No. 19A615

IN THE SUPREME COURT OF THE UNITED STATES

IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

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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Respondents offer two merits arguments for leaving in place the district court's order preliminarily enjoining their executions. The first (Opp. 16-20) is that the federal lethal-injection protocol is invalid because the Federal Death Penalty Act of 1994 (FDPA) vests authority to supervise implementation of a death sentence only in a United States Marshal. But U.S. Marshals serve "under the authority and direction of the Attorney General," 28 U.S.C. 561(a), who has express statutory authority to perform their functions, 28 U.S.C. 509, and did so here. That argument is sufficiently unavailing that the district court did not even mention it.

Respondents' second argument (Opp. 20-31) is that the FDPA's directive that the federal government implement a death sentence "in the manner prescribed by the law of the" State of conviction (or another designated State), 18 U.S.C. 3596(a), should be read in a way that conflicts with the unambiguous meaning of parallel

statutory language dating back to 1790; that would allow States to bar federal officials from executing federal inmates for federal capital crimes; that would compel the United States to follow state execution procedures on matters as minute as how a catheter is inserted; and that would render unlawful the federal government's execution of Timothy McVeigh (among others). Although the district court accepted that argument, it is no more persuasive than the first. Simply put, the government is not merely likely to succeed but plainly correct. This Court has vacated injunctions or stay orders barring State executions under similar circumstances, see Appl. 37, and the same relief is warranted here, particularly given the profound importance for the United States, the public, and the rule of law of carrying out executions in a timely manner.

On the equities, respondents' principal objection is that the four months since the Attorney General scheduled their executions has provided insufficient time to seek review of the protocol. But this Court has allowed comparable executions to proceed on much faster timelines, including when Missouri adopted a single-drug pentobarbital protocol that was a model for the protocol that the federal government adopted here. See Appl. 34-35. And here, unlike there, respondents' claim does not rest on an allegation of unconstitutional pain; the injunction relies only on a purported

statutory entitlement to different (and potentially less humane) state execution procedures.

The result of denying the government's request for relief now would be that, in all likelihood, the United States will not be able to enforce the sentences against respondents for at least many months and more likely years, after the D.C. Circuit appeal and any ensuing proceedings in this Court have run their course. Respondents' meritless claim should not be the basis for such a lengthy delay. The scheduled executions are lawful, and the Court should stay or vacate the injunction so that they may proceed.

1. In a capital case, as in others, a preliminary injunction is warranted only if a plaintiff can "establish that he is likely to succeed on the merits." Glossip v. Gross, 135 S. Ct. 2726, 2736 (2015) (quoting Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008)). Because respondents plainly cannot make that showing here -- and because any contrary decision by the court of appeals would therefore be reversed by this Court -- the injunction should be stayed or vacated.

a. Respondents' first merits argument is that the Federal Bureau of Prisons (BOP) lacked authority to issue the protocol because Congress "vested" the United States Marshals Service (USMS) "with the sole authority to carry out sentences under the FDPA." Opp. 17. The district court declined to adopt that

argument, and for good reason -- it is squarely foreclosed by the unambiguous text of the relevant federal statutes.

Respondents rely on Congress's direction that "a United States marshal * * * 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). But as the government explained in the court below (Gov't C.A. Stay Reply 2-4), Congress unambiguously directed that the USMS is "a bureau within the Department of Justice under the authority and direction of the Attorney General." 28 U.S.C. 561(a); see 28 U.S.C. 561(c) ("Each United States marshal shall be an official of the Service and shall serve under the direction of the Director."). Thus, every U.S. Marshal "is subject to the supervision and direction of the Attorney General." Pennsylvania Bureau of Correction v. United States Marshals Serv., 474 U.S. 34, 36 n.1 (1985).

