No. 20A-_____

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.

WESLEY IRA PURKEY, ET AL.

(CAPITAL CASE)

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

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

PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are William P. Barr, in his official capacity as Attorney General; the United States Department of Justice; Timothy J. Shea, in his official capacity as Acting Administrator of the Drug Enforcement Administration; Stephen M. Hahn, in his official capacity as Commissioner of Food and Drugs at the Food and Drug Administration; Michael Carvajal, in his official capacity as Director of the Federal Bureau of Prisons; Jeffrey E. Krueger, in his official capacity as Regional Director, Federal Bureau of Prisons, North Central Region; Donald W. Washington, in his official capacity as Director of the U.S. Marshals Service; Nicole C. English, in her official capacity as Assistant Director, Health Services Division, Federal Bureau of Prisons; T.J. Watson, in his official capacity as Complex Warden, U.S. Penitentiary Terre Haute; William E. Wilson, M.D., in his official capacity as Clinical Director, U.S. Penitentiary Terre Haute; and John Does I-X, individually and in their official capacities.

The respondents (plaintiffs-appellees below) are Dustin Lee Honken, Wesley Ira Purkey, and Keith Nelson.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (July 15, 2020) (issuing third preliminary injunction)*

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (July 13, 2020) (issuing and denying stay of second preliminary injunction)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 22, 2019) (denying motion to stay first preliminary injunction)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 20, 2019) (issuing first preliminary injunction)

United States Court of Appeals (D.C. Cir.):

In re: Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5199 (July 13, 2020) (denying motion for stay or vacatur of second preliminary injunction)

In re: Federal Bureau of Prisons' Execution Protocol Cases, No. 19-5322 (Apr. 7, 2020) (vacating first preliminary injunction)

In re: Federal Bureau of Prisons' Execution Protocol Cases, No. 19-5322 (Dec. 2, 2019) (denying motion for stay or vacatur of first preliminary injunction)

---

* The consolidated case, In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145, includes three individual cases relevant here: Lee v. Barr, No. 19-cv-2559 (filed Aug. 28, 2019), which includes respondent Honken as an intervenor; Purkey v. Barr, No. 19-cv-3214 (filed Oct. 25, 2019); and Nelson v. Barr, No. 20-cv-557 (filed Feb. 25, 2020). The consolidated case includes other individual cases, see, e.g., Roane v. Barr, No. 05-cv-2337 (filed Dec. 6, 2005), but the order at issue here does not pertain to those other individual cases.

Supreme Court of the United States:

Barr v. Lee, No. 20A8 (July 14, 2020) (vacating second preliminary injunction)

Bourgeois v. Barr, No. 19-1348 (19A1050) (June 29, 2020) (denying petition for a writ of certiorari and application for a stay regarding first preliminary injunction)

Barr v. Roane, No. 19A615 (Dec. 6, 2019) (denying motion for stay or vacatur of first preliminary injunction)

IN THE SUPREME COURT OF THE UNITED STATES

_____

No. 20A-_____

IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

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

v.

WESLEY IRA PURKEY, ET AL.

(CAPITAL CASE)

_____

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

_____

Around 5 a.m. today, July 15, 2020, the United States District Court for the District of Columbia -- acting on a motion that had been pending in its latest iteration since June 19 -- preliminarily enjoined respondents' scheduled executions, including an execution scheduled for later today.[1] Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General,

[1] Today's execution of respondent Wesley Ira Purkey was initially scheduled for 4 p.m., but in light of the district court's day-of-execution injunctions on this and another claim (on which the government is also seeking emergency relief in the court appeals and, if necessary, this Court), and a pending application to vacate a stay issued by the Seventh Circuit on a different ground, see United States v. Purkey, No. 20A4 (filed July 11, 2020), the government is now planning to conduct Purkey's execution no earlier than 7 p.m. to allow additional time for review by the court of appeals and this Court.

on behalf of applicants William P. Barr et al., respectfully applies for an order staying the injunction pending appeal or vacating it effective immediately. See No. 20A8 (July 14, 2020 (granting a similar application yesterday).[2]

This is the fourth time the Court has encountered this case in recent months, and the second time this week. Respondents are "federal prisoners who have been sentenced to death for murdering children." No. 20A8, at 1. They each "committed their crimes decades ago and have long exhausted all avenues for direct and collateral review." Ibid. They do not challenge the lawfulness of their convictions or capital sentences in this case. This case instead involves respondents' challenge to the federal execution protocol, which sets forth "details for carrying out federal executions," including the substances used to conduct a lethal injection. 955 F.3d 106, 109; see id. at 110.

As relevant here, the Federal Bureau of Prisons (BOP) revised the protocol in July 2019 to address the unavailability of a lethal-injection drug that had been used in prior federal executions. 955 F.3d at 110. "After extensive study," BOP amended the protocol to provide for the use of a massive dose of the

[2] As with its application to vacate the day-of-execution injunction issued by the district court on Monday, the government has filed a similar motion to stay or vacate the injunction at issue here in the court of appeals. The government has urged the court to rule promptly and will notify this Court immediately if it acts on that request. Given the time constraints caused by the district court's delayed ruling, the government again has no choice but to request relief from this Court at the same time.

sedative pentobarbital -- the same approach that States have used to execute more than 100 inmates since 2012, and that this Court upheld last year against an Eighth Amendment challenge brought by a Missouri inmate with a unique medical condition. Ibid.; see No. 20A8, at 2; Bucklew v. Precythe, 139 S. Ct. 1112, 1129-1134 (2019).

After adopting the revised protocol, BOP scheduled execution dates in December 2019 and January 2020 for five federal inmates, including respondents Purkey and Honken. Those respondents, along with inmates Daniel Lee and Alfred Bourgeois, moved to enjoin their executions based on various constitutional and statutory challenges to the protocol.[3] In November 2019, the district court enjoined the executions on a single ground -- that the protocol purportedly conflicted with the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. -- without acting on respondents' other claims. This Court declined to stay or vacate that injunction to allow the executions to proceed as scheduled, but expressed its expectation that the court of appeals would resolve the government's appeal of the injunction with "appropriate dispatch." 140 S. Ct. at 353. Three Justices added that the

[3] In descriptions of earlier proceedings in this case, the term "respondents" refers to Lee, Purkey, Honken, and/or Bourgeois (who was a party in the cases before this Court until those this week). In descriptions of the current proceedings, the term refers to Purkey, Honken, and Nelson. Any distinctions are ultimately not material to the legal issues at issue in this filing, because the inmates have all advanced the same arguments as relevant here.

government "is very likely to prevail when" the FDPA "question is ultimately decided." Ibid. (statement of Alito, J.).

