No. 20A131

IN THE SUPREME COURT OF THE UNITED STATES

IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

COREY JOHNSON AND DUSTIN JOHN HIGGS, APPLICANTS

v.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, ET AL.

(CAPITAL CASE)

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAYS OF EXECUTION

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

IN THE SUPREME COURT OF THE UNITED STATES

No. 20A131

IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

COREY JOHNSON AND DUSTIN JOHN HIGGS, APPLICANTS

v.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, ET AL.

(CAPITAL CASE)

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAYS OF EXECUTION

The Acting Solicitor General, on behalf of respondents Jeffrey A. Rosen et al., respectfully submits this response in opposition to applicants' emergency application for stays of execution. Applicants contend that the Eighth Amendment prohibits their executions as scheduled today and tomorrow because they contracted COVID-19 about a month ago. Although the district court entered a preliminary injunction on those claims, the court of appeals panel correctly held that the claims do not warrant such relief, and the en banc court denied rehearing without noted dissent. Appl. App. 33, 256. Because applicants cannot satisfy the demanding standard for a stay or injunction pending certiorari, their application should be promptly denied.

Applicants were collectively convicted of 10 murders and received 16 death sentences for federal crimes committed decades ago. Corey Johnson "is a brutal 'serial killer'" who murdered at least seven people "as an enforcer for a large-scale narcotics operation" in 1992. United States v. Johnson, No. 20-15 (4th Cir. Jan. 12, 2021), slip op. at 5 (opinion of Wilkinson, J.). Dustin Higgs in 1996 kidnapped three women after a failed triple date, drove them onto federal land, and handed his gun to a co-conspirator who shot them dead -- a crime for which Higgs received nine death sentences. United States v. Higgs, 353 F.3d 281, 295 (4th Cir. 2003). Applicants have exhaustively challenged their convictions and sentences, which have been repeatedly upheld and are not at issue here.[1]

Applicants instead challenge the method of implementing their capital sentences, seeking to enjoin their executions under the federal lethal-injection protocol today and tomorrow as a violation of the Eighth Amendment. Six months ago, this Court summarily vacated a preliminary injunction in an Eighth Amendment challenge to the same lethal-injection protocol, see Barr v. Lee,

[1] In a separate petition pending before this Court, No. 20-927, the government seeks emergency relief from a district court decision refusing to designate an alternate State to govern the manner of implementing Higgs's sentence under the Federal Death Penalty Act, 18 U.S.C. 3596(a), in light of Maryland's repeal of its state death-penalty laws after Higgs's federal sentencing. The government will not proceed with Higgs's execution as scheduled unless the Court grants relief on that petition.

140 S. Ct. 2590 (2020), and applicants acknowledge that their claims here differ only to the extent that their COVID-19 diagnosis in mid-December is relevant to the Eighth Amendment analysis.

The district court -- which has issued six injunctions of federal executions under the protocol, all of which were later vacated by the court of appeals or this Court -- enjoined applicants' executions on Tuesday. Last night, however, the court of appeals vacated that injunction, Appl. App. 33, with two judges explaining in a concurring opinion that the district court had committed the same error it committed in Lee by imposing last-minute injunctive relief based on "competing expert testimony on close questions of scientific fact," id. at 36 (Katsas, J.). Specifically, the opinion explained that applicants had failed to make the required showing on multiple aspects of their as-applied Eighth Amendment claims, including their assertions that COVID-19 had damaged their lungs; that such lung damage would speed the onset of a potentially painful condition called pulmonary edema; and that applicants would suffer pain from pulmonary edema before being rendered insensate by the lethal injection of pentobarbital. Id. at 36-39. Under this Court's decision in Lee, the panel majority concluded, applicants were not entitled to injunctive relief. Id. at 33. Judge Pillard dissented. See id. at 40-47.

Applicants this morning filed a petition for rehearing en banc. The court of appeals denied the petition without noted

dissent and issued its mandate. Appl. App. 256. The court then denied applicants' motion for a stay pending disposition of a certiorari petition. C.A. Order, No. 21-5004 (Jan. 14, 2021).

