on a number of *undisputed* underlying facts in granting a limited injunction. Respondents do not dispute that both Mr. Higgs and Mr. Johnson have been diagnosed with COVID-19 and that they "have been exhibiting symptoms consistent with that diagnosis." App. 8. Moreover, Respondents' experts do not dispute that COVID-19 causes lung damage in a large majority of symptomatic patients, even when symptoms are mild. Dr. Locher does not dispute the research cited by Dr. Van Norman indicating that at least 79% of symptomatic COVID-19 patients have lung damage. Dkt. #374-1 at 4. In fact, studies that Dr. Locher cites in his own declaration find that between 44.5% and 94.8% of even *asymptomatic* COVID-19 patients have lung damage visible on a CT scan. *See* Dkt. #389, Hrg. 78; Dkt. #380-1 at ¶ 11 (Locher Decl.). COVID-related lung damage persists after symptoms have subsided for at least several weeks to 90 days – another point that Respondents do not dispute. *See* App. 10, App. 31 n.13.

With respect to flash pulmonary edema, "[i]t is further undisputed that Petitioners will suffer flash pulmonary edema as a result of [their executions]." App. 8. Respondents do not dispute the mechanism by which flash pulmonary edema occurs. As Dr. Van Norman testified, pentobarbital causes pulmonary edema because the drug is highly caustic, so that when the chemical contacts lung tissue, it

begins damaging that tissue and causes fluid to leak into the lungs. *See generally* Hrg. 145-48. Finally, Respondents do not dispute that pentobarbital reaches the lungs before reaching the brain. App. 12 (explaining that Dr. Antognini, whom Respondents did not call for direct testimony, did not in his written declaration "address Dr. Van Norman's explanation that injected pentobarbital will begin to attack damaged lungs before it reaches the brain.").

Significant lung damage –Respondents question whether Petitioners' lungs are significantly damaged from COVID, pointing to Dr. Locher's description of "minimal" or "mild" symptoms. Add. 5-6. But the district court discounted Dr. Locher's testimony because he failed to notice significant symptoms from Mr. Higgs's medical records, including persistent coughing. Add. 29-30. Dr. Locher similarly failed to notice what Dr. Stephen and the district court described as obvious changes in Mr. Higgs's chest x-ray as between 2018 and December 2020. Add. 30. The district court that saw and heard the evidence, including the x-rays, found it "troubling that Dr. Locher did not account for these obvious differences between the two scans." Add. 30-31. And far from relying on "the court's own reading of the x-ray," Opp. at 15, the district court appropriately credited the testimony of Dr. Stephen, whom the court found more credible. Similarly concerning was the fact that Dr. Locher characterized the results of both Mr. Higgs's 2018 and 2020 x-rays as normal despite the fact that "chest x-rays typically only show seven to nine ribs, but Higgs' x-ray films showed eleven ribs" as a result of his poorly-controlled asthma, as Dr. Stephen explained. APP.13. The court reasonably

discounted Dr. Locher's testimony. *Id.*; *see also* Add. 32 (discounting Dr. Locher's views as to Johnson in light of Dr. Locher's flawed analysis of Mr. Higgs's x-rays).

Also erroneous is the court's remark that "mild" cases of COVID-19 may result in lung damage in as few as 44.5% of cases. Add. 6. That figure describes a study of *asymptomatic* COVID patients. Hrg. 63; Locher Decl., Dkt. #380-1, at 3. Mr. Higgs and Mr. Johnson are both symptomatic, as Dr. Locher acknowledged despite his selective review of medical records. Hrg. 63-64; Add. 30. And Dr. Van Norman explained that 80% to 95% of symptomatic COVID patients suffer lung damage. Hrg. 166.

COVID-enhanced likelihood of flash pulmonary edema – Respondents argue that the evidence underlying Petitioners' claims is "based entirely on pure speculation or on scientific rationales necessarily rejected by this Court in vacating the Eighth Amendment injunction at issue in *Lee*." Opp. at 10. Once again, Respondents misread the record. The district court credited Dr. Van Norman's live testimony that pentobarbital is "a caustic chemical" which is "going to attack an already leaky membrane." Add. 26-27. Dr. Van Norman explained, at length, that COVID-related damage allows toxins to degrade the same lung tissues that are already compromised. *See also* Hrg. 153, 155, 157-58, 160-61, 192. "Everything we know about pulmonary physiology at the alveolar capillary membrane level says that if you already have a damaged alveolar capillary membrane and then you flood it with a toxic chemical, that you're at increased risk and increased heightened rapidity of getting pulmonary edema." Hrg. 165-66.