That prediction proved accurate. In April 2020, the court of appeals not only vacated the injunction, but directed entry of judgment for the government on both the FDPA claim and respondents' claim that the protocol had to be issued through notice-and-comment rulemaking. 955 F.3d at 111-113. The court declined to address respondents' remaining claims, but indicated "concern about further delay from multiple rounds of litigation." Id. at 113.

Despite the expectation of expedition indicated by both this Court and the court of appeals, respondents did not ask the district court to promptly rule on their remaining challenges to the protocol. Rather, they spent the next two-and-a-half months filing a series of requests for stays and further review of the court of appeals' decision, all of which failed. See No. 19-1348 (June 29, 2020) (denying petition for a writ of certiorari and accompanying stay application).

Following issuance of the court of appeals' mandate, BOP on June 15 rescheduled execution dates for Lee, Purkey, and Honken, on July 13, 15, and 17, respectively. BOP also scheduled respondent Nelson's execution for August 28. Only after that -- on June 19, more than two months after the court of appeals vacated the first injunction -- did respondents move for another preliminary injunction. The government promptly opposed that

motion on June 25. But the district court (without objection from respondents) left the motion undecided for the next 18 days, resolving it only on Monday morning by granting a second injunction just six hours before Lee's rescheduled execution was set to occur. The sole basis for that second injunction was that the federal execution protocol violates the Eighth Amendment, see 2020 WL 3960928, at *4-*9, notwithstanding this Court's decision in Bucklew upholding the execution of an inmate using a materially identical single-drug pentobarbital protocol in circumstances "that could only have increased any baseline risk of pain" to the prisoner there. No. 20A8, at 2.

The government asked this Court to stay or summarily vacate the injunction so that the executions could proceed, and this Court did so in an order early Tuesday morning. No. 20A8. The Court held that vacatur of that injunction was "appropriate because, among other reasons, [respondents had] not established that they are likely to succeed on the merits of" the claim underlying the injunction. Id. at 1-2. The Court further explained that "'[l]ast-minute stays" like that issued the[] morning [of Lee's execution] 'should be the extreme exception, not the norm.'" Id. at 3 (quoting Bucklew, 139 S. Ct. at 1134). The Court accordingly "vacate[d] the District Court's preliminary injunction so [respondents'] executions may proceed as planned." Ibid. The

United States executed Lee in accordance with that order around 8 a.m. Tuesday.

However, the district court this morning issued yet another execution-day injunction in respondents' challenge to the federal execution protocol. App., infra, 1a-18a. This time, the basis for a third injunction against the protocol is that it violates the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 et seq., because it does not require a prescription for the pentobarbital used to execute respondents. App., infra, 12a-13a. The court acknowledged that its injunction was issued "at the last minute," but blamed "this extreme exception" from ordinary practice in other courts on the government's "rush to execute" respondents. Id. at 16a.

The execution-day injunction issued today is even less tenable than the one this Court vacated yesterday in Lee, and the Court should vacate today's injunction for materially the same reasons. Respondents again have "not established that they are likely to succeed on the merits of" the claim underlying the injunction. 20A8, at 1. The district court's FDCA holding -- its third choice of rationales for enjoining use of the protocol -- is irreconcilable with this Court's decisions in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), and Heckler v. Chaney, 470 U.S. 821, 837 (1985), as well as an Office of Legal Counsel (OLC) opinion thoroughly addressing precisely this

question, see App., infra, 19a-44a. The district court did not engage with any of that merits reasoning, and its equitable analysis is squarely inconsistent with this Court's direction in Lee.

If anything, the equities here more clearly favor a stay or vacatur of the injunction, because the asserted harm supporting this injunction is merely noncompliance with a technical statutory requirement rather than any asserted risk of pain. Indeed, the district court's decision not to rely on the FDCA rationale in its injunction issued on the day of Lee's execution Monday strongly undermines the court's finding of irreparable harm here. If the harm inflicted by an injection of pentobarbital without a prescription were actually irreparable, the district court surely would have invoked that basis for an injunction (which it addressed in just a few pages here) before Lee was executed using such an injection.

In sum, the district court's last-minute injunction today again falls well short of the "extreme exception" necessary to warrant stopping a lawful execution on the day it is scheduled to occur. 20A8, at 3 (citation omitted). Delaying the execution for months would again "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 v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion of Roberts, C.J.). The government

has made extensive preparations and is ready to execute Purkey today in a humane manner. Loved ones of Jennifer Long -- the 16-year-old girl whom Purkey kidnapped, raped, murdered, and dismembered in 1998 -- are in Terre Haute to witness the implementation of the capital sentence imposed decades ago. 955 F.3d at 127 (Katsas, J., concurring). Disrupting these extensive plans at the last minute would cause "severe prejudice" to the public, the family members of respondents' victims, and the rule of law. In re Blodgett, 502 U.S. 236, 239 (1992) (per curiam). The district court's untimely and unjustified injunction should accordingly be stayed or immediately vacated "so that the [respondents'] executions may proceed as planned." 20A8, at 3. And given the district court's latest injunctions, the Court should order that "[n]o further stays of [respondents'] execution[s] shall be entered by the [district] court[] except upon order of this Court." Vasquez v. Harris, 503 U.S. 1000, 1000 (1992) (per curiam).

STATEMENT

A. LEGAL BACKGROUND

1. The "Constitution allows capital punishment," and Congress has authorized the death penalty for the most egregious federal crimes since 1790. Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019). It "necessarily follows that there must be a" lawful "means of carrying" out executions. Baze v. Rees, 553 U.S. 35, 47

(2008) (plurality opinion); see Glossip v. Gross, 135 S. Ct. 2726, 2732-2733 (2015).

