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.

ORLANDO CORDIA HALL

(CAPITAL CASE)

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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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, M.D., 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) is Orlando Cordia Hall.

RELATED PROCEEDINGS

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

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (July 13, 2020) (issuing preliminary injunction on Eighth Amendment claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (July 15, 2020) (issuing preliminary injunction on FDCA claim and denying motion for preliminary injunction on other claims)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Aug. 20, 2020) (granting partial final judgment dismissing Eighth Amendment claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Aug. 27, 2020) (granting summary judgment and permanent injunction on FDCA claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Sept. 20, 2020) (granting summary judgment but denying permanent injunction on FDCA claim; granting summary judgment on FDPA claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 3, 2020) (denying motions to alter or amend judgment)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 19, 2020) (granting 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 to stay or vacate preliminary injunction on Eighth Amendment claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5206 (July 15, 2020) (denying motion to stay or vacate preliminary injunction on FDCA claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5252 (Aug. 25, 2020) (denying motion for stay pending appeal on dismissal of Eighth Amendment claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5260 (Aug. 27, 2020) (granting motion to vacate permanent injunction on FDCA claim)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 20-5329 (Nov. 18, 2020) (affirming denial of permanent injunction on FDCA claim; vacating dismissal of Eighth Amendment claim; affirming grant of summary judgment on FDPA claim)

Supreme Court of the United States:

Barr v. Lee, No. 20A8 (July 14, 2020) (vacating preliminary injunction on Eight Amendment claim)

Barr v. Purkey, No. 20A10 (July 16, 2020) (vacating preliminary injunction on FDCA claim)

Hall v. Barr, No. 20A99 (pending application)

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

_____

Respondent Orlando Cordia Hall is scheduled to be executed today, November 19, at 6 p.m. Yesterday, the United States Court of Appeals for the D.C. Circuit affirmed in relevant part the district court's September 20 decision that respondent is not entitled to injunctive relief on his claim that the federal execution protocol violates the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 et seq., because he had failed to show that he was likely to suffer irreparable harm. Respondent applied for emergency relief from that decision in this Court. See Hall v. Barr, No. 20A99. Respondent also sought a stay from the district court, where the case was remanded on respondents' remaining claims. Today, fewer than three hours before the scheduled execution, the district court enjoined respondent's

execution on the ground that he is likely to obtain relief on the same FDCA claim on which the court of appeals had just affirmed the district court's denial of relief.

In reversing course, the district court did not make any new factual findings; it simply stated that it was reconsidering the equities in light of the court of appeals' vacatur on a different claim. The panel majority necessarily had concluded that the district court's legal error on that other claim did not taint the court's factual findings on respondent's FDCA claim. App., infra, 5a-9a. But the dissenting judge had disagreed, id. at 33a-34a -- and the district court sided with the dissent. The district court thus embraced an argument that the court of appeals had expressly rejected. Put differently, the district court did what respondent has asked this Court to do: it vacated a decision of the court of appeals. Needless to say, a district court does not have that power, and the district court's legally baseless "last-minute" injunction should not be allowed to obstruct this lawful execution. Barr v. Lee, 140 S. Ct. 2590, 2591 (2020). Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants William P. Barr et al.,

accordingly applies for an order staying the injunction pending appeal or vacating it effective immediately.[1]

This is the sixth injunction the district court has entered in this litigation. Each of the previous five has been vacated by this Court or the court of appeals, and today's injunction is the least justified of them all. As this Court has admonished in this litigation, "last-minute intervention" before a scheduled execution is permissible only as an "'extreme exception.'" Lee, 140 S. Ct. at 2591 (citation omitted). No such exception is remotely warranted here. In July, this Court vacated without noted dissent an injunction that was based on the same FDCA claim respondent presses here. Barr v. Purkey, No. 20A10 (July 16, 2020). Since that time, respondent's prospects of obtaining relief on that claim have only grown weaker. After holding an evidentiary hearing, the district court found as a matter of fact that respondent was not "likely to suffer" the harm he asserts -- extreme pain during his execution -- as a result of the alleged FDCA violation. 20A99 Appl. App. 94a. The court of appeals affirmed that denial of injunctive relief, id. at 26a, remanding