The court of appeals' denial of relief was correct, and applicants cannot meet the high standard for a stay from this Court. Their application should be promptly denied.

STATEMENT

1. The "Constitution allows capital punishment." 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).

In the Nation's early years, hanging was the "standard method of execution" for both States and the federal government. Glossip v. Gross, 576 U.S. 863, 867 (2015). 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). Progress "toward more humane methods of execution" eventually culminated in a "consensus on lethal injection," which is now authorized by every State and the federal government. Ibid.; see id. at 40-41.

Initially, most States and the federal government conducted lethal injections using a combination of three drugs. Baze, 553 U.S. at 42-44, 53 (plurality opinion). This Court upheld use of

that three-drug protocol against an Eighth Amendment challenge in Baze. See id. at 41.

Over time, some States chose to conduct executions using the single drug pentobarbital, a sedative that "can reliably induce and maintain a comalike state that renders a person insensate to pain." Glossip, 576 U.S. at 870-871 (citation omitted). Those States have since used that protocol to carry out more than 100 executions, and this Court and multiple courts of appeals have upheld pentobarbital's use against Eighth Amendment challenges, including "as applied to a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter." Barr v. Lee, 140 S. Ct 2590, 2591 (2020) (citing Bucklew, 139 S. Ct. at 1124).

2. Following a period during which the federal government did not have an active lethal-injection protocol, BOP in July 2019 issued a revised protocol adopting a single-drug pentobarbital protocol of the kind used by many States. Administrative Record (A.R.) 868-875. After careful study, BOP determined that such a protocol is "the most suitable method based on its widespread use by the states and its acceptance by many courts." A.R. 871. BOP also consulted two medical experts, including one credited by this Court in evaluating a challenge to a single-drug pentobarbital protocol in Bucklew. A.R. 872. Both concluded that a single-drug pentobarbital protocol "would produce a humane death." A.R. 3.

Specifically, they explained that an inmate receiving the proposed injection of pentobarbital "will lose consciousness within 10-30 seconds," and "be unaware of any pain or suffering" before death occurs "within minutes." A.R. 525; accord Bucklew, 139 S. Ct. at 1132 (crediting expert testimony that pentobarbital would render an inmate "fully unconscious and incapable of experiencing pain within 20 to 30 seconds").

After adopting the amended protocol, BOP scheduled execution dates in December 2019 and January 2020 for five federal death-row inmates. Following a delay after an injunction imposed by the district court that was subsequently vacated by the D.C. Circuit, see In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, cert. denied, 141 S. Ct. 180 (2020), the government rescheduled executions for July 2020.

On the morning of the first rescheduled execution, the district court issued a second preliminary injunction, this time on Eighth Amendment grounds. Lee, 140 S. Ct. at 2591. Specifically, the court relied on expert evidence purportedly establishing a "virtual medical certainty" that pentobarbital would cause an inmate "excruciating suffering" from pulmonary edema while the inmate was still sensate. D. Ct. Doc. 135, at 11 (citation omitted). This Court summarily vacated the injunction hours later. Lee, 140 S. Ct. at 2590. The Court explained that pentobarbital "has become a mainstay of state executions"; that

courts, including this Court in considering an as-applied challenge by an inmate with a specialized health condition in Bucklew, have rejected Eighth Amendment challenges to pentobarbital protocols; and that prisoners themselves have invoked pentobarbital "as a less painful and risky alternative to" other methods. Ibid. The Court also emphasized that the government had "produced competing expert testimony of its own, indicating that any pulmonary edema occurs only after the prisoner has died or been rendered fully insensate." Ibid. The Court concluded that the inmates "ha[d] not established that they are likely to succeed on the merits of their Eighth Amendment claim," which faces "an exceedingly high bar," and that the district court's "last-minute" injunction should be vacated so that the executions "could proceed as planned." Id. at 2591-2592.

BOP carried out the planned execution shortly thereafter. Over the succeeding six months, BOP has carried out 10 more executions under the lethal-injection protocol, in several cases after additional stays or injunctions by the district court or the court of appeals were vacated by this Court. See, e.g., Rosen v. Montgomery, No. 20A122 (Jan. 12, 2021); Barr v. Hall, No. 20A102 (Nov. 19, 2020); Barr v. Purkey, 141 S. Ct. 196 (2020).