In the Nation's early years, hanging was the "standard method of execution" for both States and the federal government. Glossip, 135 S. Ct. at 2731; see 955 F.3d at 108-109 (per curiam). Over time, States replaced hanging with new methods of execution such as electrocution and lethal gas, each of which was considered "more humane" than its predecessors. Baze, 553 U.S. at 62 (plurality opinion). This Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." Id. at 48 (plurality opinion). And "understandably so," since each chosen method was designed to reduce pain for the condemned, rather than "superadd terror, pain, or disgrace to their executions." Bucklew, 139 S. Ct. at 1124; see No. 20A8, at 2 ("'[F]ar from seeking to superadd terror, pain, or disgrace to their executions, the States have often sought more nearly the opposite,' developing new methods, such as lethal injection, thought to be less painful and more humane than traditional methods, like hanging, that have been uniformly regarded as constitutional for centuries.") (citation omitted).

2. The "progress toward more humane methods of execution" eventually "culminat[ed] in [a] consensus on lethal injection." Baze, 553 U.S. at 62 (plurality opinion). The federal government likewise prescribes lethal injection as its method of execution,

see 28 C.F.R. 26.3(a)(4), and BOP executed three federal inmates by lethal injection in 2001 and 2003, see A.R. 1.

Initially, most States and the federal government conducted lethal injections using a combination of three drugs: sodium thiopental, a sedative to induce unconsciousness; pancuronium bromide, a paralytic agent that inhibits movement and stops breathing; and potassium chloride, which stops the heart. Baze, 553 U.S. at 42-44, 53 (plurality opinion). Although the States and the federal government selected that protocol to minimize pain, inmates nevertheless claimed that it constituted cruel and unusual punishment. See id. at 41. Seven Justices rejected that claim in Baze. Ibid.; see id. at 71 (Stevens, J., concurring in the judgment); id. at 94 (Thomas, J., concurring in the judgment); id. at 107 (Breyer, J., concurring in the judgment). Of particular relevance here, the Court held that States were not required to adopt the inmates' proposed alternative of a single-drug protocol consisting of sodium thiopental or another sedative such as pentobarbital. Id. at 57 (plurality opinion).

3. Although Baze did not require adoption of a single-drug protocol, some States nevertheless made that choice voluntarily. In 2009, Ohio executed an inmate using a massive dose of sodium thiopental. A.R. 93. That drug, however, soon became unavailable "as anti-death-penalty advocates pressured" its "sole American manufacturer" to cease production. Glossip, 135 S. Ct. at 2733.

States then "replaced sodium thiopental with pentobarbital, another barbiturate," which "can 'reliably induce and maintain a comalike state that renders a person insensate to pain.'" Glossip, 135 S. Ct. at 2733 (citation omitted); see, e.g., Zagorski v. Parker, 139 S. Ct. 11, 11-12 (2018) (Sotomayor, J., dissenting from denial of application for a stay and denial of certiorari) (explaining that "pentobarbital * * * is widely conceded to be able to render a person fully insensate."); Beaty v. Brewer, 649 F.3d 1071, 1075 (9th Cir. 2011) (Tallman, J., concurring in the denial of rehearing en banc) (noting that pentobarbital is "commonly used to euthanize terminally ill patients who seek death with dignity in states such as Oregon and Washington"). Ohio conducted the first execution using a single-drug pentobarbital protocol in 2011. A.R. 870-871. Other States soon followed suit. A.R. 94, 96, 102. In 2012 and 2013, three of the leading death-penalty States -- Texas, Missouri, and Georgia -- each adopted single-drug pentobarbital protocols. A.R. 96, 98, 103. Those States have since used that protocol to carry out more than 100 executions, see ibid., and federal courts of appeals has repeatedly upheld the protocol against Eighth Amendment challenges, see, e.g., Zink v. Lombardi, 783 F.3d 1089, 1097-1107 (8th Cir.) (en banc) (per curiam), cert. denied, 135 S. Ct. 2941 (2015); Ladd v. Livingston, 777 F.3d 286, 289-290 (5th Cir.), cert. denied, 135 S. Ct. 1197 (2015); Ledford v. Commissioner, 856 F.3d 1312, 1316-

1317 (11th Cir.), cert. denied, 137 S. Ct. 2156 (2017); see also No. 20A8, at 2 (discussing features of pentobarbital as used for lethal injections).

Last Term, this Court in Bucklew considered an Eighth Amendment challenge to Missouri's single-drug pentobarbital protocol by an inmate with an "unusual medical condition" who conceded that the protocol "is constitutional in most applications." 139 S. Ct. at 1118. The Court explained that an inmate "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." Id. at 1125. The Court concluded that Bucklew had failed to make that showing because his proposed alternative method (hypoxia induced by inhaling nitrogen gas) would not "significantly reduce" any "substantial risk of severe pain" caused by the use of pentobarbital. Id. at 1130. Of particular relevance here, the Court credited expert testimony that pentobarbital would "render Mr. Bucklew fully unconscious and incapable of experiencing pain within 20 to 30 seconds." Id. at 1132. Even assuming nitrogen hypoxia might render the inmate insensate in roughly the same amount of time, the Court concluded that he had failed to show that use of that alternative "would significantly reduce his risk of pain." Id. at 1133.

4. Three months after Bucklew, BOP issued a revised execution protocol adopting the same single-drug pentobarbital protocol approved in that case. A.R. 868-875. BOP's adoption of the revised protocol was the culmination of an "extensive study" that began in 2011 when sodium thiopental became unavailable. 955 F.3d at 110. BOP ultimately determined that the single-drug pentobarbital protocol is the most suitable method based on its widespread use by the states and its acceptance by many courts." A.R. 871. Indeed, BOP noted that inmates in States that use different lethal-injection protocols frequently identify a single-drug pentobarbital protocol as a humane and lawful alternative. A.R. 4 (citing cases, including Glossip). And "[a]lthough various media outlets have reported complications with lethal injection executions, none of those executions appear to have resulted from the use of single-drug pentobarbital." A.R. 871; see also No. 20A8, at 2 (recounting similar considerations).

BOP also consulted with two medical experts, including the expert credited by this Court on the effects of pentobarbital in in Bucklew. A.R. 872. Both concluded that the single-drug pentobarbital protocol "would produce a humane death." A.R. 3. Specifically, the experts explained that an inmate receiving the proposed injection of pentobarbital -- which is 12 to 35 times the maximum tolerable human dosage -- "will lose consciousness within 10-30 seconds," and "will be unaware of any pain or suffering"

before death occurs "within minutes." A.R. 525; see Bucklew, 139 S. Ct. at 1132; A.R. 401-524.

