EXECUTIONS SCHEDULED FOR JANUARY 14 & 15, 2021 AT 6:00 P.M. E.T.

No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

DUSTIN HIGGS AND COREY JOHNSON,
Petitioners,

v.

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

CAPITAL CASE

EMERGENCY APPLICATION FOR STAY OF EXECUTION
OF DUSTIN HIGGS AND COREY JOHNSON

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the D.C. Circuit.

INTRODUCTION

The Government intends to execute Petitioners Corey Johnson and Dustin Higgs today and tomorrow, respectively, by injecting them with massive doses of pentobarbital. Petitioners both contracted COVID-19 less than a month ago and remain symptomatic. Within five days of learning of their diagnoses, Petitioners raised as-applied Eighth Amendment claims alleging that, while their lungs are still suffering damage from COVID-19, lethal injection of pentobarbital would cause torturous executions akin to death-by-waterboarding. The district court expeditiously ordered briefing and held a two-day evidentiary hearing.

On January 12, 2021, the district court entered a "***limited*** injunction" temporarily enjoining the executions of Mr. Higgs and Mr. Johnson on the ground that their undisputed COVID-19 infections, when combined with lethal doses of pentobarbital, will cause them to consciously suffer flash pulmonary edema for up to two and a half minutes during their executions—an excruciating condition described as "a sensation of drowning akin to waterboarding." APP.3. The district court's factual findings were based on Petitioners' extensive medical evidence and the testimony of "highly credible" medical experts. APP.10. In a 2-1 split decision, the D.C. Circuit vacated the injunction, negating the district court's detailed factual findings without even addressing, let alone meaningfully grappling with, the "clear

error" standard of review to which it was bound. In doing so, the majority imposed a standard for Eighth Amendment claims that is contrary to logic and law, whereby the Government can immunize itself from claims of cruel and unusual punishment if it presents *any* expert to defend its practices, even if that expert is found to be non-credible or unpersuasive.

The majority grounded its ruling on a fundamental misreading of this Court's decision in *Barr v. Lee*, 140 S. Ct. 2590 (2020), an erroneous interpretation that this Court should take the opportunity to correct. First, in disregarding the district court's clear and well-supported fact-findings made after an evidentiary hearing, the majority erroneously precludes relief "as a matter of law no matter what facts and science might show," *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 133 (D.C. Cir. 2020), whenever the Government proffers "competing expert testimony," APP.36. Second, the majority misapprehended the Government's "competing" expert evidence as presenting "close questions of scientific fact," APP.36; in truth, the questions were not close at all because the Government's experts presented unpersuasive testimony that was manifestly "inaccurate" and "troubling" to the district court. APP.15

Never was this error more apparent than with respect to Petitioner Higgs's x-ray results. Although the Government's expert opined that the x-rays showed no lung damage, Petitioners' expert testified extensively and, in the district court's view, more persuasively, that they showed significant damage. APP.15-16. In fact, the district

court, with the aid of Petitioners' expert, observed that damage itself, finding the damage "readily apparent" even to a lay observer. APP.13. The D.C. Circuit majority, however, simply swept aside these detailed factual findings, holding that the Government's witness gave rise to a "scientific controversy" that precluded judgment in Petitioners' favor. ECF No. 396. The Government should not be permitted to evade the strictures of the Eighth Amendment merely by introducing "competing expert testimony," APP.35, that a district court hears and finds to be "unpersua[sive]," "inaccurate," and "troubling," APP.14-15.

Respondents' mad rush to execute Petitioners raises serious concerns that go to the heart of our Constitution and justice system, as at least two judges have now separately concluded. Given the importance of these issues, which are almost certain to arise again, Petitioners respectfully request that their executions be temporarily enjoined pending a petition for certiorari on their as-applied Eighth Amendment claims, so that these important issues may be fully and fairly determined by this Court.

STATEMENT OF JURISDICTION

This Court "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Because this Court has ultimate jurisdiction over the issues raised on appeal, it has the authority to protect its jurisdiction by staying an execution that

would otherwise moot the case—a step the Court took in *Bucklew v. Lombardi*, No. 13A1153.

