No. 20A6

IN THE

Supreme Court of the United States

EARLENE PETERSON, KIMMA GUREL, AND MONICA VEILLETTE,

Petitioners,

v.

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

Respondents.

On Application for Stay

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

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ARGUMENT

The government treats the family of the murder victims here as if they were an inconvenience. They are not. They are the same people the government contacted when Nancy Mueller, Sarah Powell, and William Mueller went missing, when the bodies of their loved ones were found in a lake, and when it was time for trial. It was these three women alone who sat through all the evidence introduced at the trial and two death penalty sentencings and who have followed, with the help of the government all post-conviction proceedings until this point. When Respondents refer in their pleadings to "an" eight-year- old and her parents" it is *their* child, their grandchild, their sister they would render anonymous. And, as noted in our application, the government cited their interests repeatedly as it has defended Lee's sentence in multiple courts and in scheduling this execution.

Now, when these same people have again asserted their interest in and right to be present for the last part of this process, the Department regards them as an inconvenience. They are suddenly mere "third parties" whose status seems to depend on what the government thinks about their views on whether Mr, Lee should be executed. But whether or not any of the petitioners "oppose the execution," Govt. Resp. at 4, they have a right to attend: to grieve for their lost love ones, to find peace, and to mourn their losses together. Yet in insisting on an execution when the nation's health officials tell Mrs. Peterson, Ms. Gurel, and Ms. Veillette not to travel, and to avoid crowds and COVID hotspots, the government writes them out of the picture entirely.

The government's veiled suggestions that petitioners are attempting to disrupt the process or delay the execution for improper reasons are specious. The resurgence of the COVID-19 virus is as unprecedented as it is serious. Indeed, Mrs. Peterson did not ask Respondents to "reschedule" when she had heart surgery in the fall and could not attend the December planned execution of her family's killer. She wishes to attend this execution, but simply cannot do so due to the government's reckless decision.[1]

The government, despite its rhetoric concerning its support for victims' family members, has refused to take petitioners concerns seriously. Instead, they minimize their situation (and their suffering) and respond with a parade of horribles that reflects a misunderstanding of petitioners' claims. The district court's injunction does not require a lengthy stay of Lee's execution "until treatment or a vaccine is available" (Resp. at 10). In fact, petitioner's motion for a preliminary injunction requested a delay "until such time as treatment or a vaccine for COVID-19 is available or the current surge in the virus has receded *or the threat to their health posed by the ongoing COVID-19 pandemic has otherwise abated*." Dist. Ct. Dkt. 17, at 1 (emphasis added); *see also* Dkt. 17-3, at 5 (proposed order). More to the point, the district court made clear that it would "vacate the injunction upon a

[1] The government notes that other victims, referring possibly to two family members of William Mueller, have accepted the pandemic's risks. Petitioners have no interest in denying their right to attend and mourn together as they too would like. But 81-year-old family matriarch Earlene Peterson should not have to risk her health in order to be present. And the government makes no effort to show that any other family members will be harmed by a delay, or even that they would oppose petitioners' request.

showing by the defendants of an agency action setting a date for Mr. Lee's execution in accord with the FDPA and demonstrating reasonable consideration of the plaintiffs' right to be present for the execution." Appx. 24. Petitioners merely seek to delay the execution to a time when it is safe to travel and attend and not in a time of a resurgent virus surging throughout much of the Nation. That is all the district court's injunction requires.

And neither petitioners' argument nor the district court decision will lead to a regime in which "the availability and travel preferences of every person who might witness the execution" could be used to manipulate or delay the scheduling of an execution. The arbitrary and capricious standard shields the government from scheduling decisions that fail to take into account mundane scheduling matters. But a scheduling decision that effectively deprives victims' close family members of their right to witness the execution by disregarding the substantial risks of COVID-19 to vulnerable individuals fails under that standard.

As the government points out, the Seventh Circuit panel obviously had strong views regarding the merits of petitioners' case. Respectfully, those views are mistaken. The Federal Death Penalty Act (FDPA), 18 U.S.C. § 3596, means more than the government and the court of appeals acknowledge. Indeed, the government's technical arguments on the limits of the FDPA (upon which three D.C. Circuit judges could not agree) demonstrate why this issue is worthy of certiorari. More important, under the controlling interpretation of the FDPA, manner includes binding state law on how the execution is to proceed. And here the

mandatory procedures of Arkansas law clearly require the presence (if they so choose) of family members such as petitioners. That is precisely the sort of positive law from binding state statutes that Judge Rao found encompassed in the FDPA and which governs here. *In re Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 130 (D.C. Cir. 2020) (Rao, J. Concurring). This is not about following "every nuance" of state procedure; it is about following a clearly applicable state statute on the manner in which the sentence is implemented.

Moreover, federal regulations govern who "shall be present" at the execution. *See* 28 C.F.R. § 26.4. And, as we have noted, BOP's Execution Protocol sets forth precisely who the citizen witnesses provided for in the regulation are intended to be: "in identifying these [eight citizen] individuals, the Warden, no later than 30 days after the setting of an execution date, will ask the United States Attorney for the jurisdiction in which the inmate was prosecuted to recommend up to eight individuals who are victims or victim family members to be witnesses of the execution)." Appx. 70-72 (emphasis added).

The government also seeks to dismiss the language of BOP's mandatory protocol, which states that BOP "will" ask the U.S. Attorney to recommend up to eight individuals "who are victims family members" to be witnesses pursuant to 28 C.F.R. § 26.4. Govt. Br. at 18. But the government's contention that BOP is not *required* to choose them makes one wonder what purpose this directive serves. Moreover, the fact that BOP has some discretion does not mean it has unlimited, unreviewable discretion. Here, BOP had selected petitioners pursuant to the

regulations and the protocol to attend this and the previous execution. In these circumstances, it was an abuse of discretion to schedule the execution at a time in which attendance would endanger them.

With respect to the balance of harms, the government incorrectly focuses on its general interest in the timely carrying out of a capital sentence and fails to articulate why their interest in executing Mr. Lee *today* is outweighed by the victims' interest in obtaining closure and peace by attending this execution at a future date, when it is safe to do so. Indeed BOP's own declarations demonstrate that the risk of traveling to and attending this execution entails more than the mere "possibility" of viral exposure (Opp. at 28): an individual who has attended meetings with the very staff who will carry out this execution has tested positive for COVID-19. There is at least one confirmed COVID-19 death on prison grounds, and cases are on the rise across the United States. The lives and health of petitioners and others attending the execution, together with the health of those they will interact with in airports and other public places, outweigh the government's interest in holding an execution during a new resurgence of the pandemic where the nation's health officials warn against travel. Postponing the execution until a time when Petitioners can safely attend serves the public interest, as well. *Cf. Banzhaf v. F.C.C.*, 405 F.2d 1082, 1096-97 (D.C. Cir. 1968) ("Whatever else it may mean, however, we think the public interest indisputably includes the public health. There is perhaps a broader public consensus on that value, and also on its core meaning, than on any other likely component of the public interest.").

CONCLUSION

For the foregoing reasons, this Court should stay the order of the Seventh Circuit pending petitioners' forthcoming petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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