B. PRIOR PROCEEDINGS

1. After adopting the revised protocol, BOP scheduled executions of five federal inmates -- including respondents Purkey and Honken -- for dates in December 2019 and January 2020. In August 2019, respondents Purkey and Honken (along with Daniel Lee and Alfred Bourgeois) sought to enjoin their executions on multiple grounds, including that the amended protocol violates the FDPA's "manner" of execution provision, 18 U.S.C. 3596(a); the notice-and-comment requirement and other provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., 5 U.S.C. 701 et seq.; provisions of the FDCA, and Controlled Substances Act (CSA), 21 U.S.C. 801 et seq.; and the First, Fifth, Sixth, and Eighth Amendments.

On November 20, 2019, the district court concluded that respondents were entitled to a preliminary injunction because they were likely to succeed on their claim that the protocol conflicts with the FDPA's requirement that federal executions be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). This Court denied the government's motion for a stay or vacatur of the injunction, but expressed its expectation that the court of appeals would resolve the government's appeal of the injunction with "appropriate

dispatch." 140 S. Ct. at 353. Justice Alito, joined by Justices Gorsuch and Kavanaugh, stated that the government "has shown that it is very likely to prevail when" the FDPA "question is ultimately decided." Ibid.

2. After expedited briefing and argument, the court of appeals on April 7, 2020, vacated the preliminary injunction and directed entry of judgment for the government on both the FDPA claim and respondents' claim that the BOP protocol could be issued only after notice-and-comment rulemaking. 955 F.3d at 112-113. The court declined to address respondents' remaining claims in the first instance, but stated that it "share[d] the government's concern about further delay from multiple rounds of litigation." Id. at 113. Judge Katsas added that the injunction should have been vacated on the equities alone, given that respondents' claims were designed "to delay lawful executions indefinitely" -- an objective federal courts "should not assist." Id. at 129.

Following the panel's decision, respondents sought rehearing en banc, but that request was denied on May 15. Respondents then sought a stay of the mandate from the court of appeals in two separate motions, with the ultimate result that the court denied a stay but extended the date of the mandate's issuance by nearly three weeks. See 19A1050 Gov't Opp. 14-15 (describing these proceedings in more detail). On June 5, respondents filed a petition for a writ of certiorari in this Court, No. 19-1348, and

on June 10, they filed an accompanying stay application, No. 19A1050. The Court denied both the certiorari petition and stay application over two noted dissents on June 29.

3. Throughout that time, the district court retained jurisdiction to address respondents' remaining claims, including their FDCA claim. See, e.g., 16 Charles Alan Wright et al., Federal Practice & Procedure § 3921.2 (3d ed. 2020) (Wright & Miller). Respondents, however, did not seek another preliminary injunction on their remaining claims until June 19, after BOP on June 15 announced their execution dates for July 13, July 15, July 17, and August 28.[4] The government promptly opposed respondents' motion on June 25. But with executions approaching, the district court did not decide the motion until this Monday, six hours before Lee's scheduled executions.

In its injunction on the day of Lee's execution, the district court held that respondents were likely to succeed on their claim that the federal government's use of pentobarbital violates the Eighth Amendment, see 2020 WL 3960928, at *4-*9, notwithstanding the clear import of this Court's decision in Bucklew upholding the

[4] When appropriate, a court may enjoin an execution before the date has been scheduled. Indeed, in several of the underlying actions in the consolidated case (none of which are involved here), the district court entered preliminary injunctions barring executions before a date had been set. See, e.g., No. 05-cv-2337 Docs. 67, 68, 336. And at a minimum, nothing prevented respondents from seeking a preliminary injunction and briefing it so the court would be able to promptly rule when the government rescheduled the executions, as it clearly intended to do.

execution of an inmate using a materially identical single-drug pentobarbital protocol. The government applied for this Court to stay or summarily vacate the injunction so that the executions could proceed, and this Court did so in an order early Tuesday morning. No. 20A8. The Court held that vacatur of that injunction was "appropriate because, among other reasons, [respondents had] not established that they are likely to succeed on the merits of" the claim underlying the injunction. Id. at 1-2. The Court further explained stated that "'[l]ast-minute stays" like that issued the[] morning [of Lee's execution] 'should be the extreme exception, not the norm.'" Id. at 3 (quoting Bucklew, 139 S. Ct. at 1134). The Court accordingly "vacate[d] the District Court's preliminary injunction so [respondents'] executions may proceed as planned." Ibid. The United States executed Lee in accordance with that order around 8 a.m. Tuesday.

4. This morning, less than 12 hours before respondent Purkey's scheduled execution, the district court issued a third injunction of respondents' executions under the federal protocol. App., infra, 1a-18a. The court rejected on the merits respondents' contentions that the protocol was arbitrary and capricious under the APA, violated the CSA, and violated their constitutional rights to counsel and access to the courts. Id. at 7a-11a, 13a-14a. The court concluded, however, the protocol failed to comply with the FDCA because it did not require a prescription for the

pentobarbital used to conduct lethal injections. Id. at 10a, 12a-13a. Specifically, the court rejected the government's position, articulated in a lengthy OLC opinion, that lethal-injection drugs are not subject to the FDCA because they could never be approved for that intended use and would therefore be prohibited -- a result Congress could not have provided for in the FDCA given its authorization of the death penalty for federal crimes and the use of lethal injection by the federal government and the States in hundreds of executions over multiple decades. Id. at 12a. The court reasoned that "[w]here the government argues that a lethal injection drug is legally and constitutionally permissible because it will ensure a 'humane' death, it cannot then disclaim a responsibility to comply with federal statutes that exist in order to ensure that the drugs operate humanely." Id. at 12a.

The court then concluded that the equities supported an injunction notwithstanding the "last minute" nature of its ruling on the day of Purkey's execution. App. infra, 16a. The court blamed the disruption caused by its ruling on the government's "rush to execute" respondents -- not on respondents' failure to move for a second preliminary injunction on this claim until after their executions were rescheduled, or the court's own decision to address respondents' claims piecemeal. Id. at 17a. In a different execution-day injunction issued this morning (on which the government is also seeking emergency relief), the court explained

that the timing of its ruling was driven by "the Supreme Court's prioritization of" the government's "pace" of execution scheduling "over additional legal process." Purkey v. Barr, 19-cv-3570 (D.D.C. July 15, 2020), slip op. 2.