FACTUAL AND PROCEDURAL BACKGROUND

I. THE 2019 PROTOCOL

On July 25, 2019, after a hiatus of more than fifteen years, the Department of Justice ("DOJ") announced that the Federal Bureau of Prisons ("BOP") had adopted a new protocol and addendum detailing federal procedures for carrying out federal executions (the "2019 Protocol"). *See* APP.3-4. The 2019 Protocol calls for federal executions to be carried out by lethal injection of five grams of pentobarbital. *See id.* APP.2. Under the 2019 Protocol, Respondents scheduled Petitioner Corey Johnson's execution for January 14, 2021, and Petitioner Dustin Higgs's execution for January 15, 2021. APP.1.

II. PETITIONERS' AS-APPLIED CHALLENGES TO THE 2019 PROTOCOL

Less than a month before their scheduled executions, both Petitioners tested positive for COVID-19. APP.4-5. Petitioner Higgs tested positive on December 16, 2020, and the BOP notified him on December 17, 2020. No. 21-5004 Doc. 1879951 at 3. That same day, counsel for Petitioner Higgs informed the district court of his positive test, and, five days later on December 22, Petitioner Higgs filed an amended and supplemental complaint along with a motion for preliminary injunction barring his execution based on his diagnosis. ECF No. 369-1 at 2; ECF No. 369-5. Petitioner Johnson filed his own supplemental complaint and motion for preliminary injunction

on December 23, 2020, within five days of learning of his own COVID-19 diagnosis on December 18, 2020. ECF Nos. 372-1, 373-1.

Both Petitioners allege that, given their diagnoses with COVID-19, injection of pentobarbital under the 2019 Protocol will cause flash pulmonary edema immediately upon injection, before pentobarbital has reached the brain and before brain levels of pentobarbital have peaked, thereby causing Petitioners significant pain and suffering before they are rendered unconscious or insensate. *See* ECF Nos. 371, 375. Flash pulmonary edema produces "a sensation of drowning akin to waterboarding." APP.3.

In support of these allegations, Petitioners produced expert declarations from Dr. Gail Van Norman, an anesthesiologist, *see* ECF Nos. 370-2, 374-1, 374-3; Dr. Michael Stephen, a pulmonologist, *see* ECF Nos. 370-3, 374-7; and Dr. Joel Zivot, an anesthesiologist, *see* ECF Nos. 374-4, 374-6.

III. PROCEDURAL HISTORY

On December 31, 2020, Respondents opposed Petitioners' motions for preliminary injunction and introduced new expert declarations of their own. *See* ECF No. 380. Petitioners filed their reply on January 3, 2021. ECF No. 383. To assess the testimony of the parties' experts, the district court held an evidentiary hearing on January 4 and 5, 2021. APP.5. During the hearing, Drs. Kendall von Crowns and Todd Locher testified for Respondents, while Drs. Van Norman and Stephen testified for Petitioners. *Id.*

On January 12, 2021, the district court issued a limited injunction delaying Petitioners' executions until March 16, 2021. *See generally* APP.1 In doing so, the court noted that "[i]t is undisputed that both Higgs and Johnson have been diagnosed with COVID-19 and have been exhibiting symptoms consistent with that diagnosis, including shortness of breath, an unproductive cough, headaches, chills, fatigue, etc." APP.8. The court further noted that it is "undisputed that Petitioners will suffer flash pulmonary edema as a result of the 2019 Protocol, 'a medical condition in which fluid rapidly accumulates in the lungs causing respiratory distress and sensation of drowning and asphyxiation.'" *Id.* (quoting *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 131 (D.C. Cir. 2020)).