Congress likewise directed that the BOP Director is "appointed by and serv[es] directly under the Attorney General," and that BOP duties are performed "under the direction of the Attorney General." 18 U.S.C. 4041, 4042. And, critically, Congress "vested in the Attorney General" "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice," with certain exceptions not presented here, 28 U.S.C. 509, and authorized the

Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General," 28 U.S.C. 510.

Thus, even if respondents were correct that the FDPA vests all authority for developing federal execution protocols in USMS or individual Marshals, such authority also vests by operation of law in the Attorney General, who may exercise such authority directly or by delegation to BOP. Here, there can be no dispute that the protocol was adopted at the direction, and under the authority, of the Attorney General. Administrative Record (A.R.) 868; see 28 C.F.R. 26.3(a)(4). Moreover, USMS concurred in the protocol, A.R. 872, which assigns it a supervisory role in federal executions, see A.R. 1069 (providing for the lethal injection to be "administered by qualified personnel * * * acting at the direction of the United States Marshal"); ibid. (requiring the BOP Director to appoint a senior-level employee to "assist the United States Marshal in implementing the federal death sentence"). Accordingly, even respondents do not argue that the protocol would have been any different if it had been issued by USMS with BOP's concurrence, rather than the other way around.

b. Respondents' second argument (Opp. 20-31) is the one the district court adopted: that the FDPA's directive to implement

the sentence "in the manner prescribed by" the relevant State law, 18 U.S.C. 3596(a), requires the federal government not only to use the same method of execution prescribed by the relevant State (here, lethal injection) but also to follow every one of the State's other execution procedures, such as "how the intravenous catheter is to be inserted," Appl. App. 12a. That position is "untenable" as a matter of statutory text, history, purpose, and common sense. Jones v. United States, 527 U.S. 373, 388 (1999) (interpreting the FDPA).

Respondents explore (Opp. 21) the general meaning of the term "manner," but the question here is not what the word means in the abstract; the question is what it means in the FDPA. And on that question, there is no room for doubt. Respondents do not dispute that the FDPA borrowed the phrase "manner prescribed by the law[] of the State" from the Act of June 19, 1937 (1937 Act), ch. 367, 50 Stat. 304, which in turn borrowed the term "manner of inflicting the punishment of death" from the Crimes Act of 1790, 1 Stat. 112, 119; see Appl. 6-9; Andres v. United States, 333 U.S. 740, 745 n.6 (1948). Respondents also do not dispute that the Crimes Act of 1790, which provided that "the manner of inflicting the punishment of death[] shall be by hanging," § 33, 1 Stat. 119, used the term "manner," ibid., in a way that is necessarily "coterminous" with

the "method" of execution, Opp. 22; see, e.g., Wilkerson v. Utah, 99 U.S. 130, 133 (1878); Appl. 22.

That history forecloses respondents' position. Because "a word * * * obviously transplanted from another legal source," such as "other legislation, * * * brings the old soil with it," Hall v. Hall, 138 S. Ct. 1118, 1128 (2018) (citation omitted), respondents must offer some basis to conclude that "manner" has a different meaning in the FDPA than it did in the Crimes Act of 1790. But respondents entirely fail to do so. They do not even mention the Crimes Act of 1790. And their assertion (Opp. 22-23) that the 1937 Act somehow expanded the meaning of "manner" that had been settled for the past 147 years has no foundation.

The government has attached as an appendix the two-page House Report that respondents cite (Opp. 22-23), see H.R. Rep. No. 164, 75th Cong., 1st Sess. 1-2 (1937 Report). Not a word in that Report evinces a congressional "desire to encompass more than just the 'method' of execution." Opp. 22. To the contrary, the Report's entire discussion proceeds on the premise that the terms "manner" and "method" are synonymous in this context. The Report begins with the title "Method of Imposition of the Death Sentence," and ends with text amending the Crimes Act of 1790 to require infliction of the death penalty in the "manner provided by the law of the state." 1937 Report 1 (emphases added; capitalization

altered). In between, both the House Judiciary Committee and the Attorney General's letter repeatedly use the terms "method" and "manner" interchangeably. Id. at 1-2.