ARGUMENT

Under Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals, or may summarily vacate the order. See, e.g., No. 20A8, at 3 (summarily vacating the district court's execution-day injunction that it entered on Monday). Although the government and respondents have disputed the precise standard that applies in this context, it is common ground that the Court must determine whether the applicant is likely to succeed on the merits and which party the equities support. See Nken v. Holder, 556 U.S. 418, 434 (2009); San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers). Here, those considerations counsel strongly in favor of a stay or vacatur of the injunction given the overwhelming likelihood that the injunction will not withstand appellate review and the profound public interest in implementing respondents' lawfully imposed sentences without further delay -- the same factors that led this Court to vacate the district court's execution-day order entered earlier this week in Lee. No. 20A8.

I. THE DISTRICT COURT'S INJUNCTION IS UNLIKELY TO WITHSTAND APPELLATE REVIEW

Like the district court's first two injunctions of respondents' executions under the protocol, the injunction entered by the court this morning is "without merit" and exceedingly unlikely to withstand appellate review. 955 F.3d at 112; see No. 20A8, at 1-2; see also 140 S. Ct. at 353 (statement of Alito, J.). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). In the capital context, as in others, a plaintiff must first "establish that he is likely to succeed on the merits." Glossip v. Gross, 135 S. Ct. 2726, 2736 (2015) (quoting Winter, 555 U.S. at 7) (emphasis added). As with the district court's two prior vacated injunctions in this case, respondents again did not come close to making that showing here. If anything, the district court's third-choice rationale for enjoining the executions is even less substantial than the repudiated rationales given for its two. The court's interpretation of the FDCA is contrary to this Court's seminal decisions in FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), and Heckler v. Chaney, 470 U.S. 821, 837 (1985), and with a 26-page OLC opinion addressing precisely this question, see App., infra, 19a-44a. And the district court's finding of irreparable harm is foreclosed by its own willingness to allow Lee to be executed under the protocol without addressing

his FDCA claim (even though addressing that claim apparently required only about three pages of reasoning, see id. at 10a, 12a-13a). Allowing such a legally baseless injunction to again delay 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 v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion). The Court should accordingly stay or vacate the injunction so that the government can proceed with these lawful executions. See No. 20A8, at 3.

A. The Injunction Rests On Legal Error

First and foremost, the injunction is very unlikely to withstand review because respondents failed to "establish that [they are] likely to succeed on the merits." Glossip, 135 S. Ct. at 2736 (citation omitted). The district court concluded that the protocol violates the FDCA because it does not require the federal government to obtain a prescription for the pentobarbital to be used in respodnents' executions, allegedly in violation of 21 U.S.C. 353(b)(1). App. infra, 12a–13a. But the statutory text and context make clear that the FDCA's requirements do not apply to lethal agents intended for use in capital punishment. See id. at 19a-44a (OLC opinion outlining this argument in depth). To the contrary, that Congress enacted in the FDPA a detailed execution framework without referencing the FDCA provides powerful evidence of its common-sense view that lethal-injection drugs should not be

treated like ordinary pharmaceuticals in the respects relevant here. Likewise, the lack of any apparent objection from the executive, legislative, or judicial branches to the hundreds of state executions conducted by lethal injection of substances that have never been required to meet the FDCA's prescription requirements strongly reinforces that those statutes do not apply in this context. And in all events, death-sentenced inmates are precluded from trying to enforce the FDCA against the BOP, as enforcement of the statute's applicable provisions is committed to the unreviewable discretion of the Food and Drug Administration (FDA). The district court offered almost no response to these merits arguments, and its holding would produce the implausible result that hundreds of executions carried out by lethal injection by States and the federal government between the late 1970s and yesterday morning were unlawful. That cannot be correct, and the injunction cannot withstand appellate review.

1. a. The district court's acceptance of respondents' FDCA claim conflicts with that statute's text and structure as construed by this Court in its landmark decision in Brown & Williamson. There, the Court held that the FDA lacks jurisdiction to regulate articles intended for a use not traditionally regulated by FDA (there, customarily marketed tobacco products) when (1) other statutes clearly assume such articles will remain lawful and available for that use, but (2) if regulated under the FDCA, would

be prohibited. See id. at 143 (holding that "there is no room for tobacco products within the FDCA's regulatory scheme" because "they cannot be used safely for any therapeutic purpose, and yet they cannot be banned"). "[T]he meaning of one statute may be affected by other Acts," the Court explained, "particularly where Congress has spoken subsequently and more specifically to the topic at hand." Id. at 133.

That is the case here. Just as Congress "foreclosed the removal of" tobacco "from the market," Brown & Williamson, 529 U.S. at 137, it has foreclosed respondents' attempt to make it impossible to use lethal-injection drugs in executions. Federal law authorizes the death penalty for dozens of federal crimes, and the FDPA directs that such sentences be imposed "in the manner prescribed by the law of the [sentencing] State," 18 U.S.C. 3596. When Congress enacted the FDPA in 1994, many states permitted execution exclusively by lethal injection, and lethal injection was the sole method of execution prescribed by federal regulation. 28 C.F.R. 26.3(a)(4); see 57 Fed. Reg. 56,536, 56,536 (Nov. 30, 1992). Today, all States that provide for a death penalty allow lethal injection as one (often the sole) method. If lethal substances and other articles intended for use in capital punishment were regulated by the FDCA, however, such lawful executions could never take place. "Several provisions in the [FDCA] require the [Food and Drug Administration] to determine

that the product itself is safe as used by consumers" -- that is, that "the product's probable therapeutic benefits … outweigh its risk of harm." Brown & Williamson, 529 U.S. at 140; see 21 U.S.C. 355(b)(1), (d). That standard is inapposite for drugs intended to cause death as part of an execution. See App., infra, 29a (OLC opinion explaining that "there is no way products intended to carry out capital punishment could ever satisfy that test"); see also United States v. Rutherford, 442 U.S. 544, 556 (1979) (explaining that under the FDCA, "a drug is unsafe if its potential for inflicting death * * * is not offset by the possibility of therapeutic benefit").