Based on expert testimony at the evidentiary hearing and its comprehensive review of the other evidence before it, the district court found that "Higgs has shown that if his execution proceeds as scheduled—less than a month after his COVID-19 diagnosis—he will suffer flash pulmonary edema within one or two seconds of injection but before the pentobarbital reaches the brain and renders him unconscious." APP.16. This will subject Petitioner Higgs "to a sensation akin to waterboarding." APP.3. The district court also found it "undisputed that Johnson is suffering from symptoms of COVID-19, which . . . means he has suffered damage to his alveoli-capillary membrane." APP.17. The court similarly concluded that if Petitioner Johnson were to be executed on January 14, pentobarbital would "burn the alveoli-capillary membrane which has already been damaged from COVID-19,

triggering flash pulmonary edema, all before the pentobarbital even reaches [Johnson's] brain and begins to have an anesthetizing effect." *Id.*

In reaching these conclusions, the district court credited Dr. Van Norman's "highly credible" testimony that "inmates with lung damage from COVID-19 will experience flash pulmonary edema within a second or two after injection" because "COVID-19 causes severe damage to . . . the aveolar-capillary membrane," and pentobarbital is caustic such that "a high concentration dose will burn the [already damaged] alveoli-capillary membrane in the lungs within a second or two of injection." APP.10-11 (quoting APP.239). The court found further that "[a] person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain." APP.11; *see also* APP.195 ("[T]he inmate is virtually certain to be sensate during parts of the execution that include the stages in which the lungs are flooding with fluid due to prior damage with COVID-19."). Moreover, as Dr. Van Norman explained, although "some textbooks indicate that pentobarbital onset is anywhere from 30 seconds to two and a half minutes," APP.197, "the clinical effect" that renders a person insensate "occurs later than the onset," APP.198. Given that pentobarbital "takes longer to reach peak effectiveness" than its initial onset, the district court found that Petitioners "will suffer the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection." APP.11. The court also credited Dr. Stephen's "particularly persuasive and helpful" testimony with respect to Petitioner Higgs, specifically by walking the

court through a comparison of Higgs's lung images showing the extensive damage caused by COVID-19. APP.13.

The court was "unpersuaded" by the rebuttal testimony offered by Dr. Todd Locher, and specifically pointed out that his "failure to account for [] obvious differences" between Mr. Higgs's 2018 and 2020 x-rays was "concerning" and "undermine[d] his opinion that patients with mild COVID-19 symptoms are unlikely to suffer extensive lung damage." APP.14; APP.17. Similarly concerning was the fact that Dr. Locher characterized the results of both Mr. Higgs's x-rays as normal, despite the fact that "chest x-rays typically only show seven to nine ribs, but Higgs's x-ray films showed eleven ribs" as a result of his poorly-controlled asthma. APP.13. The court found that "Dr. Locher's live testimony cast further doubt on his credibility" because multiple inaccuracies in his sworn declaration made it "unclear how closely [Dr. Locher] had reviewed the relevant medical records." *Id.* Similarly, the district court found that Dr. Antognini's declaration "did not adequately refute Dr. Van Norman's opinions." APP.12. The court described Dr. Antognini's opinions as "conclusory" because he cited only "two studies in his entire declaration, neither of which involved COVID-19." *Id.* Further, Dr. Antognini's declaration "does not address Dr. Van Norman's explanation that injected pentobarbital will begin to attack damaged lungs before it reaches the brain, and Dr. Antognini did not proffer how long it would take for an inmate to be rendered unconscious." *Id.*

In spite of these detailed factual findings, on January 13, 2021, a panel of the United States Court of Appeals for the District of Columbia Circuit vacated the district court's injunction. APP.33. In a statement filed with the Order, Judge Katsas, joined by Judge Walker, explained that he voted to vacate the injunction because "the district court based its findings on the same kind of evidence that the Supreme Court had found insufficient in *Lee*: competing expert testimony on close questions of scientific fact." APP.36. In doing so, though, Judges Katsas and Walker failed to discuss the clear error standard that applies to the district court's factual findings, and instead substituted their own judgment for that of the lower court's. *See* APP.42 ("As the Supreme Court has reminded us—including specifically in the death penalty context—'we review the district court's factual findings under the deferential "clear error" standard. This standard does not entitle us to overturn a finding "simply because [we are] convinced that [we] would have decided the case differently."" (quoting *Glossip v. Gross*, 576 U.S. 863, 881 (2015) (Pillard. J., dissenting)).

Petitioners filed a petition for rehearing en banc on January 14, 2021, mere hours after the D.C. Circuit's vacatur, which was denied the same day. Petitioners now seek an emergency stay before this Court pending their forthcoming petition for a writ of certiorari.