Respondents' assertion (Opp. 23) that Congress "intended the 1937 law to constrain the federal government's authority" is equally baseless. Congress adopted the 1937 Act at the suggestion of the Attorney General, who did not seek to constrain the federal government, but rather proposed that it would be "desirable" for the federal government to adopt the "more humane" methods of executions applied by the States. 1937 Report 2.

Respondents also suggest (Opp. 23) that this Court's decision in Andres refers to "limitations imposed by the 1937 law." It does not. The passage of Andres that respondents cite discusses an unrelated provision involving capital jury verdicts. 333 U.S. at 748; see id. at 747. The passage of Andres discussing the 1937 Act, by contrast, directly refutes respondents' position by explaining that the "purpose of" the 1937 Act was "the adoption of the local mode of execution," which Congress equated with "'more humane methods of execution, such as electrocution, or gas.'" Id. at 745 n.6 (quoting 1937 Report 1) (emphases added); see id. at 745 (upholding a sentence of "death by hanging" under the 1937 Act without discussing any additional required procedures).

Respondents suggest (Opp. 22-23) that, if "'manner'" and "'method'" were synonymous, "the federal government would have conducted executions [under the 1937 Act] at federal facilities using the State method." That logic does not follow. Interpreting "manner" in the 1937 Act to require a method of execution such as hanging, electrocution, or firing squad, does not imply anything about where such an execution would take place. Indeed, the 1937 Act separately addressed the place of execution, providing that the federal government "may use available State or local facilities" so long as it pays the cost. 50 Stat. 304. At a time when there were fewer federal prisons and no federal execution chamber, it was natural for the federal government to carry out executions in state facilities. But that practice does not suggest that the federal government had to carry out executions in state facilities under the 1937 Act's "manner" requirement. To the contrary, as noted above, the 1937 Act made the use of state facilities discretionary. 50 Stat. 304. And as respondents concede (Opp. 23), the federal government did carry out some federal executions in federal facilities -- namely when the relevant States (i.e., Michigan and Kansas in 1938) were "not conducting executions," id. at 6; see Appl. 23; Gov't C.A. Reply 4-5. That history underscores that the 1937 Act did not actually bind the federal government to all state procedures; if it had,

the federal government could not have conducted executions in federal facilities.

Respondents do not seriously contend that Congress changed the meaning of the 1937 Act's directive to implement a death sentence in the "manner prescribed by the law[] of the State", 50 Stat. 304, when it enacted identical language in the FDPA, 18 U.S.C. 3596(a). The meaning of the FDPA thus comes down to the meaning of the 1937 Act, which -- as discussed above -- clearly required federal compliance only with "the local mode of execution," such "'as electrocution, or gas.'" Andres, 333 U.S. at 745 n.6 (citation omitted). Respondents' only additional statutory arguments (Opp. 24, 27-28) rely on forms of post-enactment legislative history, including failed bills. But even if such materials were pertinent, none suggests that the FDPA departed from the long-settled meaning of "manner" in the 1937 Act. See Appl. 31-32; Gov't C.A. Reply 6-8.[1]

Respondents also have no answer to the absurd consequences that their reading of the FDPA would produce. See Appl. 27-30. Respondents' principal response (Opp. 29) to the prospect that a

[1] Respondents briefly suggest (Opp. 25-26) that Congress's use of the term "implementation" in the FDPA has some significance. But the term "implementation" alone signifies nothing; what the FDPA requires "implementation of" is "the sentence in the manner prescribed by the law of the State," 18 U.S.C. 3596(a) (emphasis added), and that circles back to the central question of how to define "manner."

State could effectively veto a federal execution by making it impossible to comply with some aspect of state procedure is the assertion that no "State with a death-penalty protocol would ever attempt to" do that. Congress, however, need not have engaged in such wishful thinking, and respondents conspicuously decline to address the real-life example of California's gubernatorial moratorium on the death penalty. See Appl. 28-29.[2] And although respondents suggest that States that want to cooperate will always do so, they ignore the serious confidentiality concerns that States face. See State Amici Br. 13-15.