Indeed, the reading of the FDCA embraced by respondents and the district court would mean that articles traditionally used by the federal government and the States in executions -- such as electric chairs, lethal gas, and perhaps even firing-squad rifles -- would be regulated by the Act. But in the many decades over which the FDCA and capital punishment have coexisted, it does not appear that anyone has seriously advanced that argument. And for good reason: "If the FDCA applied to electric chairs, gallows, gas chambers, firearms used in firing squads, and substances used in lethal-injection protocols, the statute would effectively ban those articles. Yet the Constitution and laws of the United States presuppose the continued availability of capital punishment for the most heinous federal and state crimes." App., infra, 28a.

This reading of the FDCA reflects the government's longstanding position, advanced to this Court in Heckler v. Chaney, 470 U.S. 821, 837–38 (1985). See Pet. Br. 13-14, 44-46, Heckler v. Chaney, 470 U.S. 821 (1985) (No. 83-1878). The government emphasized repeatedly that "Congress did not intend the FDA to regulate capital punishment," id. at 45, and asserted that the assessment of lethal injections would be "far removed from [FDA's] mission of protecting the consuming public from unsafe and improperly labeled drugs," id. at 10; see id. at 45 (similar). And then-Judge Scalia, dissenting from the D.C. Circuit majority's conclusion that the FDA could regulate execution drugs under the FDCA, explained why "a law designed to protect consumers against drugs that are unsafe or ineffective for their represented use" should not be read as "mandating federal supervision of the manner of state executions." Chaney v. Heckler, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (Scalia, J., dissenting).

b. In any event, the district court erred in concluding that respondents can seek relief based on their allegation that BOP will violate the FDCA by adhering to its protocol. See App., infra, 10a. As this Court has explained, "[t]he FDA's decision not to take * * * enforcement actions" to prevent the use of drugs intended for use in lethal injection is "not subject to judicial review under the APA." Chaney, 470 U.S. at 837–838; see

5 U.S.C. § 701(a)(2). Thus, respondents could not sue the FDA directly for failing to enforce the statute as respondents wish.

Respondents' inability to force the FDA to act does not mean that respondents themselves may seek relief for BOP's supposed violations of the FDCA. On the contrary, in the FDCA itself, Congress specified that "all * * * proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States." 21 U.S.C. 337(a) (emphasis added). This requirement forecloses actions by private parties seeking to restrain third parties' putative violations of the FDCA's general strictures, leaving "the United States with nearly exclusive enforcement authority" over those matters; "[p]rivate parties may not bring enforcement suits." POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 109 (2014). The federal government clearly does not believe that it is violating the FDCA by using pentobarbital to conduct lethal injections, and that judgment is reserved to the Executive Branch by the FDCA's plain terms. The district court's conclusion that respondents may end-run the nonreviewability of the FDA's enforcement decisions by invoking the APA against BOP cannot be squared with this Court's instructions to the contrary. See, e.g., Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984) (holding that APA action is precluded by federal statutes even where they implicitly

foreclose certain private-party enforcement, let alone where, as here, they expressly do so).

2. The district court gave two brief reasons for its conclusion that the FDCA does apply to lethal-injection drugs: (1) the D.C. Circuit's decision in Cook v. FDA, 733 F.3d 1 (2013), regarding the FDCA's import provisions; and (2) the district court's view that the government's efforts to ensure a humane death necessitates the FDCA's application to the drugs used to effectuate death. App., infra, 12a–13a. Neither is sustainable.

a. Contrary to the district court's conclusion, Cook does not undermine the government's interpretation of the FDCA. There, the court of appeals addressed a specific FDCA provision regarding the FDA's treatment of imported drugs, concluding that FDA was required to apply that provision to drugs "destined for" lethal-injection use in "state correctional facilities." 733 F.3d at 11. The court rested its analysis on the particular language of that import provision, 21 U.S.C. 381(a), which provides that the FDA "shall" take certain actions with respect to the import of drugs manufactured at "an unregistered establishment" that "appear" to violate that provision, Cook, 733 F.3d at 8–10. The court's holding turned on the scope of the agency's enforcement discretion under Section 381. Id. at 8.

In Cook, however, the court of appeals did not address whether the FDCA applies to lethal injection drugs in the first place. 733

F.3d at 11 (noting that "the FDA [had] conceded before the district court that the * * * shipments" were a covered "unapproved new drug") (quotation marks omitted). It therefore does not control the issue before this Court here. And in any event, the D.C. Circuit's conclusion that Chaney does not preclude review of the FDA's enforcement choices under Section 381(a) regarding drugs manufactured in unregistered foreign establishments has no application here. The prescription and compounding provisions of the FDCA that respondents invoke, see 21 U.S.C.353(b), 353b, are distinct from the import provisions in Section 381. Cook, 733 F.3d at 6-7. Indeed, in Chaney itself, this Court rejected an attempt to compel enforcement of Section 355, which those compounding provisions turn on. See 470 U.S. at 824, 835-36; 21 U.S.C. 353b(a) (providing that Section 355 "shall not apply to a drug compounded" at facilities meeting various criteria).

Critically, even if Cook somehow did apply beyond Section 381, it would not permit respondents here to sue to enforce the FDCA's provisions. The Cook plaintiffs sought to require the FDA to take enforcement actions; they did not seek to enforce the FDCA directly themselves against an allegedly regulated party. Accordingly, the court of appeals had no occasion in Cook to address Section 337's prohibition on private enforcement actions. Courts have repeatedly rejected private individuals' attempt to

enforce the FDCA's provisions themselves.[5] Thus, even under Cook's logic, respondents have no basis to ask a court to second-guess the government's decisions regarding the FDCA's intersection with lethal-injection drugs.

b. Nor are lethal-injection drugs subject to the FDCA simply because the government took care to ensure that it chose a drug with the goal of causing a humane and painless death. See App., infra, 12a–13a. The government's effort to make sure it chose a protocol rendering the inmate insensate demonstrates its commitment to compliance with the Eighth Amendment. It does not demonstrate that a drug intended for use to execute an inmate has "probable therapeutic benefits * * * outweigh[ing] its risk of harm," Brown & Williamson, 529 U.S. at 140, such that they could plausibly be subject to regulation under the FDCA.