REASONS FOR GRANTING THE STAY

An appellate court's power to vacate a stay entered by a lower court should be reserved only for exceptional circumstances. *See, e.g., Kemp v. Smith*, 463 U.S. 1321, 77 L. Ed. 2d 1424 (1983) (Powell, J., Circuit Justice); *O'Connor v. Board of Education*, 449 U.S. 1301 (1980) (Stevens, J., Circuit Justice). A lower court's decision is "deserving of great weight." *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 434 U.S. 1316, 1319, 12 (1977) (Marshall, J., Circuit Justice). Where the lower court offered no reason for its decision to grant the stay application," and "no plausible reason appeared from the record," *Wainwright v. Booker*, 473 U.S. 935 (1985), then vacating a stay may be appropriate. *See also Dugger v. Johnson*, 485 U.S. 945 (1988) (O'Connor, joined by Rehnquist, C.J., dissenting) ("Because neither the District Court nor the Court of Appeals has articulated an adequate legal basis for entering a stay in this case, I would grant the State's application to vacate."). Here, the district court's clear and well-supported fact-findings made after an evidentiary hearing should be afforded deference. The D.C. Circuit failed to afford such deference, misapprehending the evidence of record and failing to acknowledge the district court's reasons for finding as it did.

The standard for granting a stay of execution is well-established. A federal court must consider the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v.*

Campbell, 541 U.S. 637, 649-50 (2004). All of these factors weigh in favor of staying Petitioners' executions pending the filing of a petition for a writ of certiorari.

I. PETITIONERS BRING MERITORIOUS AS-APPLIED EIGHTH AMENDMENT CLAIMS AND ARE LIKELY TO SUCCEED ON APPEAL.

Petitioners Higgs and Johnson must show a "significant possibility of success on the merits" to obtain a stay. *Hill,* 547 U.S. at 584. Importantly, after an evidentiary hearing, the district court found as a matter of fact and law that Petitioners are likely to succeed and can show a sufficient risk of severe pain to justify further proceedings on this claim. The D.C. Circuit simply disregarded these specific factual findings in vacating the preliminary injunction, without so much as explaining how or why they could constitute "clear error." *See* APP.47 ("I believe the government has failed to meet the high burden required to second-guess the district court's factfinding and stay its order.") (Pillard, J., dissenting).

A. The District Court Held that Petitioners Have COVID-19 and Remain Symptomatic, and that Nearly All Symptomatic COVID-19 Patients Sustain Lung Damage

Respondents admit throughout their briefing below that Petitioners Higgs and Johnson tested positive for COVID-19 and are both still experiencing symptoms ***nearly a month later***. *See, e.g.*, No. 21-5004, ECF No. 1879763 at 5 (describing symptoms observed after Petitioners were "medically clear[ed] from isolation"); *see*

also APP.40 (Pillard, J., dissenting).[1] Indeed, the district court held that none of Respondents' medical experts dispute Petitioners' diagnoses, symptoms, or credibly undermine the proposition that Petitioners are consequently at greater risk of experiencing painful flash pulmonary edema during execution.

1. The District Court Found that Petitioners Have Overt COVID-19 Symptoms

Petitioners' medical records, on which the D.C. Circuit relied, indicate that both Petitioners Higgs and Johnson have experienced COVID-19 symptoms related to lung functioning. As the district court held: "[i]t is undisputed that both Higgs and Johnson have been diagnosed with COVID-19 and have been exhibiting symptoms consistent with that diagnosis, including shortness of breath, an unproductive cough, headaches, chills, fatigue, etc." APP.8.

Despite Respondent's contentions, Petitioners' symptoms are not improving. Mr. Higgs has continued to experience labored breathing and coughing. ECF No. 383-1 ¶¶ 7-16. In fact, Respondents deemed it necessary to provide Petitioner Higgs with a chest X-ray on December 30, 2020. ECF No. 383 at 10. As for Petitioner

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[1] Defendants acknowledge that both Petitioners have continued to experience symptoms after being "medically cleared," and that the BOP's "medical clearance" procedure is only in place to determine whether the prisoner can still actively transmit the virus to others. *See* Dist. Ct. Dkt. #376 (joint status report to the court explaining that "[t]his [medical clearance] guidance does not require a negative test or for symptoms to fully resolve before a person can be medically cleared from isolation status. Indeed, Mr. Higgs and Mr. Johnson continue to experience some symptoms consistent with COVID-19.").