3. On November 20, 2020, BOP scheduled applicants' executions for January 14 and 15, 2021, respectively. On December 16, 2020, applicants tested positive for COVID-19. D. Ct. Doc.

380-4, at 16, 121 (BOP medical records). Both experienced mild symptoms. Higgs complained of a stuffy nose, intermittent headache, cough, sore throat, and occasional shortness of breath, although his temperature and oxygen saturation were normal. Id. at 57-75. Johnson's temperature and oxygen saturation were also within normal ranges, and he complained only of an intermittent headache and cough. Id. at 132-149. After ten days, both were "medically clear[ed] from isolation." Id. at 17, 122.

Higgs subsequently told his provider that he "was short of breath sometimes" but "fine." D. Ct. Doc. 380-4, at 13. As a precaution, Higgs underwent a chest x-ray on December 30; the radiology report indicated "clear lungs" with only a "right apical reticular nodular density" that was "unchanged" compared to a 2018 x-ray. Id. at 107. Johnson's medical records indicate that he has not reported any body aches or fatigue, and instead has reported a cough and intermittent sore throat. See id. at 118-162; D. Ct. Doc. 389, at 74-77; D. Ct. Doc. 388-2. No further testing was medically indicated for those symptoms.

4. Notwithstanding their mild and improving symptoms, applicants sought preliminary injunctions on as-applied Eighth Amendment claims, contending that the lethal-injection protocol at issue in Lee and all other federal executions since July cannot be used to execute them on the scheduled dates in light of their COVID-19 diagnoses. See Appl. App. 4-5. Applicants based their

alleged constitutional violation on a chain of premises: (1) COVID-19 damaged their lungs, (2) their damaged lungs would make them susceptible to a faster onset of pulmonary edema after injection with pentobarbital, (3) they would feel pain from pulmonary edema before the pentobarbital rendered them insensate, and (4) that pain would be so much more significant for them than for other inmates not previously infected by COVID-19 that the government would have to choose an alternative method of execution, and (5) permissible alternatives include being shot to death by a firing squad or executed using pentobarbital and another drug that relieves pain. See, e.g., id. at 8-17, 21-26.[2]

Despite receiving sharply contrasting expert testimony on virtually every major point, the district court enjoined both executions on Tuesday, just over 48 hours before Johnson's was scheduled to occur. Appl. App. 1-32. The court concluded that applicants were likely to succeed on their as-applied challenges because "they have demonstrated that as a result of their COVID-19 infection, they have suffered significant lung damage such that they will experience the effects of flash pulmonary edema one to two seconds after injection and before the pentobarbital has the opportunity to reach the brain" -- a result that "could be avoided

---

[2] Higgs also made claims based on his asserted heart conditions, but the district court did not rely on them and Higgs has not since pressed them. See Appl. App. 19.

were" the government to "administer[] a pre-dose analgesic or carry[] out the execution by firing squad." Id. at 3.

5. The government immediately appealed and moved to stay or vacate the injunction in the court of appeals. Last night, a panel of the court of appeals vacated the injunction. Appl. App. 33. As Judge Katsas explained in detail in an accompanying opinion joined by Judge Walker, the district court improperly based its injunction on "competing expert testimony on close questions of scientific fact." Id. at 36. Specifically, Judge Katsas explained that every key step in the series of inferences underlying applicants' as-applied Eighth Amendment claim -- that COVID damaged their lungs, that such lung damage would cause pulmonary edema to occur more quickly, and that applicants would suffer pain from that edema before being rendered insensate -- was subject to at best "genuinely disputed testimony." Ibid. Indeed, Judge Katsas explained, some of the evidence underlying the claims was based entirely on pure speculation or on scientific rationales necessarily rejected by this Court in vacating the Eighth Amendment injunction at issue in Lee. See id. at 36-39. Judge Katsas added that the "balance of the equities also favors" allowing the executions to proceed given that applicants "each committed multiple murders" years ago and have long since "exhausted all available direct and collateral challenges to their convictions and sentences." Id. at 39.