Respondents offer no response at all to the paradoxical result that, under their position, the federal government would be barred from using execution procedures that are more humane to inmates than those prescribed by the law of the States. See Appl. 29-30. Indeed, although they understandably do not say so expressly, respondents ultimately seem to embrace the position that the FDPA would require the federal government to execute them using state three-drug protocols that other inmates have routinely challenged as unduly painful, rather than under the single-drug pentobarbital

[2] Respondents observe (Opp. 29) that the FDPA provides for designation of a different State for sentence-implementation purposes when "the law of the State [of conviction] does not provide for implementation of a sentence of death." 18 U.S.C. 3596(a). But that does not address a situation like California's gubernatorial moratorium, in which the "law of the State" of conviction plainly does "provide for implementation of a sentence of death." Ibid.

protocol widely recognized as humane. Ibid. Or perhaps, even worse, respondents intend to argue in the future that they may not be executed at all because the FDPA requires one particular drug protocol and the Eighth Amendment requires another.

Finally, respondents appear to accept (Opp. 25) that, on their view of the FDPA, the federal government's execution of Timothy McVeigh for bombing the Oklahoma City federal building -- and also of Louis Jones for the kidnapping, rape, and murder of Private Tracie McBride at an Air Force base in Texas, see Jones, 527 U.S. at 376 -- violated the FDPA simply because they were conducted at the federal execution facility in Indiana rather than at prisons in Oklahoma and Texas. See Appl. 25-26; Opp. 25 (pointing out only that McVeigh and Jones did not raise such an argument). That respondents admit their position compels such a result only further underscores that they have no prospect of success on the merits.

2. If the Court agrees that the government should succeed on the merits, it should stay or vacate the preliminary injunction on that basis alone. See Glossip, 135 S. Ct. at 2736–2737; Opp. 32 ("If the Government were to defeat the Respondents' claims in the underlying action, it would be able to proceed with executions (assuming there are no other impediments)."). But in any event, the equities weigh heavily against respondents as well.

Respondents do not (and could not) dispute the government's overwhelming interest in the enforcement of the criminal sentences imposed by unanimous federal juries after fair trials and upheld through extensive appellate and post-conviction proceedings in federal courts. See Bucklew v. Precythe, 139 S. Ct. 1112, 1113 (2019); State Amici Br. 7-13. The American people have chosen to make capital punishment available in the federal system; if that decision is to be given meaningful effect, sentences must be enforced in cases like these.

On the other side of the balance, respondents' cognizable interests are minimal. Of central importance, respondents are not contesting their guilt, their death sentences, or their execution by lethal injection in this action.[3] Their asserted injury therefore is not that they will be wrongfully executed. Nor, in contrast to many recent drug-protocol cases, is the asserted injury before this Court that respondents will be subjected to unwarranted pain during execution. See, e.g., Bucklew, 139 S. Ct. at 1118. Rather, the only harm respondents assert is that they will not receive a purported statutory entitlement to execution in compliance with certain state procedures. See, e.g., Opp. 31-32

[3] Although respondents have exhausted their permissible appeals and collateral challenges, some have continued to file additional challenges. Earlier today, a district court in Southern Indiana issued a stay of respondent Lee's execution pending consideration of his motion under 28 U.S.C. 2241. The government plans to seek immediate relief in the Seventh Circuit.

(discussing differences in catheter-insertion procedures and provision of a sedative before execution). Such purely procedural interests would generally be entitled to only limited weight, and the injuries respondents assert here are especially modest given that they do not dispute that the federal procedures that will be applied may in fact be more humane than the state alternatives they claim are statutorily required. See Appl. 36-37.