[1] The government has filed a similar motion to stay or vacate the injunction in the court of appeals. The government will notify this Court immediately if the court of appeals acts on that request. Given the time constraints caused by the district court's delayed ruling, the government has no choice but to request relief from this Court at the same time.

only on a different claim, id. at 26a. There is no equitable or logical basis to support an FDCA-based injunction by the district court in that posture -- much less one entered fewer than three hours before the scheduled execution, with the victim's family waiting in Terre Haute to witness the implementation of a sentence imposed more than 25 years ago.

In addition to being unjustifiable on the equities, the injunction should be stayed or vacated because it has no foundation in the merits. "Inmates seeking time to challenge the manner" of their execution must show "a significant possibility of success on the merits." Dunn v. McNabb, 138 S. Ct. 369, 369 (2017) (citation omitted). Although the district court recited that standard, App., infra, 7a, it provided no reasoning to meet it. As the government explained in its brief in opposition to respondent's emergency stay application, see 20A99 Gov't Br. in Opp. (20A99 Gov't Opp.), respondent's FDCA claim fails for three independent reasons.

First, the court of appeals correctly affirmed the district court's factual finding that respondent had not shown that he will be irreparably harmed by the FDCA violation he alleges. Specifically, the court of appeals correctly held that respondent has failed to show any irreparable harm "due to" the FDCA violation they allege -- "unprescribed use of pentobarbital" -- because pentobarbital creates the same effects on the body whether or not

it is accompanied by a prescription. 20A99 Appl. App. 26a. Even apart from the prescription requirement in particular, the court of appeals properly held that "the evidence in the record does not support [respodnent's] contention that [he is] likely to suffer" the pain they fear from a lethal injection of pentobarbital. Ibid. (citation omitted). The court of appeals' decision was correct, and the district court has not made it any less correct or made respondent any more likely to succeed simply by changing its mind and seeking further time to "reconsider[] its finding that Plaintiffs failed to show the necessary 'irreparable harm' to warrant enjoining their executions." App., infra, 10a.

Second, relief on respondent's FDCA claim is not warranted because the execution protocol does not violate the FDCA in the first place. As Judge Rao's opinion explains -- and as the government contended in obtaining vacatur of the prior FDCA injunction in July -- the FDCA does not apply to lethal-injection drugs. See 2099 Appl. App. 38a-44a; Gov't Appl. at 21-25, Purkey, supra (No. 20A10); see also 20A99 App., infra, 1a-26a (Office of Legal Counsel (OLC) opinion). The FDCA requires a drug to be "safe and effective" for its intended use, which means its "therapeutic benefits must outweigh its risk of harm." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 140 (2000). But a lethal-injection drug could never satisfy that standard, because its

intended use is to cause death as part of a capital sentence, not provide therapeutic benefits. Applying the FDCA to lethal-injection drugs would thus mean banning lethal injection -- the "humane means of" execution used "by every jurisdiction that imposes the death penalty." Baze v. Rees, 553 U.S. 35, 41 (2008) (plurality opinion). That cannot be what Congress did in the FDCA, because later statutes -- including the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. -- contemplate the use of lethal injection in federal executions. The "inescapable conclusion is" that lethal-injection drugs "do not fit" within the requirements of the FDCA. Brown & Williamson, 529 U.S. at 134; see 20A99 Appl. App. 40a-44a (Rao, J.).