6. Applicants filed a petition for rehearing en banc this morning. After calling for a response, the court of appeals denied the petition without noted dissent, issued its mandate, and denied a motion for a stay pending certiorari. Appl. App. 256.

ARGUMENT

Applicants' request for emergency relief should be denied. Although they briefly refer to an injunction request (Appl. 3), they recite the standard for a stay of execution (Appl. 10). Applicants, however, cannot obtain stays of their executions in this case. A stay "temporarily divest[s] an order of enforceability," Nken v. Holder, 556 U.S. 418, 428 (2009), but there is no order before this Court that, if divested of enforceability, would bar applicants' execution. The court of appeals has already issued its mandate. See Appl. App. 256. And applicants cannot challenge their criminal judgments in this non-habeas suit. See Hill v. McDonough, 547 U.S. 573, 579-583 (2006). What applicants appear to seek is an order under the All Writs Act, 28 U.S.C. 1651, barring respondents from proceeding with their executions on the scheduled dates based on their as-applied Eighth Amendment claims. Such an order would be an injunction -- an "in personam" order "directed at someone, and govern[ing] that party's conduct." Nken, 556 U.S. at 428; cf. Appl. 3.

The standard for an injunction is appreciably higher than the standard for a stay. To obtain a stay of execution pending

consideration of a petition for a writ of certiorari, a movant must first establish a likelihood of success on the merits -- specifically, "a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," as well as "a significant possibility of reversal of the lower court's decision." Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (citation omitted). A movant must also establish "a likelihood that irreparable harm will result if that decision is not stayed." Ibid. (citation omitted).

In addition to satisfying the typical stay standard, a movant seeking an injunction pending certiorari must further show that the relevant "legal rights" are "'indisputably clear.'" Wisconsin Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (citation omitted); see South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief). That showing "'demands a significantly higher justification' than a request for a stay" pending review. Respect Maine PAC v. McKee, 562 U.S. 996, 996 (2010) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

Ultimately, though, the precise standard is immaterial, because applicants cannot prevail under any applicable standard for equitable relief. The summary vacatur of the district court's

injunction by the court of appeals is plainly correct in light of this Court's decision in Barr v. Lee, 140 S. Ct. 2590 (2020), and the court of appeals' non-precedential ruling on applicants' COVID-specific, as-applied Eighth Amendment claim does not conflict with the decision of any other court of appeals or implicate a question of exceptional importance that is likely to recur. The equities, moreover, weigh heavily against an injunction or stay of applicants' executions for brutal federal crimes committed decades ago. The application should be denied.

I. THE DECISION BELOW WAS CORRECT

The court of appeals correctly concluded that, following this Court's decision in Lee, applicants are not entitled to injunctive relief on their as-applied Eighth Amendment challenge to their executions this week under the federal lethal-injection protocol.

A. An Eighth Amendment method-of-execution claim faces "an exceedingly high bar," particularly at the preliminary-injunction stage. Lee, 140 S. Ct. at 2591; see, e.g., Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008) (explaining that a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief"). Indeed, this Court has never held that any method of execution violates the Eighth Amendment, either facially or as-applied. See, e.g., Lee, 140 S. Ct. at 2591; Bucklew v. Precythe,

139 S. Ct. 1112, 1119 (2019); Glossip v. Gross, 576 U.S. 863, 867 (2015) Baze v. Rees, 553 U.S. 35, 41 (2008) (plurality opinion).

To meet the Eighth Amendment's high bar, an inmate must show that he is "sure or very likely" to experience "needless suffering" -- that is, "an 'objectively intolerable risk of harm.'" Glossip, 576 U.S. at 877 (citations omitted). Making such determinations in the context of "challenges to lethal injection protocols test[s] the boundaries of the authority and competency of federal courts," which are not equipped to review complex medical questions or evaluate risk in the way executive or legislature officials can. Id. at 882. This Court has accordingly directed that courts must not sit as "boards of inquiry" attempting to render fine-grained judgments about execution practices or "embroil [themselves] in ongoing scientific controversies beyond their expertise." Baze, 553 U.S. at 51; see, e.g., id. at 69 (Alito, J., concurring).

