No. 20A8

IN THE SUPREME COURT OF THE UNITED STATES

IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

DANIEL LEWIS LEE, ET AL.

(CAPITAL CASE)

REPLY IN SUPPORT OF APPLICATION FOR A STAY OR VACATUR OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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This Court has "never invalidated" a State or federal "procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment" -- not hanging, the firing squad, the electric chair, or lethal injection using a substance that is indisputably more controversial than pentobarbital. Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion of Roberts, C.J.); see Bucklew v. Precythe, 139 S. Ct. 1112, 1124 (2019); Glossip v. Gross, 135 S. Ct. 2726, 2746 (2015); id. at 2781 (Sotomayor, J., dissenting). But the district court in this case, six hours before the first scheduled federal execution in 17 years, concluded that respondents are likely to establish that execution by an injection of pentobarbital will be the first method of execution that this

Court ever determines to constitute cruel and unusual punishment -- even though that lethal-injection protocol was adopted by the federal government precisely because it "would produce a humane death" and had been "tested" by extensive litigation, A.R. 4, and even though this Court approved it just last year for the execution of an inmate with a particularly sensitive medical condition, see Bucklew, 139 S. Ct. at 1118-1119. In the district court's view, notwithstanding that pentobarbital is a sedative "commonly used to euthanize terminally ill patients who seek death with dignity in states such as Oregon and Washington," Beaty v. Brewer, 649 F.3d 1071, 1075 (9th Cir. 2011) (Tallman, J., concurring in the denial of rehearing en banc), and "widely conceded to be able to render a person fully insensate," Zagorski v. Parker, 139 S. Ct. 11, 11-12 (2018) (Sotomayor, J., dissenting from denial of application for a stay and denial of certiorari), use of the drug in carrying out executions is the constitutional equivalent of "the punishments of the Old World," such as "disemboweling, quartering, [and] public dissection," Bucklew, 139 S. Ct. at 1123-1124.

There is no realistic prospect that position will prevail on appeal or in this Court. Whether considered under the standard proposed by respondents, see Opp. 8, or by the government, see Appl. 19-20, the government has made a strong "showing that that [it] is likely to succeed on the merits," Nken v. Holder, 556 U.S. 418, 434 (2009). And the equities tip overwhelmingly toward

the government as well, in light of many years that have elapsed since respondents committed their horrific federal crimes, the exhaustive appellate and collateral review they have received, and the extensive preparations the government has made to ensure the sentences imposed on respondents are implemented in a humane and responsible way. Allowing an injunction devoid of legal merit to again delay these lawful executions "would serve no meaningful purpose and would frustrate the [federal government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze, 553 U.S. at 61 (plurality opinion). The "people of" the United States -- who have made the considered choice to permit capital punishment for egregious federal crimes like these -- "deserve better," and so do the family members of respondents' victims. Bucklew, 139 S. Ct. at 1134.[1]

1. On the merits, the district court's holding rests on manifest legal errors that -- like its first injunction -- will not withstand appellate review. It is implausible that either the court of appeals or this Court will ultimately conclude that, in adopting a single-drug pentobarbital protocol for lethal

[1] Respondents note (Opp. 27) that some family members of Lee's murder victims oppose his execution. The government respects their views. But other family members of Lee's victims are in Terre Haute now to witness Lee's execution, and they do not share those views. In addition, "[b]oth the [government] and the victims of crime have an important interest in" punishing grievous offenses and "the timely enforcement of a" capital sentence. Hill v. McDonough, 547 U.S. 573, 584 (2006); see, e.g., Calderon v. Thompson, 523 U.S. 538, 556 (1998).

injections, the federal government and many States were "seeking to superadd terror, pain, or disgrace to their executions." Bucklew, 139 S. Ct. at 1124. That suggestion has no foundation in the record, history, precedent, or common sense. This Court has repeatedly explained that States and the federal government turned to lethal injection precisely because it was the "method of execution believed to be the most humane available." Baze, 553 U.S. at 62 (plurality opinion); see, e.g., Bucklew, 139 S. Ct. at 1124-1125; Glossip, 135 S. Ct. at 2732. The record underlying the government's adoption of the challenged protocol -- which includes extensive analysis culminating in the conclusion that pentobarbital "would produce a humane death," A.R. 3 -- underscores that the government selected pentobarbital based on an informed conclusion that it would not inflict "unnecessary pain," Bucklew, 139 S. Ct. at 1125. And that conclusion is firmly reinforced by this Court's own repeated reliance on pentobarbital as a lethal-injection option that would not cause such pain, see id. at 1131; Glossip, 135 S. Ct. at 2733.