3. At a minimum, the district court's holding that the FDCA provisions assuring the safety and efficacy of drugs apply to substances intended to effectuate a death sentence is so contrary to common sense that district court could not have permissibly concluded that respodnents are likely to succeed on this claim. Cf. Bucklew, 139 S. Ct. at 1134; Davis v. Shoop, No. 16-cv-495, 2020 WL 3255145, at *50 (S.D. Ohio June 16, 2020) (rejecting a

[5] See, e.g., Irick v. Ray, No. 3:10-1004, 2010 WL 4810653, at *4 (M.D. Tenn. Nov. 19, 2010), aff'd, 628 F.3d 787 (6th Cir. 2010) (concluding that "no private right of action exists under either the CSA or the FDCA, and therefore, any injury allegedly suffered by the Plaintiff cannot be redressed through a declaratory judgment action").

reading of the FDCA and CSA that would "make lethal injection -- the federal government's intended method of execution -- impossible" as "dubious, if not absurd"). The district court's conclusion on this score once again falls far short of "the showing required to justify last-minute intervention by a Federal Court." No. 20A8, at 3.

B. The Equities Do Not Support Entry Of The Injunction

Even apart from the merits, the injunction is likely to be vacated on appeal because the required equitable considerations -- likelihood of irreparable harm, the public interest, and the balance of equities -- all weigh heavily against further injunctive relief. Glossip, 135 S. Ct. at 2736; see Winter, 555 U.S. at 22.

1. First, any cognizable "irreparable harm" that respondents will suffer "in the absence of preliminary relief" is minimal, at best. Glossip, 135 S. Ct. at 2736 (citation omitted). To be sure, death is an irreparable harm, but that cannot be the irreparable harm supporting this injunction, because all agree that respondents "do not challenge the federal government's authority to execute them." 955 F.3d at 145 (Tatel, J., dissenting). Indeed, respondents could not raise such a challenge in this APA suit. See Hill v. McDonough, 547 U.S. 573, 580 (2006).

The alleged harms actually underlying this injunction are far narrower and less compelling. The only basis of the injunction is that respondents cannot be executed under the federal protocol

unless BOP obtains a prescription for the lethal agent. But the district court did not hold (and, in light of the vacatur of its prior injunction could not hold) that executing respondents without a prescription would violate the Eighth Amendment or any substantive right. Respondents' asserted harm thus amounts exclusively to the technical violation of the FDCA, not to any real-world harm, and accordingly cannot support an injunction -- particularly on the day of the execution. Cf. Winter, 555 U.S. at 32-33 (vacating injunction in part because, while respondents alleged harm to marine life, their "ultimate legal claim" required only preparation of an environmental impact statement, not cessation of the allegedly harmful conduct); 955 F.3d at 126-129 (Katsas, J., concurring) (concluding that the first injunction in this case should have been vacated on equitable considerations even apart from the merits).

Indeed, the district court's handling of the case strongly reinforces the absence of cognizable irreparable harm. The court expressly declined to rely on respondents' FDCA claim in its execution-day injunction on Monday, even though the court knew that the government planned to execute Lee that day (as it ultimately did early Tuesday). See 2020 WL 3960928, at *9 n.6. If the court's position was that lack of a prescription actually constituted cognizable irreparable harm, the court surely would have issued such a holding before Lee was executed. After all,

the court's FDCA holding here is only a few pages long and easily could have been part of its Monday injunction. The court's own decision not to issue such relief undermines the court's assertion that the asserted harm is irreparable and therefore does not warrant an injunction even apart from the merits. Cf. Winter, 555 U.S. at 32 (noting that an "injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course").

2. Second, this Court has repeatedly emphasized the public's "powerful and legitimate interest in punishing the guilty," Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted), by "carrying out a sentence of death in a timely manner," Baze, 553 U.S. at 61 (plurality opinion). Once a criminal defendant is tried, convicted, sentenced, and exhausts all permissible appeals and collateral challenges, the need for "finality acquires an added moral dimension." Calderon, 523 U.S. at 556. "Only with an assurance of real finality can the [government] execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." Ibid.

As this Court recognized in vacating the district court's prior execution-day injunction, "[t]hose interests have been frustrated in this case." Bucklew, 139 S. Ct. at 1133. Respondents were each convicted and sentenced to death more than

15 years ago, and each has exhausted all permissible opportunities for further review. Their executions have already been postponed for six months based on an injunction that proved (predictably) to be "without merit." 955 F.3d at 112; see 140 S. Ct. at 353 (statement of Alito, J.). Particularly given the unwarranted delay that resulted from its prior errors, the district court should been "sensitive to the [government's] strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill, 547 U.S. at 584. The district court again gave insufficient weight to that weighty interest.

3. Finally, "the balance of equities" weighs "strongly in favor of the" government and therefore against the injunction. Winter, 555 U.S. at 26. Respondents committed "heinous" murders of children and others with a brutality staggering even in the realm of capital offenses. 140 S. Ct. at 353 (statement of Alito, J.). Purkey and Nelson kidnapped, raped, and murdered girls. 955 F.3d at 127 (Katsas, J., concurring). Honken murdered four people, including six- and ten-year-old girls, "execution-style, by shooting each in the head." Ibid. Despite that shockingly inequitable conduct, "they continue to litigate with a vengeance" to try to control the precise details of their death -- an opportunity they denied to the victims of their crimes. Id. at 128; cf. Bucklew, 139 S. Ct. at 1124. In addition to the

dispositive legal flaws in the injunction, it is manifestly unsupported by equity.

II. THE INJUNCTION SHOULD BE STAYED OR VACATED

A. Given that respondents have "not established that they are likely to succeed on the merits of their" FDCA claim, it follows directly from this Court's order yesterday that the district court's injunction in this case should be stayed or vacated "so that the [respodnents'] executions may proceed as planned." No. 20A8, at 1-3. As the Court emphasized, federal courts have a responsibility "to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously," so that "the question of capital punishment" can remain with "the people and their representatives, not the courts, to resolve." Id. at 3.