As the court of appeals correctly recognized, that is what the district court did here. Few subjects today are more "fraught with medical and scientific uncertainties" than the effects of COVID-19. South Bay, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (citation omitted). Indeed, when applicants received a positive test result in mid-December, the district court responded by observing that "this virus is extremely unpredictable" and the court "couldn't even begin to guess how it will affect" them. 12/17/20 Hr'g Tr. 7-8. Applicants' lead expert

similarly acknowledged that "we are still in the infancy of understanding" the virus's effects. D. Ct. Doc. 372-2, at 3.

Nevertheless, on a series of novel and heavily contested premises necessary to applicants' Eighth Amendment claim, the district court repeatedly made findings that "rest on speculation unsupported, if not affirmatively contradicted, by the evidence in the" record. Bucklew, 139 S. Ct. at 1130. The court of appeals correctly vacated the resulting injunction. Appl. App. 33.

For example, the first link in applicants' chain of inferences is that COVID-19 caused them to suffer lung damage. But that starting point is subject to serious doubt. See Appl. App. 36-38 (Katsas, J., concurring) (detailing the conflicting evidence). With respect to Higgs, two medical doctors -- the examining radiologist, who initially interpreted the chest x-ray in the ordinary course of BOP's provision of medical care, and the government's board-certified pulmonologist expert –- found that there was "no evidence" of lung damage related to COVID-19. Appl. App. 14 (citation omitted). For his part, Johnson's symptoms were so mild that no lung imaging was medically indicated. See D. Ct. Dec. 380-4, at 117-64. The district court nevertheless relied on the contrary view of applicants' single expert –- and, it seems, the court's own reading of the x-ray -- to conclude that Higgs had suffered "extensive" lung damage. Appl. App. 9; see id. at 15 (stating that "one does not have to be a radiologist" to interpret

the images); see id. at 37 (Katsas, J., concurring) (explaining that the district court relied "on its own independent interpretation of the x-rays"). The court then extrapolated its conclusions from Higgs to Johnson -- who had not been indicated for any lung imaging -- asserting that it could "infer" the same medical conditions purportedly experienced by Higgs would also be experienced by Johnson. Id. at 17a.

The next inference underlying applicants' claim -- that lung damage from COVID-19 will produce a significantly faster onset of pulmonary edema -- is even more poorly substantiated. See Appl. App. 38 (Katsas, J., concurring). The district court accepted that premise based on statements by applicants' expert, but, as Judge Katsas explained, the expert's declaration "cites no evidence" for her "inference" that lung "damage would render COVID-positive patients particularly 'susceptible to rapid and massive barbiturate damage.'" Ibid. (citation omitted). The district court credited the expert's testimony because she has treated patients with COVID-19," but that "provides little basis for an opinion on the specific question of the relationship between pentobarbital and pulmonary edema." Ibid. Indeed, the court acknowledged that the expert "did not 'provid[e] support for her conclusions,'" but accepted them anyway on the ground that the government's expert offered "'conclusory'" opinions as well. Ibid. (citation omitted). As Judge Katsas explained, that approach

reflects a misunderstanding of the high bar required by both the Eighth Amendment and the preliminary-injunction standard, because "if both sides' evidence on this point was shaky, Lee requires denying a stay." Ibid.