The district court fundamentally erred by disregarding all of that and operating as the kind of "'board[] of inquiry" to referee battles of medical experts that this Court has repeatedly deemed impermissible. Bucklew, 139 S. Ct. at 1125 (quoting Baze, 553 U.S. at 51 (plurality opinion)). This is not, as respondents suggest (Opp. 1), a mere factual dispute. The district court's

statement that, "[w]hile it is difficult to weigh competing scientific evidence at this relatively early stage," respondents "have the better of scientific evidence" reflects a fundamental legal error. Appl. App. 12a. The question before a court in a method-of-execution challenge is not which side has more convincing experts -- an inquiry that "would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of [government officials] in implementing their execution procedures." Baze, 553 U.S. at 51 (plurality opinion). It is whether, given the appropriate "measure of deference to a [government's] choice of execution procedures," the inmates have established an "objectively intolerable risk of harm" that qualifies as cruel and unusual. Id. at 50, 52 n.3 (citation omitted).

By weighing the expert reports against each other -- and giving essentially controlling weight to respondents rather than any deference to the government's choice -- the court overlooked that a widely-used method like pentobarbital cannot reasonably be viewed as creating an intolerable risk of harm under this Court's precedent. Baze, 553 U.S. at 53 ("[I]t is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated."). Indeed, under the district court's view, it appears that the execution protocols of Texas, Missouri, Georgia, and several other States -- which are materially identical to and

served as a model for the federal protocol -- were used to unconstitutionally execute more than 100 people over the past decade.

The district court also committed legal error in analyzing whether respondents have established "a known and available alternative" that is "'feasible, readily implemented," that "in fact significantly reduce[s] a substantial risk of severe pain,'" Glossip, 135 S. Ct. at 2737, 2739, and that the government has refused to adopt "without a legitimate penological reason," Bucklew, 139 S. Ct. at 1125. Respondents insist that an entirely novel two-drug protocol, consisting of some "pre-dose of opioid pain or anti-anxiety medication," Appl. App. 18a, followed by pentobarbital, is such an alternative, Opp. 17-19. As this Court's cases in recent years demonstrate, litigation over the precise contours of lethal-injection regimes is hotly contested. Respondents' suggestion that the federal government could simply proceed, without further challenges to its protocol, by adopting a never-used drug regime is meritless. And even if this new protocol were readily available, certainly its untested status would be a legitimate reason for the government to forgo it in lieu of the well-tested single-drug pentobarbital protocol that this Court approved and the government selected after extensive study. See Bucklew, 139 S. Ct. at 1129-1130.

Equally hard to credit is respondents' contention (Opp. 21) that their constitutional rights will be violated if the government employs that oft-used pentobarbital protocol to execute them instead of a firing squad. As the Eighth Circuit recently explained, "[t]he firing squad has been used by only one State since the 1920s," and there is no "significant possibility that use of a firing squad is readily implemented and would significantly reduce a substantial risk of severe pain." McGehee v. Hutchinson, 854 F.3d 488, 494 (2017). And Utah, the one state to actually use a firing squad in the last century, now authorizes the method only as a last resort. Utah Code Ann. § 77-18-5.5(3), 4 (2015).[2]

Even apart from feasibility concerns, the government's interest in selecting a method it regards as "preserving the dignity of the procedure," Baze, 553 U.S. at 57 (plurality opinion), would independently serve as a legitimate reason to decline as a policy matter to opt for "the splatter from an execution carried out by firing squad," Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting from the denial of rehearing en banc). The federal government is not