Third, as Judge Rao also explained and as the government contended in obtaining the prior FDCA-injunction vacatur, respondent's claim fails because Congress barred private parties from suing to prevent alleged FDCA violations by BOP. See 20A99 Appl. App. 44a-46a; Gov't Appl. at 27-30, Purkey, supra. The statutory text could not be clearer: "all * * * proceedings for the enforcement, or to restrain violations" of, the FDCA "shall be by and in the name of the United States." 21 U.S.C. 337(a). Respondent cannot circumvent that limitation by invoking the APA, because that cause of action is unavailable where the underlying statute at issue "preclude[s] judicial review." 5 U.S.C.

701(a)(1). Indeed, even an implicit preclusion of review may be sufficient to bar APA claims, see, e.g., Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984), and here the preclusion is express, because Section 337(a)'s terms plainly "foreclose" respondent's APA suit against BOP. 20A99 Appl. App. 45a (Rao, J.).

Because respondent's FDCA claim has no substantial prospect of success on the merits, leaving the injunction in place would "serve no meaningful purpose and would frustrate the [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.). And the equities overwhelmingly support allowing this execution to proceed. Respondent was convicted and sentenced to death more than 25 years ago after he and co-conspirators kidnapped a 16-year-old girl, held her hostage for two days, repeatedly raped her, beat her over the head with a shovel, and buried her alive. United States v. Hall, 152 F.3d 381, 389-390 (5th Cir. 1998), cert. denied, 529 U.S. 1117 (1999). His extensive appellate and collateral challenges failed more than 13 years ago. He has been litigating his method of execution ever since then, and his challenges to the new federal execution protocol issued in July 2019 have received exhaustive judicial review since that time. Seven federal inmates

have been executed since this July under that challenged protocol, more than 100 inmates have been executed under analogous state protocol, and more than 1000 inmates have been executed by lethal injection over the past four decades -- all without any requirement to comply with the FDCA. See Lee, 140 S. Ct. at 2591. It is implausible that those executions were all unlawful and inflicted irreparable harm. And under no conceivable view of equity is it an "extreme exception" justifying "last-minute intervention" that the district court wishes to second-guess its own factual findings just hours before the execution and hours after they were affirmed by the panel majority, simply because it is belatedly persuaded by the panel dissent. Ibid. The Court should accordingly stay or vacate the district court's remarkable and improper order and allow respondent's executions to "proceed as planned." Id. at 2591-2592.

STATEMENT

1. The legal and factual background are set forth in detail in the brief filed by the government this morning in response to respondent's emergency stay application. 20A99 Gov't Opp. 9-16. In short, respondent and other federal death-row inmates have been litigating for the past year and a half to stop their executions under the federal execution protocol adopted in July 2019, which

provides for execution using a single drug -- the sedative pentobarbital. See Barr v. Lee, 140 S. Ct. 2590, 2591 (2020).

2. Of particular relevance here, respondent and the other inmates allege that the protocol violations the FDCA because the Federal Bureau of Prisons (BOP) has not obtained a prescription for the pentobarbital that will be used in their executions. The district court entered an injunction on that claim on July 15, reasoning that the FDCA applied to lethal-injection drugs and that the government's alleged violation warranted injunctive relief. D. Ct. Doc. 145, at 10-13. The government sought emergency relief, contending that the FDCA does not apply to lethal-injection drugs, that private parties cannot sue to restrain alleged FDCA violations, and that the absence of a prescription does not create irreparable harm warranting injunctive relief. The court of appeals declined to vacate the injunction, but this Court did so the next morning without noted dissent. Barr v. Purkey, No. 20A10 (July 16, 2020). Six inmates have been executed under the protocol since that time.

3. In September 2020, the district court considered the parties' motions for summary judgment on the FDCA claim. Notwithstanding this Court's vacatur of its prior injunction, the court reiterated its prior view that the FDCA applied to BOP's use of pentobarbital in executions and required, among other things,

that BOP obtain a prescription. 20A99 Appl. App. 88a. After holding a two-day evidentiary hearing, however, the court found that the inmates had "not established that flash pulmonary edema is 'certain' or even 'likely' to occur" after the administration of pentobarbital "before an inmate is rendered insensate." Id. at 91a. The court added that "it is not apparent how securing a prescription would eliminate [the inmates'] alleged harm," given that the pentobarbital would have the same physiological effects regardless of whether it is accompanied by a prescription. Id. at 90a. The court accordingly granted summary judgment to the inmates on the merits of their FDCA claim, but declined to enter an injunction given the inmates' failure to demonstrate irreparable harm from the FDCA violation. Id. at 96a.