Finally, the third premise of applicants' claim -- that they would feel pulmonary edema before pentobarbital renders them insensate -- is equally dubious. See Appl. App. 38 (Katsas, J. concurring). The district court accepted applicants' position based on their expert's oral testimony that pentobarbital has an onset of action time (that is, begins to affect the brain) between 30 seconds and two-and-a-half minutes after injection. D. Ct. Doc. 394, at 11. But that testimony was supported only by the expert's unelaborated oral reference to "textbooks," D. Ct. Doc. 389, at 150, and was contradicted by (1) the expert's own previous declaration, see D. Ct. Doc. 183-2, at 4-5; (2) applicants' prior representations to the district court about the time it takes for pentobarbital to affect the brain, see D. Ct. Doc. 383, at 12-13; (3) the opinion of applicants' other expert, who stated that pentobarbital has an onset of action time of 30 seconds to one minute, see D. Ct. Doc. 344-1, at 2; and (4) the opinion of the government's expert that, at a lethal dose, pentobarbital's onset time is 20-30 seconds, see D. Ct. Doc. 352-1, at 6 & Ex. B; see also D. Ct. Doc. 380-2, at 4 (government expert's declaration stating that applicants "are not at an increased risk of developing

pulmonary edema from pentobarbital prior to the onset of unconsciousness"); Bucklew, 138 S. Ct. at 1132-33 (crediting testimony that pentobarbital would render the inmate "fully unconscious and incapable of experiencing pain within 20 to 30 seconds"). As Judge Katsas explained, such a "thinly supported assertion" is precisely the kind of evidence that this Court found insufficient in Lee. Appl. App. 39.

In sum, applicants' position "rest[s] on speculation unsupported, if not affirmatively contradicted, by the evidence in this case," Bucklew, 139 S. Ct. at 1130, and does not come close to satisfying the "exceptionally high bar" to warrant injunctive relief on their Eighth Amendment claim, Lee, 140 S. Ct. at 2591.

B. Applicants' as-applied claims also fail for an additional reason. Even if their prior COVID-19 infections were likely to produce all the effects that they allege, applicants still could not establish an Eighth Amendment violation. As this Court made clear in Bucklew, what the Eighth Amendment prohibits in the execution context is "super[adding] terror, pain, or disgrace to" the implementation of a capital sentence, as "the punishments of the Old World" did. 139 S. Ct. at 1124. Such punishments were unconstitutional not because they inflicted pain but because they were meant to inflict pain. See id. at 1123. By contrast, the constitutionality of hanging -- the leading method of execution for most of the Nation's history -- was "virtually

never questioned," even though "[m]any and perhaps most hangings were evidently painful for the condemned person because they caused death slowly," including by "suffocation, which could take several minutes." Id. at 1124 (citations omitted); see Lee, 140 S. Ct. at 2591 (stating that hanging has "been uniformly regarded as constitutional for centuries").

The Court's understanding of the Eighth Amendment forecloses applicants' claims here. Applicants cannot seriously contend that execution by lethal injection using a protocol designed to induce death quickly and humanely becomes the constitutional equivalent of "punishments like burning and disemboweling" simply because an inmate previously contracted COVID-19. Bucklew, 139 S. Ct. at 1123. Even if applicants were correct that their prior COVID infection would make their executions more painful, the brief duration of pain they assert -- likely measured in seconds, and at most around two minutes -- is still far less than the "suffocation, which could take several minutes" endured by inmates executed by hanging. Ibid. (citation omitted); cf. In re Ohio Execution Protocol Litigation, 946 F.3d 287, 290 (6th Cir. 2019) (explaining that an inmate's claim of pain related to pulmonary edema "pales in comparison to the pain associated with hanging").

Critically, executing applicants using BOP's protocol is not "intended to be painful." Bucklew, 139 S. Ct. at 1124. As explained above, the government introduced expert evidence

indicating that there is no "evidence that asymptomatic or mildly symptomatic Covid-19 patients have increased propensity for pulmonary edema when administered lethal doses of pentobarbital," and that applicants therefore "are not at increased risk of developing pulmonary edema * * * prior to * * * unconsciousness." D. Ct. Doc. 380-2, at 2-3. Any inadvertent pain that applicants experience cannot rise to the level of a constitutional violation. This Court has stated repeatedly that "the Eighth Amendment does not guarantee a prisoner a painless death," and has rejected "time and time again" the proposition that "executions must always be carried out painlessly because they can be carried out painlessly most of the time." Bucklew, 139 S. Ct. at 1124, 1127; see id. at 1125 (reiterating that the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions"). At best, applicants' allegations establish that they face some marginal risk of harm beyond that of other inmates. But the prospect of a "minor reduction in risk is insufficient" to implicate the Eighth Amendment. Id. at 1130. Because the government is not in any plausible sense "cruelly super[adding] pain to the death sentence" by executing applicants using a protocol chosen for its humanity, they cannot establish an Eighth Amendment violation. Id. at 1125.