[2] The other two states that also authorize firing squad, Oklahoma and Mississippi, similarly put firing squad at the bottom of their order of preference. Both states provide for firing squad as the quaternary option for carrying out an execution, making it available only in the event execution by lethal injection, nitrogen hypoxia, and electrocution are all declared unconstitutional. See Okla. Stat. tit. 22, § 1014; Miss. Code. Ann. § 99-19-51.

constitutionally required to make this type of change, Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 870–71 (11th Cir. 2017), any more than the States are. Respondents' resort to claiming that the federal execution protocol is invalid under the Eighth Amendment because it does not use a method deemed less "humane" by "today's [societal] consensus," Baze, 553 U.S. at 62 (plurality opinion), only demonstrates that their Eighth Amendment challenge lacks merit.

2. The equities overwhelmingly support stay or vacatur of the injunction. Respondents were convicted of horrific crimes more than 15 years ago, and their executions have already been delayed once for six months by a legally unwarranted injunction. Declining to stay or vacate the district court's second injunction, which is even less legally tenable than the first, would likely produce many more months of delay for no valid reason. Respondents have received extensive review of their convictions and sentences, which they do not challenge here. They received thorough appellate proceedings on the statutory claim that was the district court's first choice for an injunction. And the Eighth Amendment claim at issue here is so unmeritorious that further review would not serve any meaningful purpose. At this point, "no more delay is warranted." United States v. Lee, No. 97-cr-24 (E.D. Ark. July 10, 2020), slip op. 9. The government is prepared to implement the sentence in a humane and dignified way; the contractors and

victims' families are waiting in Terre Haute now; the inmate is prepared; at this point, "the execution must come." Id. at 10.

Respondents and the district court suggest that the government moved too quickly in scheduling (or rescheduling) respondents' executions -- and simultaneously suggest that the government moved too slowly in revising its protocol to carry out those executions. See Appl. App. 3a, 20a. But there is no background principle that the government must -- after awaiting an inmate's years of direct appeals and post-conviction remedies -- set a schedule for implementing a lawful capital sentence that allows additional months or years for the inmate to conduct lengthy litigation over method-of-execution claims. Quite the reverse: this Court has instructed that the judiciary "should police carefully against attempts to use [method-of-execution] challenges as tools to interpose unjustified delay." Bucklew, 139 S. Ct. at 1134.

That instruction accords with the timeline contemplated in the statute and regulations governing federal executions. The Federal Death Penalty Act provides that, before implementing a death sentence, the Attorney General shall have custody of the inmate "until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence." 18 U.S.C. 3596(a). And the regulations contemplate that an inmate will generally receive 20 days' notice of an execution date, 28 C.F.R.

26.4(a), and that the government will "promptly" designate a new execution date "[i]f the date designated for execution passes by reason of a stay of execution" that is lifted, 28 C.F.R. 26.3(a)(1). Thus, nothing about this Court's precedents, the governing statute, or the relevant regulations remotely suggest that the government's rescheduling of three of respondents' executions after the court of appeals vacated the first, meritless injunction was too hasty simply because respondents had filed a sprawling complaint challenging the government's execution protocol.

Nor was the time the government took in selecting an execution protocol a form of delay "undermin[ing]" its interests in carrying out respondents' sentences. Appl. App. 20a. As Judge Katsas explained in rejecting similar reasoning from the district court in connection with its first injunction, this pause was prompted by the "long and successful campaign of obstruction by opponents of capital punishment, which removed" a drug from the government's previous protocol "from the market by 2011." 955 F.3d at 128. "At that point, the government's options were severely limited, and it can hardly be faulted for proceeding with caution." Ibid. "The government's care in selecting an available and effective execution substance does not diminish the importance of carrying out" these lawfully imposed, and long-delayed, sentences. Ibid. The district court, which suggested that the

government should have been yet more careful in selecting a protocol, should not have penalized the government for the time it took to ascertain it had chosen a method of ensuring a humane and dignified death.

* * * * *

For the foregoing reasons and those stated in the government's application for a stay or vacatur, the district court's injunction should be stayed or vacated effective immediately.

Respectfully submitted.

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