Respondents also complain about the timetable of their executions (Opp. 32-36), suggesting simultaneously that the government delayed scheduling their executions for too long and that the government scheduled their executions too quickly. But the government's timeline is well within the framework that this Court has previously approved. As explained in the government's application (at 34-35), this Court authorized Missouri's execution of an inmate just over one month after the State adopted a lethal-injection protocol similar to the one the government has adopted here, even though that inmate was actively challenging the legality of the protocol, and even though that inmate -- unlike respondents -- had received a district-court injunction on the ground that he would experience unconstitutional pain. See Franklin v. Lombardi, 571 U.S. 1066 (2013). Indeed, within four and half months of Missouri's adoption of a single-drug pentobarbital protocol (i.e., the same amount of time since the Attorney General's adoption of

a similar protocol in July), the State had executed five inmates, and in each case this Court had declined to grant stays. See Appl. 35 n.5. Respondents offer no reason why they should receive more advantageous treatment.

* * * * *

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.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

DECEMBER 2019

75TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 164

METHOD OF IMPOSITION OF DEATH SENTENCE

JANUARY 29, 1937.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. WEAVER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 2705]

The Committee on the Judiciary, to whom was referred the bill (H. R. 2705), to provide for the manner of inflicting the punishment of death, after consideration, report the same favorably to the House with the recommendation that it do pass.

The method of imposition of the death sentence imposed by Federal courts is by hanging, which has been the method employed since the beginning of the Government. Many States now use more humane methods of execution, such as electrocution, or gas. The Attorney General suggests that it appears desirable for the Federal Government likewise to change its law in this respect, in which your committee concurs.

The Attorney General has proposed the bill here reported. It provides that the manner of execution shall be the manner prescribed by the laws of the State within which the sentence is imposed. In the event the State in which sentence is imposed does not inflict the death penalty, the court is to designate some other State in which the sentence is to be executed in the manner prescribed by the laws of that State.

The United States marshal having responsibility for the execution is authorized by the bill to use available State or local facilities and their officials, or to employ some other person, for such purpose, and to pay the cost thereof in an amount approved by the Attorney General.

The letter of the Attorney General follows:

DECEMBER 30, 1936.

Hon. HATTON W. SUMNERS,
Chairman, Committee on the Judiciary, House of Representatives,
Washington, D. C.

MY DEAR MR. CHAIRMAN: Under existing law, section 323 of the Criminal Code (U. S. Code, title 18, sec. 542), a death sentence imposed by a Federal court is carried out by hanging. The statute to that effect was originally enacted on April 30, 1790 (1 Stat. 112, 119).

Subsequently to the enactment of the statute many of the States have changed the method of execution and have adopted more humane methods, such as electrocution. It appears desirable for the Federal Government likewise to change its law in this respect.

Accordingly, the enclosed bill proposed that a sentence of death imposed by a Federal court shall be carried out in the same manner in which such sentences are carried out under the laws of the State in which the Federal court is held. The bill further proposes that the United States marshal charged with the duty of carrying out the sentence may use State or local facilities and avail himself of the services of State or local officials for that purpose.

I hope that this measure may be introduced and enacted during the ensuing session of the Congress.

Sincerely yours,

HOMER CUMMINGS, *Attorney General.*

In compliance with clause 2a of rule XIII of the Rules of the House of Representatives, existing law is printed below in roman, with matter proposed to be stricken out in black brackets, and new matter proposed to be inserted printed in italics:

SEC. 323. The manner of inflicting the punishment of death shall be [by hanging] *the manner prescribed by the laws of the State within which the sentence is imposed. The United States marshal charged with the execution of the sentence may use available state or local facilities and the services of an appropriate state or local official or employ some other person for such purpose, and pay the cost thereof in an amount approved by the Attorney General. If the laws of the state within which sentence is imposed make no provision for the infliction of the penalty of death, then the court shall designate some other State in which such sentence shall be executed in the manner prescribed by the laws thereof.*

O