Johnson, his cough has persisted and worsened. ECF Nos. 393, 394. Indeed, Petitioner Johnson's spiritual advisor, the Reverend William T. Breeden, submitted a sworn declaration describing his in-person meeting with Petitioner Johnson on January 5, 2021, during which Reverend Breeden observed that Petitioner Johnson's cough was "constant" and "more pronounced and more consistent" than before, and that Petitioner Johnson "exhibited intense fatigue," "dozing off mid-sentence for 8-12 seconds at a time." ECF. No. 393 at 2.

2. The District Court Found that Petitioners' COVID-19 Symptoms Indicate It Is Sure or Nearly Certain They Have Suffered Lung Damage

After reviewing the experts' testimony, the district court held that it was clear both Petitioners have suffered lung damage. For Petitioner Higgs, the district court credited Dr. Stephen's "particularly persuasive and helpful" testimony reviewing Petitioner Higgs's x-ray showing that "Higgs's alveoli-capillary membrane has already been breached by COVID-19 particles, and white blood cells are flooding into his lungs to combat them" indicating "extensive damage." APP.13. Further, with respect to Petitioner Higgs, the district court found that a chest x-ray confirmed "extensive damage caused by COVID-19." APP.13. As for Petitioner Johnson, as his undisputed medical evidence reflects, and as the district court correctly found, his documented symptoms are enough to conclude that he has suffered COVID-19 related respiratory damage. APP.17-18. Indeed, Dr. Van Norman's unrebutted testimony explained that 80-95% percent of symptomatic COVID-19 patients suffer lung damage. APP.213; *see* APP.17.

Respondents' experts do not dispute that COVID-19 causes lung damage in a large majority of symptomatic patients. Indeed, studies that Dr. Locher cites in his declaration conclude that between 44.5% and 94.8% of even *asymptomatic* COVID-19 patients had lung damage visible on a CT scan. *See* APP.125; ECF No. 381-1 ¶ 11 (Locher Decl.). Moreover, Dr. Locher does not dispute the research cited by Dr. Van Norman indicating that at least 79% of *symptomatic* COVID-19 patients—including those with only mild symptoms—had lung damage. ECF No. 374-1 at 4.

Nonetheless, the D.C. Circuit doubted whether Plaintiffs' lungs are significantly damaged from COVID, pointing to Dr. Locher's description of "minimal" or "mild" symptoms. APP.37. But the district court discounted Dr. Locher's testimony because he failed to notice symptoms from Mr. Higgs's medical records, including persistent coughing. APP.14-15. Dr. Locher similarly failed to notice what Dr. Stephen and the district court described as obvious changes in Mr. Higgs's chest x-ray between 2018 and December 2020. APP.15-16. The district court that saw and heard the evidence, including the x-rays, found it "troubling that Dr. Locher did not account for these obvious differences between the two scans." APP.15. The court reasonably discounted Dr. Locher's testimony because his analysis was careless at best. *Id.*; *see also* APP.17 (discounting Dr. Locher's views as to Johnson in light of Dr. Locher's flawed analysis of Mr. Higgs's x-rays).

The D.C. Circuit further insists that two other doctors viewed Mr. Higgs's x-ray and concluded that he lacked significant lung damage. APP.37 ("two government

experts and the attending radiologist"). That is inaccurate. In fact, pathologist Dr. Crowns never viewed the x-rays because they did not become available until the night *after* his testimony. APP.93. Dr. Crowns instead relied on the report of radiologist Dr. Yoon, APP.15-16, but Dr. Yoon did not testify or present a declaration, and the district court noted the absence of any evidence as to whether Dr. Yoon "routinely reviews x-rays of COVID-19 patients." APP.16.