Flash pulmonary edema before the prisoner is insensate – The D.C. Circuit also errs by characterizing Petitioners' evidence that they will experience flash pulmonary edema while sensate as "shaky" and insufficient to meet the "high bar" imposed by *Lee*. The D.C. Circuit errs because the evidence below is substantially broader than that in *Lee* – and was credited as such by the district court. First, Dr. Van Norman explained the mechanism by which pentobarbital works swiftly on COVID-damaged lung tissues by corroding them when "the drug has not even reached the brain at that point." Hrg. 192. Pulmonary edema begins "instantaneously" in light of the "synergistic effects" of the COVID infection and pentobarbital at the pulmonary-capillary membrane. Hrg. 160-61. Second, Dr. Stephen *also* testified to that effect and was found credible. Add. 27. He stated that flash pulmonary edema would occur "almost immediately" after injection of 5 grams of pentobarbital. Hrg. 98. Third, the district court discounted Dr. Antognini's views because Dr. Antognini nowhere addressed the causal mechanism described by Drs. Van Norman and Stephen and credited by the district court.

B. The District Court Acted Appropriately as Factfinder

While it is true that the Supreme Court has cautioned against courts "embroil[ing] [themselves] in ongoing scientific controversies beyond their expertise," when evaluating *alternative* methods of execution, *Glossip v. Gross*, 576 U.S. 863, 882 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion)), the court did not suggest that district courts abdicate their responsibility to determine whether a given method of execution is cruel in the first instance.

Indeed, the Court in *Glossip* reaffirmed that "we *must* invalidate a lethal injection protocol if it violates the Eighth Amendment." *Glossip*, 576 U.S. at. 863 (emphasis added). Here, the district court acted entirely within its authority to hold an evidentiary hearing to evaluate the credibility of competing experts. In doing so, the court fulfilled one of the most basic roles of a court: to act as factfinder and evaluate the relative credibility of witnesses with conflicting testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999) ("[T]he law grants a district court the same broad latitude when it decides *how* to determine reliability [of scientific or technical evidence] as it enjoys in respect to its ultimate reliability determination.").

Here, the district court appropriately limited its analysis to making lay observations and evaluating traditional markers of credibility. The court discounted, for instance, much of the testimony from Respondents' pulmonologist Dr. Locher because multiple inaccuracies in his sworn declaration made it "unclear how closely [Dr. Locher] had reviewed the relevant medical records." A14. These inaccuracies included Dr. Locher's contention "that Higgs was not experiencing any symptoms" on multiple dates in late December despite the fact that BOP medical records "clearly indicate" that he was. A14-15. The court found similar inconsistencies with respect to Dr. Locher's review of Mr. Johnson's medical records. *See id.* (noting that "Dr. Locher's declaration states that Johnson exhibited no symptoms of COVID-19 on December 22 and 23" but that he acknowledged during cross-examination that the medical records reflected COVID-19 symptoms during that time period).

Similarly, in declining to credit the opinions of Dr. Antognini, the court relied on the fact that Dr. Antognini only "cited two studies in his entire declaration, neither of which involved COVID-19," and that "[h]is declaration did not indicate whether he even treats COVID-19 patients." App. 12. Here again, the court relied on traditional markers of the reliability of expert testimony: the expert's qualifications and his reliance on relevant published studies. What the court did here was no different from the daily work of district judges across the country, who routinely preside over bench trials involving complex medical malpractice, mass torts, and products liability, and other matters involving specialized scientific or technical evidence. Surely Respondents do not suggest that district courts are incapable of resolving factual disputes involving scientific expert testimony.

III. Executing Petitioners While They Remain COVID-19 Symptomatic Superadds Pain And Terror To Their Executions

The Government contends that they are not superadding pain to Petitioners' executions, despite a finding from the district court that executing Petitioners while they remain symptomatic with COVID-19 will cause them to experience sensations akin to waterboarding for up to two and a half minutes. Opp.18. Yet that is precisely what the Government is doing by rushing to execute Petitioners before their lungs heal. Indeed, Mr. Higgs's recent chest x-ray confirmed "extensive damage caused by COVID-19." App.13. The injunction issued in this case is a limited one, and lasts only until March 16, 2021, when the Government will be free to execute Petitioners. At that time their risk for consciously experiencing flash pulmonary edema will have

decreased, i.e. the risk of flash pulmonary edema may remain, but it will not be certain to happen, as the district court found. App. 16.

CONCLUSION

The application for stays of executions pending a petition for a writ of certiorari should be granted.

January 14, 2021

Respectfully submitted,

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