4. After expedited briefing and argument, the D.C. Circuit yesterday affirmed the district court's denial of injunctive relief on the FDCA claim. 20A99 Appl. App. 2a-46a. In a per curiam opinion, the court of appeals relied on circuit precedent to hold (over Judge Rao's dissent) that the FDCA applies to lethal-injection drugs and that private parties can sue to restrain FDCA violations via the APA. Id. at 22a-25a. The court then held (over Judge Pillard's dissent) that the district court "was correct to deny a permanent injunction" based on its factual finding that "the evidence in the record does not support [respondent's]

contention that they are likely to suffer [pain from] flash pulmonary edema while still conscious." Id. at 25a-26a. The court accordingly declined to enjoin respondents from conducting respondent's executions, see ibid., leaving the government free to proceed with the executions as planned.

Aside from its disposition of the FDCA claim, the court of appeals vacated the district court's dismissal of respondent's Eighth Amendment claim but declined to enter a stay or injunction of their executions on that ground. 20A99 Appl. App. 14a-22a. The court of appeals also affirmed the district court's grant of summary judgment to the government on respondent's FDPA claim. See id. at 26a-28a.

5. Respondent simultaneously (1) asked this Court to stay or enjoin his execution pending disposition of a petition for a writ of certiorari challenging the court of appeals' decision on their FDCA claim, and (2) asked the district court to stay or enjoin his execution pending further review of his FDCA claim. Around 3:30 this afternoon, fewer than three hours before respondent's execution was scheduled to occur, the district court entered the injunction respondent requested. App., infra, 1a-10a.

Relying on Judge Pillard's dissent, the district court explained that its "prior assessment of the evidence in the record was tainted by [its] erroneous interpretation of" this Court's

decision in Lee. App., infra, 6a. Although the court did not consider any new record evidence or make any new findings of fact, it stated that the court of appeals' decision had "cast[] the evidence in a different light such that [respondent] established a significant possibility of showing irreparable harm given [the government's] violation of the FDCA." Ibid. The court acknowledged that it was entering "yet another last-minute stay of execution," but concluded that doing so was warranted "until such time that the court has reconsidered its finding that [respondent] failed to show the necessary 'irreparable harm' to warrant enjoining" his execution. Id. at 9a-10a.

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 Barr v. Purkey, No. 20A10 (July 16, 2020) (vacating injunction of executions in this litigation); Barr v. Lee, 140 S. Ct. 2590 (2020) (same); Dunn v. Price, 139 S. Ct. 1312 (2019) (vacating stay of execution); Mays v. Zagorski, 139 S. Ct. 360 (2018) (same); Dunn v. McNabb, 138 S. Ct. 369 (2017) (vacating injunction barring execution); Brewer v. Landrigan, 562 U.S. 996 (2010) (same). In considering whether to stay an injunction pending appeal, the three questions are, first, "whether four

Justices would vote to grant certiorari" if the court below ultimately rules against the applicant; second, "whether the Court would then set the order aside"; and third, the "balance" of "the so-called 'stay equities.'" San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (citation omitted). Here, all those factors counsel 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 respondent's lawfully imposed sentences without further delay.

I. THE EQUITIES ALONE WARRANT A STAY OR VACATUR OF THE INJUNCTION

The last-minute injunction entered fewer than three hours before respondent's execution is untenable and warrants a stay or vacatur.