B. The District Court Held that Petitioners' Clear Lung Damage Means They Are Virtually Certain To Experience Flash Pulmonary Edema

The district court made explicit factual findings that Petitioners will suffer from flash pulmonary edema given their COVID-19 related lung damage. The D.C. Circuit's decision cannot overturn these findings "simply because [we are] convinced that [we] would have decided the case differently." (quoting *Glossip v. Gross*, 576 U.S. 863, 881 (2015) (Pillard. J., dissenting)).

With respect to Petitioner Higgs, the district court found that "if his execution proceeds as scheduled—less than a month after his COVID-19 diagnosis—he *will suffer* flash pulmonary edema within one or two seconds of injection but before the pentobarbital reaches the brain and renders him unconscious." APP.16. With respect to Petitioner Johnson, the court similarly held that "Johnson has demonstrated a substantial risk of serious harm." APP.18. For both Petitioners, the Court found that the duration of suffering would be more than just a brief moment of pain: Petitioners "*will suffer* the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection." APP.11 (emphasis added). Moreover, the

court found that "the risk of substantial suffering can be avoided by using one of Petitioners' proffered alternatives or by waiting several weeks to allow Petitioners to recover from a novel disease before executing them." APP.28.

In reaching these conclusions, the court credited Dr. Van Norman's "highly credible" testimony that "inmates with lung damage from COVID-19 will experience flash pulmonary edema within a second or two after injection" because "COVID-19 causes severe damage to . . . the aveolar-capillary membrane," and pentobarbital is caustic such that "a high concentration dose will burn the [already damaged] alveoli-capillary membrane in the lungs within a second or two of injection." APP.10-11 (quoting APP.239).

The court found further that "[a] person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain," APP.11, because the onset of action of pentobarbital is not synonymous with the point at which it renders a person insensate. *Id.*; *see also* APP.195 ("[T]he inmate is virtually certain to be sensate during parts of the execution that include the stages in which the lungs are flooding with fluid due to prior damage with COVID-19.").

The D.C. Circuit was incorrect that the record "contains substantial conflicting testimony on whether asymptomatic or mildly symptomatic COVID-19 patients would be more likely to experience flash pulmonary edema." APP.38 In fact, the district court was entirely "unpersuaded" by the rebuttal testimony offered by Dr. Locher. With respect to Dr. Locher's statement that "there is no evidence in the

medical literature suggesting an injection with pentobarbital would somehow exacerbate symptoms or physiologic abnormalities in patients with COVID-19," APP.14 (quoting ECF No. 381-1, Locher Decl. ¶ 14), the court found that "Dr. Van Norman explained that there are no such studies because no physician or scientist has administered massive overdoes of intravenous pentobarbital to COVID-19 patients." APP.11. Moreover, the court credited Dr. Van Norman's testimony that COVID-related damage allows toxins to degrade the same lung tissues that are already compromised. *See also* Hrg. 153, 155, 157-58, 160-61, 192. As the district court explained, Dr. Van Norman testified that pentobarbital is "a caustic chemical" which is "going to attack an already leaky membrane." Add. 26-27. According to Dr. Van Norman—an anesthesiologist and professor of anesthesiology with over 35 years of experience—"[e]verything we know about pulmonary physiology at the alveolar capillary membrane level says that if you already have a damaged alveolar capillary membrane and then you flood it with a toxic chemical, that you're at increased risk and increased heightened rapidity of getting pulmonary edema." Hrg. 165-66. Dr. Locher offered no evidence to rebut this key point.

With respect to Dr. Locher's opinion that "any findings on a CT scan would likely be minor in view of a normal chest x-ray," APP.14 (quoting ECF No. 381-1, Locher Decl. ¶ 13), the court criticized his assertion that a relatively more accurate measurement would not reveal useful information beyond that captured in a relatively less accurate measurement. *Id.*

At base, the Government established no substantive rebuttal to Petitioners' evidence that their COVID-19 infections will cause them to experience painful flash pulmonary edema quickly during their executions, and that they will experience flash pulmonary edema well before pentobarbital reaches the brain. As the district court explained, "[i]t is further undisputed that Petitioners will suffer flash pulmonary edema as a result of the 2019 Protocol, 'a medical condition in which fluid rapidly accumulates in the lungs causing respiratory distress and sensation of drowning and asphyxiation.'" APP.8. The court explained that Dr. Van Norman testified that "[b]ecause pentobarbital is caustic, a high concentration dose will burn the alveoli-capillary membrane in the lungs within a second or two of injection. A person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain." A11. None of Respondents' three experts offered a competing explanation to refute the physiological mechanism that Dr. Van Norman described.