C. Even if applicants were able to show that pentobarbital creates a constitutionally cognizable risk of severe pain given

their prior COVID-19 diagnosis, they have not made the requisite additional showing of an alternative method of execution that would "significantly" reduce that alleged pain, is "feasible and readily implemented," and "that the [government] has refused to adopt without a legitimate penological reason." Bucklew, 139 S. Ct. at 1125, 1130. Neither the novel two-drug lethal-injection protocol applicants propose nor a firing squad satisfies those criteria.

1. Applicants first contend that combining pentobarbital with an opioid, such as fentanyl, would make a permissible alternative method of execution. D. Ct. Doc. 394, at 21–23. No State, however, uses such an opioid-plus-pentobarbital cocktail. And as this Court explained in Bucklew, when an inmate seeks "the adoption of an entirely new method [of execution] -- one that had never been used to carry out an execution and had no track record of successful use," the government has "a legitimate reason for declining to switch from its current method of execution as a matter of law." 139 S. Ct. at 1129–1130 (emphasis added; citations omitted). "[C]hoosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it." Ibid.

The analysis in Baze further refutes applicants' position. There, an inmate proposed a one-drug barbiturate protocol instead of Kentucky's three-drug protocol. See 553 U.S. at 56-57 (plurality opinion). The plurality noted that no other

jurisdiction had adopted the proposed protocol, and relied on that fact in concluding that Kentucky was not required to move from one drug to three, whatever arguable benefits such a change might have. See ibid.; see also Bucklew, 139 S. Ct. at 1130. So too here, no other jurisdiction has adopted the opioid-plus-pentobarbital protocol applicants envision, and that suffices to justify the government's use of its carefully selected protocol.

In addition, the government's "continued use of" its single-drug pentobarbital protocol "cannot be viewed as posing an objectively intolerable risk when no other State has adopted" the specific two-drug protocol applicants rely on, and applicants have "proffered no study showing that it is an equally effective manner of imposing a death sentence." Baze, 553 U.S. at 57 (plurality opinion). The district court's cursory conclusion that this combination "is likely to be as effective as it is easily and quickly administered," Appl. App. 23, falls far short of the type of "study" that establishes the two-drug protocol reliability.

That is particularly true given that the only evidence on which the court relied is an opinion from one of applicants' experts stating that adding "a pre-dose of certain opioid pain medications, such as morphine or fentanyl, will significantly reduce the risk of severe pain during the execution." Appl. App. 21. That opinion demonstrates only that use of a pain reliever might help relieve pain, not the "comparative efficacy" of -- or

any potential medical or administrative complications that might attend -- this particular drug protocol. Baze, 553 U.S. at 57 (plurality opinion). Thus, applicants' proposed two-drug "method of execution is not so well established that [the federal government's] failure to adopt it constitutes a violation of the Eighth Amendment." Ibid. Indeed, given the many years of litigation over other multi-drug execution protocols, and previous allegations that drug combinations designed to alleviate suffering in fact masked it, any suggestion that the government is compelled to adopt an untested multi-drug regime is especially misguided.

2. Applicants' position that it would be constitutional to execute them by firing squad but not by lethal injection of pentobarbital is equally erroneous. See Appl. App. 23-26. To be sure, the firing squad is a constitutionally permissible method of execution. Wilkerson v. Utah, 99 U.S. 130, 131–132 (1878). But every other court to have considered the issue has rejected the firing squad as an alternative method that renders lethal injection unconstitutional. See, e.g., Gray v. McAuliffe, No. 16-cv982, 2017 WL 102970, at *19 (E.D. Va. Jan. 10, 2017); McGehee v. Hutchinson, No. 17-cv-179, 2020 WL 2841589, at *37 (E.D. Ark. May 31, 2020). And for good reason. Being shot to death by a firing squad can involve "shattering of bone and damage to the spinal cord," and even in successfully implemented executions, "for the 8-10 seconds of consciousness after bullet entry, the injury would

be severely painful." D. Ct. Doc. 111-4, at 8. At a minimum, the difference between the pain involved in being shot to death and the lung-related pain applicants allege will result here is not of constitutional dimension.