1. As an initial matter, respondent's request for injunctive relief is foreclosed by the court of appeals' opinion issued yesterday morning, affirming that the district court "was correct to deny the entry of a permanent injunction [on Hall's FDCA claim]." 20A99 Appl. App. 25a. The court of appeals explained that the district court had previously "specifically found * * * that 'the evidence in the record does not support Plaintiffs' contention that they are likely to suffer flash pulmonary edema

while still conscious.'" Ibid. (quoting D. Ct. Doc. 261 at 39). The court of appeals also noted that "[respondent has] not identified before the district court or [the court of appeals] any other type of irreparable harm that would likely be suffered due to the unprescribed use of pentobarbital." Id. at 26a.

Law-of-the-case principles preclude the district court from departing from the court of appeals' mandate to take the course outlined by the dissenting judge. See Indep. Petroleum Ass'n of Am. v. Babbitt, 235 F.3d 588, 596-97 (D.C. Cir. 2001) ("Under the mandate rule," a "more powerful version of the law-of-the-case doctrine," "'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'") (quoting Briggs v. Pa. R.R. Co., 334 U.S. 304, 306 (1948)). Although the district court indicated it now wishes to "reconsider" its factual findings regarding FDCA-related harms, App. infra, 5a-7a, 10a, it did so based on precisely the same information before the court of appeals when it affirmed the denial of injunctive relief. The court of appeals was aware that it concluded that the district court had read Lee too broadly in dismissing the Eighth Amendment claim. And the court of appeals was aware that plaintiffs thought this error rendered the district court's evaluation of the evidence legally erroneous. But a majority of the court of appeals rejected that argument, finding no legal error. Only Judge Pillard's

partial dissent concluded that the district court should reconsider its earlier finding regarding plaintiffs' inability to carry their burden of demonstrating irreparable harm. Id. at 33a-34a (Pillard, J., concurring in part and dissenting in part). By relying on that dissent, and disregarding the effect of the majority's opinion, see App., infra, 6a, the district court fundamentally misapplied the court of appeals' decision.

The district court suggested it was free to revisit its earlier factfindings underlying its denial of permanent injunctive relief, reasoning that the court of appeals must have only concluded that the district court had not abused its discretion. See App., infra, 7a. But if the district court's misreading of Lee had tainted its FDCA-related findings, that would be a legal error. When the court of appeals affirmed, it necessarily concluded that the district court had committed no such legal error, and the district court was not free to reconsider factual findings that the court of appeals had affirmed based on a non-existent legal error that the court of appeals had rejected. Cf. Massachusetts v. EPA, 549 U.S. 497, 529-32 (2007) (agency erred in concluding it lacked the power to regulate greenhouse gas emissions).

Nor does the district court's retention of jurisdiction over the case based on pending, unrelated claims give it free license

to revisit issues disposed of by a higher court. The district court did not even purport to avail itself of one of the narrow instances in which courts may revisit their earlier decisions. See Fed. R. Civ. P. 60(b).

2. Even assuming the district court had jurisdiction to revisit its previous decision after the court of appeals affirmed it, the injunction should be summarily vacated as unsupported by an adequate finding of irreparable harm. By vacating the earlier injunction in Purkey, this Court has already made clear that the two forms of irreparable harm on which the court rested its injunction -- a stand-alone FDCA violation and respondent's ability to continue litigating an Eighth Amendment claim on which he has not demonstrated a likelihood of ultimately succeeding -- are insufficient. Vacatur is warranted on that basis alone.

The district court this afternoon justified its injunction based on two asserted forms of irreparable harm: respondent's "execut[ion] with a drug administered in violation of a federal law that ensures its safety and efficacy for the intended purpose," and his inability "to pursue his Eighth Amendment claim, which the D.C. Circuit has just revived as of yesterday." App. infra, 8a. Notably, the court did not enter any findings regarding plaintiffs' asserted harms related to pulmonary edema. See id. at 5a-7a. To the contrary, the district court candidly stated that it had not

yet "reconsidered its finding that [respondent] failed to show the necessary 'irreparable harm' to warrant enjoining [his] execution[], despite [the asserted] violation of the FDCA." Id. at 10a.