In vacating the preliminary injunction, the D.C. Circuit decision fundamentally misinterpreted *Lee*, and the preliminary injunction standard, as barring relief whenever the Government offers any expert testimony at odds with the expert testimony offered by Petitioners. In *Lee*, the district court had not heard live testimony or evaluated the relative credibility of experts. In the order granting a preliminary injunction, the district court thus noted that it was "difficult to weigh competing scientific evidence at this relatively early stage." *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 219 (D.D.C. 2020), *vacated*

sub nom. Barr v. Lee, 140 S. Ct. 2590 (2020). This overbroad reading of *Lee* – suggesting that any competing expert testimony is sufficient to defeat a preliminary injunction, even after an evidentiary hearing – is starkly at odds with ordinary civil practice. *See* 11A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2949 (3d ed. 1998) (updated Oct. 2020) (when a motion for a preliminary injunction "depends on resolving a factual conflict by assessing the credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross examination, rather than on the respective plausibility of their affidavits").

C. The District Court Found that Severe Pain from Flash Pulmonary Edema Violates the Eighth Amendment

Petitioners have also established that the pain they are virtually certain to suffer from flash pulmonary edema meets the Eighth Amendment standard justifying injunctive relief. The district court credited testimony that, within a second or two of injection, highly caustic and concentrated pentobarbital will burn the already COVID-damaged alveoli-capillary membrane in the lungs, leading Petitioners to experience flash pulmonary edema immediately—and before the pentobarbital even reaches the brain, let alone before the 30 seconds to two and-a-half minutes after which the drug starts to take effect. APP.3, APP.11, APP.16.

Flash pulmonary edema creates "a sensation of drowning akin to waterboarding." APP.3. Dr. Van Norman explained that "not being able to breathe during drowning or asphyxiation is one of the most powerful, excruciating feelings

known to man." ECF No. 24 at 34. That same sensation "is deliberately elicited in the 'enhanced interrogation technique' called waterboarding, which is . . . a form of torture." *Id.*

Although the district court found, after a two-day evidentiary hearing, these conclusions to be true, the D.C. Circuit majority swept these factual findings aside based on a fundamental misreading of this Court's decision in *Lee*, 140 S. Ct. 2590. Despite any contentions to the contrary, "*Lee* did not hold that the Eighth Amendment turns its back on needless and extreme suffering as long as it is caused by flash pulmonary edema." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d at 134. In fact, the D.C. Circuit previously (and correctly) rejected Respondents' prior arguments that *Lee* "forevermore categorically exempted the federal government's execution protocol from Eighth Amendment scrutiny." *Id.* Instead, *Lee* was a limited ruling, addressing only those specific facts and under the conditions of a "last-minute" stay. *Id.* Thus Respondents' assertion in briefing below that flash pulmonary edema "would not suffice to establish a violation of the Eighth Amendment" is without legal basis.

Relatedly, *Lee* did not, as Respondents urge and as the D.C. Circuit majority concluded, hold that Petitioners cannot succeed on their Eighth Amendment challenge if Respondents can must any experts to support their defense. *See, e.g.*, APP.36 ("[T]he district court based its finding on the same kind of evidence that the Supreme Court had found insufficient in *Lee*: competing expert testimony on close

questions of scientific fact."). This is with good reason, as such a rule would immunize the Government from Eighth Amendment scrutiny simply by finding an expert to defend its execution practices, regardless of how unpersuasive to the finder of fact. Here, the district court heard live testimony, examined evidence, and made credibility determinations, and ultimately found in Respondents' favor on the merits of their challenge. The D.C. Circuit majority's negation of these findings are without merit and should not be allowed to stand.