The district court disregarded that directive by issuing another execution-day injunction of precisely the kind this Court vacated yesterday. Although the Court made clear that execution-day injunctions should be an "extreme exception," No. 20A8, at 3(citation omitted), the district court suggested that its admittedly "last minute" injunction today was justified by the government's haste in scheduling executions, App., infra, 16a–17a. But this Court necessarily rejected that rationale in Lee, and the district court's injunction is contrary to Lee for that reason as well. Indeed, in the other execution-day order issued today (on

which the government is separately seeking emergency relief), the district court appeared to criticize "the Supreme Court's prioritization of that pace over additional legal process." Case Purkey v. Barr, 19-cv-3570 (D.D.C. July 15, 2020), slip op. 2. The district court, however, is not free to depart from this Court's direction.

If anything, vacatur of today's execution-day injunction is even more clearly warranted than it was for Monday's. The merits rationale in this case is even more strained, as evidenced by the court's own decision not to rely on it before Lee was executed, though it easily could have done so. Likewise, the district court's delay is even more "abusive" here, because it easily could have addressed these issues much earlier -- and at the very least in its order Monday -- given that they have long been pending before the court and are not affected by any recent developments. Gomez v. U.S. District Court, 503 U.S. 653, 654 (1992). And the equities supporting an injunction here are much weaker than those invoked in its Monday execution-day injunction. There, the district court concluded (erroneously) that respondents would be subjected to cruel and unusual pain based on the injection of pentobarbital. But here, the court's injunction relies only on the asserted harm of an absent prescription. Other courts have rightly repeatedly declined to grant stays of execution on that rationale. See, e.g., Durr v. Strickland, No. 10-cv-288, 2010 WL

1610592, at *4 (S.D. Ohio Apr. 15, 2010) (declining to stay an execution based on claims that a State "would be acting in technical violation of federal law"), aff'd, 602 F.3d 788 (6th Cir. 2010); Ringo v. Lombardi, No. 09-cv-4095, 2010 WL 4103201, at *1-2 (W.D. Mo. Oct. 18, 2010) (similar).

For these reasons, this Court should stay or immediately vacate the district court's injunction of the protocol so that respondents' "executions may proceed as planned." No. 20A8, at 3. In addition, given the district court's unreasonable decision to proceed piecemeal, see this Court should make clear that "[n]o further stays of [respondents'] execution[s] shall be entered by the [district court] except upon order of this Court," Vasquez v. Harris, 503 U.S. 1000, 1000 (1992) (per curiam).

B. To the extent that Purkey asserts that his execution cannot happen after midnight tonight, he appears to be relying on a misreading of the relevant regulations. If a designated execution date "passes by reason of a stay of execution, then a new date shall be designated promptly by the Director of the Federal Bureau of Prisons when the stay is lifted." 28 C.F.R. 26.3. The Warden is generally required to give a prisoner 20 days' notice of an execution date, but 28 C.F.R. 26.4(a) specifically excepts the situation that will occur if this Court lifts the stays currently barring his execution late this evening. If "the date designated for execution" "follows a postponement of fewer than 20

days of a previously scheduled and noticed date of execution," then the regulation requires only that "the Warden shall notify the prisoner as soon as possible." Ibid. Here, the new date follows a postponement of just a few hours, far less than 20 days.

Nor do other notification requirements pose any barrier to a prompt redesignation of Purkey's execution date for July 16, 2020 should this Court remove the impediments to his execution today. The regulations provide that the Warden "should" -- not "shall" -- notify certain individuals, such as spiritual advisors and defense attorneys, "as soon as practicable before the designated time of execution." 28 C.F.R. 26.3(e) (citing individuals listed in section 26.3(c)). This provision is plainly hortatory, not mandatory, and in any event, all relevant individuals would be notified that Purkey's execution will be rescheduled for tomorrow if his own efforts to secure and maintain various stays of execution result in its delay beyond today.

The federal execution protocol does not require the government to restart the notification process in such an event either. The protocol, like the regulation, contemplates that "[i]f the date designated passes by reason of a stay of execution, then a new date will be promptly designated by the Director of the BOP when the stay is lifted." A.R. 1023. The BOP Director will promptly designate July 16 as Purkey's new execution date if this Court lifts the relevant stays today at a time when execution would

occur after midnight. And like the regulations, if an execution date passes by reason of stay, the protocol does not indicate that the government must restart the notification process -- a regime plainly at odds with common sense. Rather, if the original date "is stayed," "notice of the new execution date" is to provide 20 days' notice only "if time permits, and if not, as soon as possible." Ibid. In all events, the protocol specifically permits "deviation or adjustment" when "required, as determined by the Director of the BOP or Warden." A.R. 1019. And it further provides that it "explains internal government procedures and does not create any legally enforceable rights or obligations." Ibid.

* * * * *

"Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable." Baze, 553 U.S. at 61 (plurality opinion). But the people of the United States, acting through Congress, have authorized the death penalty for serious federal offenses since President Washington signed the Crimes Act of 1790. See Bucklew, 139 S. Ct. at 1122. Respondents here were prosecuted by the Department of Justice across different presidential administrations for undisputedly heinous crimes. They were found guilty of the charged offenses and worthy of the ultimate punishment by juries of their peers. They have fully exercised their rights to appeal and seek collateral relief up and

down the federal judicial system for roughly two decades, including repeatedly over the past month. After searching review by many appellate judges, their convictions and sentences have been upheld as lawful. BOP is prepared to execute them using a lethal-injection protocol chosen precisely for its humanity and its constitutionality under this Court's most recent precedent. See id. at 1118-1119. Two of their executions have already been delayed for six months by an injunction that was subsequently vacated in a thorough appellate decision that this Court declined to review. The district court's third injunction -- requested after extensive delay and entered at the eleventh hour on a third-choice set of rationales that lack merit and have nothing to do with respondents' criminal culpability -- does not come close to tipping the equities toward respondents or justifying further delay. At some point, "no more delay is warranted," and the "execution must come." United States v. Lee, No. 97-cr-24 (E.D. Ark. July 10, 2020), slip op. 9. Id. at 10. That point has been reached in this case. The delayed and meritless third injunction entered by the district court should be stayed or vacated, "so that [respondents'] executions may proceed as planned." No. 20A8, at 3.

CONCLUSION

The district court's injunction should be stayed or summarily vacated effective immediately.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JULY 2020