The asserted harm related to the Eighth Amendment is plainly untenable; as this Court emphasized yesterday, it merely reversed the district court's conclusion that plaintiffs had failed to even state a claim, and thus it remains unclear "[w]hether Plaintiffs will ultimately be able to climb the Eighth Amendment's high constitutional mountain of proof is not the question for today." 20A99 Appl. App. 18a. Reinstatement of this claim is manifestly not the type of showing of success of the ultimate merits required for equitable relief during continuing litigation.

3. Finally, the equities surrounding the district court's order to once again halt a federal execution just hours before it was scheduled to commence weigh heavily in favor of immediate vacatur of this afternoon's injunction. This Court has emphasized in this litigation that "last-minute intervention" of the kind the district court granted here "should be the extreme exception, not the norm." Lee, 140 S. Ct. at 2591 (citation omitted). There is no good reason for such an exception here. Seven other federal inmates have been executed under the protocol being challenged, six of them after the Supreme Court vacated an injunction on the

same claim on which the district court based its stay here. See Purkey, supra. Equity cannot support a different result now, particularly given the court of appeals' affirmance of the denial of injunctive relief and the absence of any new contradictory factual findings by the district court.

Further delay would also undermine the public's "powerful and legitimate interest in punishing the guilty" by carrying out the lawfully imposed capital sentences. Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted). As noted above, respondent was convicted more than twenty-five years ago of a crime of staggering brutality; he has long since exhausted all permissible appeals and collateral challenges; and he has received undeniably extensive review of his claims regarding the federal execution protocol over the past year. Family members of respondent's 16-year-old victim -- who have waited over two decades for implementation of this sentence -- traveled over a thousand miles to Terre Haute, where they are now waiting to witness the execution. Equity strongly supports the administration of the justice. A district court's desire to consider reversing factual findings the day after they have been affirmed by a higher court does not constitute the type of extreme exception to the Supreme Court's admonition barring last-minute orders barring executions. As the Fifth Circuit recently explained, "It is time -- indeed,

long past time -- for these proceedings to end." In re Hall, No. 19-10345, 2020 WL 6375718, at *7 (Oct. 30, 2020).

II. THE INJUNCTION SHOULD BE STAYED OR VACATED BECAUSE THERE IS NO PROSPECT THAT IT WILL WITHSTAND APPELLATE REVIEW

In addition to being unjustified by equities, the injunction has no realistic prospect of withstanding review on the merits for three independent reasons, all of which warrant a stay or vacatur so that respondent's execution can proceed.

First, as Judge Rao explained in her opinion below; as the government contended in its application in Purkey; as the Office of Legal Counsel explained in its thorough opinion; and as the government further outlined this morning, the FDCA does not apply to lethal-injection drugs. Indeed, the logical implication of the contrary position is that Congress in the FDCA banned lethal injection (and perhaps all forms of capital punishment) and that every execution conducted by lethal injection since the late 1970s (and perhaps every execution since enactment of the FDCA in 1938) has been unlawful. That cannot be correct. See 20A99 Gov't Opp. 19-26.

Second, as also demonstrated by Judge Rao, the government's Purkey application, and the government's brief this morning, the FDCA precludes private enforcement suits, including under the APA. The contrary view has no foundation in the statutory text and would produce implausible results. See 20A99 Gov't Opp. 26-29.

Third, as explained in detail in the government's filing this morning, the court of appeals correctly affirmed the district court's earlier decision that respondent failed to show irreparable harm warranting injunctive relief. See 20A99 Gov't Opp. 29-38. The district court's reconsideration of its own findings based on no new evidence, a court of appeals' decision on a different claim, and the position of the dissent does not make the court of appeals' decision any less correct or respondent any more likely to ultimately receive relief on his FDCA claim.

CONCLUSION

The application to stay or vacate the injunction should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

NOVEMBER 2020