D. The District Court Concluded that Known and Available Alternatives Would Substantially Reduce The Risk of Harm

The district court also found two known and available alternatives presented by Petitioners persuasive: (1) use of an analgesic which he court described as "a simple addition to the execution procedure that is likely to be as effective as it is easily and quickly administered;" and (2) firing squad which is "feasible, readily implemented, and would significantly reduce the risk of severe pain."[2] APP.23-24.

The district court noted that Nebraska recently carried out an execution using fentanyl—an analgesic—in order to reduce the risk of pain rather than to bring about death. A22; *see also* ECF No. 135 at 15 (district court observing that "the parties agree that Nebraska recently used a pre-dose of fentanyl for the precise purpose of reducing the risk of serious pain during an execution.") (emphasis added). Even though Nebraska's multiple-drug protocol is not identical to the Government's, in

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[2] The D.C. Circuit opinion fails to address Petitioners' proffered alternatives.

both instances the executioner is able to administer fentanyl to reduce the risk of pain from another drug. Such use of an opioid, then, is neither "novel" nor "untested" as the Government urges.

Based on the evidence before it, the district court also found that the firing squad would "significantly reduce the risk of severe pain" in comparison to the 2019 Protocol when applied to Petitioners. APP.24. The Government argues that the prisoner would suffer severe pain for only "8-10 seconds" after being shot by a firing squad, but the district court found that Petitioners would consciously suffer the excruciating experience of drowning for as long as two-and-a-half minutes. APP.11.

IV. THE BALANCE OF HARMS AND PETITIONERS' LACK OF DELAY JUSTIFY A STAY

In addition to the merits of Petitioners' claim, the Court must also consider the balance of harms and whether Petitioners have unduly delayed their claim. *Nelson*, 541 U.S. 637, 649-50 (2004); *Nooner v. Norris*, 491 F.3d 804, 808 (8th Cir. 2007). These factors also weigh in favor of a stay.

Bearing in mind that the death penalty is "obviously irreversible," *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., granting stay as circuit justice), the 2019 Protocol carries a "substantial risk" that Petitioners will experience severe pain from pulmonary edema within a second or two of their injection with pentobarbital due to the already damaged state of their lungs. APP.16, APP.18. Although Respondents have an interest in enforcing criminal judgments without unnecessary delay, the public interest is not served by executing individuals before

they have had the chance to fully and fairly challenge the constitutionality of their executions. *See Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (Op. of Alito, J., respecting denial of stay or vacatur) (finding it preferable for claims to be heard on the merits "in light of what is at stake"); *see also Purkey v. United States*, 964 F.3d 603, 618 (7th Cir. 2020) ("Just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so."). Indeed, going forward with Petitioners executions now—rather than two months from now as ordered by the district court—would subject them to "a method that the district court has determined is likely under the current circumstances to cause them agonizing, readily avoidable pain." APP.46 (Pillard, J., dissenting).

Furthermore, as Judge Pillard recognized, Petitioners have not delayed their as-applied challenges in the slightest. *Id.* ("Johnson's and Higgs's claims could not have been brought earlier. As soon as they knew of their COVID-19 diagnoses, they notified the district court; within days, they supplemented their complaints."). Indeed, the district court previously recognized that the last-minute nature of these proceedings and the resulting costs to the government are largely Respondents' doing by scheduling execution dates as they have. *See* ECF No. 145 at 16. In this situation, that is all the more true; Respondents have allowed COVID-19 to ravage its prisoner population, including Petitioners. *See, e.g.*, *Smith v. Barr*, No. 20-cv-00630, 2021 WL 71168, at *2 (S.D. Ind. Jan. 7, 2021) (noting that 657 prisoners and 70 staff members at FCC Terre Haute tested positive for COVID-19 between December 8, 2020 and

January 7, 2021).[3] Accordingly, this is not a case in which "a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *See Hill*, 547 U.S. at 584. This Court should stay Petitioners' executions to allow full and fair litigation of their meritorious claims, and to preserve its authority to review that claim after the appeal.

[3] It also was not lost on the district court that "executing inmates who are positive for COVID-19 in a facility with an active COVID-19 outbreak will endanger the lives of those performing the executions and those witnesses it" and "is irresponsible at best." APP.29.

CONCLUSION

The application for stays of executions pending a petition for a writ of certiorari should be granted.

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Respectfully submitted,

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