In addition, the federal government has a legitimate interest in using a method it regards as "preserving the dignity of the procedure." Baze, 553 U.S. at 57 (plurality opinion). Given the "consensus" among the States that lethal injection is more dignified and humane than the firing squad, BOP was entitled to reach the same conclusion. Id. at 62. Although the government could choose the firing squad, the Constitution does not mandate that it turn back the clock to a more primitive execution form, nor does it entitle applicants to make such a demand. See ibid.

D. Even apart from applicants' inability to show a likelihood of success on the merits, applicants' request for injunctive relief would fail because the additional required considerations -- likelihood of irreparable harm, the public interest, and the balance of equities -- all weigh heavily against them. See Winter, 555 U.S. at 26; Appl. App. 39 (Katsas, J., concurring).

On one side of the equitable balance, the cognizable irreparable harm that applicants would suffer "in the absence of preliminary relief" is necessarily limited. Glossip, 575 U.S. at 876 (citation omitted). To be sure, death is an irreparable harm,

but that cannot be the irreparable harm supporting an injunction in this case, because applicants do not challenge the government's authority to execute them. Indeed, applicants could not raise such a challenge in this suit. See Hill v. McDonough, 547 U.S. 573, 580 (2006) (permitting challenge to execution method outside habeas only where there was no "challenge to the fact of the sentence itself"). The irreparable harm at issue is instead the difference between being executed using pentobarbital and being executed using one of applicants' preferred methods. As described above, that difference is marginal at best.

On the other side of the balance, "the proper determination of where the public interest lies" is not "a close question." Winter, 555 U.S. at 26. 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). Applicants were each convicted and sentenced to death more than 20 years ago, and each long ago exhausted all permissible opportunities for further review. Their crimes are brutal, and their guilt is beyond question. As Judge Wilkinson recently noted, "Johnson has committed multiple murders of a horrific nature, and even in the depressing annals of capital crimes, his case stands out." Johnson, supra, slip op. at 4-5. The sentencing judge in Higgs's

case similarly observed that "Higgs's crimes were an abomination, his central responsibility is indisputable, and he had a fair trial on both in terms of guilt and the applicability of the death penalty before a jury of his peers." United States v. Higgs, No. 98-cr-520, 2020 WL 7707165, at *7 (D. Md. Dec. 29, 2020).

The "balance of equities" thus weighs "strongly in favor of the" government and against any injunction. Winter, 555 U.S. at 26; see Appl. App. 39 (Katsas, J., concurring). Whatever marginal degree of additional pain theoretically might result from executing applicants about a month after their COVID-19 diagnoses, it is far outweighed by the "strong interest" of the public and families of applicants' victims "in enforcing * * * criminal judgments without undue interference from the federal courts" and without further delay. Hill, 547 U.S. at 584. In both these cases, "[t]he time has long since passed for the judgment of the jury and that of so many courts thereafter to be carried out." Johnson, supra, slip op. at 5 (Wilkinson, J.).

II. THE EQUITIES WEIGH STRONGLY AGAINST AN INJUNCTION OR STAY

For similar reasons, the equities weigh heavily against emergency injunctive relief. Numerous family members of Johnson's victims have traveled to Terre Haute to witness his execution today for the murder of their loved ones nearly three decades ago. Family members of Higgs's victims are planning to travel to Indiana to witness his execution tomorrow as well, nearly 25 years after

he murdered three young women simply because of a bad experience on a date. "To unsettle these expectations" in the final hours before the executions would be "to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the [government] and the victims of crime alike." Calderon, 523 U.S. at 556 (citation omitted). The sentences in these cases are lawful and just. The government is prepared to implement them humanely. The Court should allow the executions to proceed.

CONCLUSION

The application should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

JANUARY 2021