No. 20A8

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.

DANIEL LEWIS LEE, et al.,

Respondents.

CAPITAL CASE – EXECUTION SCHEDULED TODAY

On Application for Stay

OPPOSITION TO EMERGENCY APPLICATION FOR A STAY

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The Government asks this Court to vacate the District Court's preliminary injunction and allow Plaintiffs' executions to proceed—one later today, one on Wednesday, one on Friday, and one next month—before this the D.C. Circuit or this Court ever has an opportunity to consider briefing and argument on appeal. That request is nothing short of extraordinary. To Plaintiffs' knowledge, this Court has *never* vacated a stay or preliminary injunction against an execution based on the assertion—implied but never outright argued by the Government— that a district court's factual findings were clearly erroneous. This case should not be the first.

The District Court found based on the scientific and medical evidence submitted by both sides that the Government's chosen execution method is "very likely to cause Plaintiffs extreme pain and needless suffering." A9. Plaintiffs then proposed a straightforward remedy: a clinical dose of a widely available analgesic or anti-anxiety medication. *See* A13-15. Alternatively, Plaintiffs proposed that the Government might adopt the "readily implementable alternative" of a firing squad. A18.

Rather than take either of these steps, the Government asks this Court to grant extraordinary relief and give it a green light to proceed with no changes to its execution protocol. It seeks this relief even though the District Court's conclusion was based on careful fact-finding and credibility determinations. Indeed, the Government offers no reason why, after it delayed these executions for over eight years, it is imperative for them to proceed now, when serious legal questions remain unresolved and the ongoing global pandemic injects further risk and uncertainty. Indeed, given the timeline one which the Government requests review, it is difficult to see how this Court *could* undertake the careful review of the factual record required to assess whether clear error exists.

The Government bemoans the "last-minute" nature of the District Court's order, Appl. 5, but as the District Court explained, that posture is a direct "result of the Government's decision to set short execution dates even as many claims, including those addressed here, were pending." A3. The delay is certainly not attributable to Plaintiffs, who have moved with dispatch at every step of this litigation since

the Government's first announcement last summer. The Government seems to recognize as much, directing much of its ire at the District Court rather than Plaintiffs. *See* Appl. 5-6, 17-18, 34-37. But the District Court acted quickly in the face of a rapidly evolving situation. It is extraordinary that the Government, which insists on a "presumption of regularity" from the judiciary, is unwilling in this instance to extend its co-equal branch the same courtesy. *Cf. Walton v. Arizona*, 497 U.S. 639, 653 (1990) ("Trial judges are presumed to know the law and to apply it in making their decisions."). And, in any event, it would be completely misdirected for this Court to punish *Plaintiffs,* and effectively deprive them of appellate review, because of the District Court's schedule. The only conceivable justification the Government offers for that remarkable request is the resources it has expended in preparing for executions this week. But that is a strategic choice the Government made knowing full well the risk that this litigation would require more time to achieve a resolution.

This is not a case for "cutting corners" or short-circuiting appellate review. *Dept. of Homeland Security v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1910 (2020). The Government's motion should be denied.

STATEMENT

A. The Lethal-Injection Protocols

In 2004, Defendants adopted a protocol that detailed procedures for carrying out federal executions. *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, No. 12-CV-0782, 2019 WL 6691814, at *2 (D.D.C. Nov. 20, 2019). In 2008, the Bu-

reau of Prisons (BOP) issued an addendum announcing that federal executions would be carried out using three drugs. *Id.* But in 2011, BOP announced that it lacked the drugs necessary to implement the 2008 addendum and that it was in the process of considering revisions to it. *Id.*

On July 25, 2019, after more than eight years of review, the Department of Justice (DOJ) issued what it referred to as an "addendum" to the lethal-injection protocol. *Id.* This self-styled addendum replaces the three drugs specified by the 2008 addendum with a single drug, pentobarbital sodium, and makes other changes. *Id.* At the same time, BOP replaced the 2004 protocol with a 2019 main protocol (together with the 2019 addendum, the "2019 Protocol"). *Id.*

B. Factual And Procedural History

1. On July 25, 2019, simultaneously with the announcement of the 2019 Protocol, Defendants identified five individuals to be executed under the new protocol: Daniel Lee on December 9, 2019; Lezmond Mitchell on December 11; Wesley Purkey on December 13; Alfred Bourgeois on January 13, 2020; and Dustin Honken on January 15. Plaintiffs Lee, Purkey, Bourgeois, and Honken each challenged the 2019 Protocol and sought preliminary injunctions. They argued that the 2019 Protocol violates the Federal Death Penalty Act (FDPA); the Eighth Amendment; the First, Fifth, and Sixth Amendments; the Food, Drug and Cosmetic Act and the Controlled Substances Act; and was arbitrary and capricious, in violation of the Administrative Procedure Act (APA).

2. In November 2019, the District Court granted a preliminary injunction, finding that Plaintiffs were likely to succeed on their claim that the 2019 Protocol contravenes the FDPA, and thus found it unnecessary to reach any of the other claims. *Execution Protocol Cases*, 2019 WL 6691814, at *7. The District Court further found that, absent preliminary injunctive relief, Plaintiffs would suffer "manifestly irreparable harm"; that this outweighed "any potential harm to the Defendants"; and that it was "in the public interest to issue a preliminary injunction." *Id.* at *8.

The District Court, the D.C. Circuit, and this Court all denied Defendants' motion to stay the preliminary injunction. Dist. Dkt., Minute Order (Nov. 22, 2019); Order, *In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Dec. 2, 2019) (per curiam); *Barr v. Roane*, 140 S. Ct. 353, 353 (2019) (mem). As Justice Alito explained, "in light of what is at stake, it would be preferable for the District Court's decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out." *Roane*, 140 S. Ct. at 353 (Alito, J., respecting the denial of stay or vacatur).

On appeal, a panel of the D.C. Circuit reversed the District Court's FDPA holding. *In re Fed. Bureau of Prisons' Execution Protocol Cases* (*In re FBOP*), 955 F.3d 106 (D.C. Cir. 2020) (per curiam). Plaintiffs petitioned for a writ of certiorari, which this Court denied on June 29, 2020. *Bourgeois v. Barr*, No. 19-1348, 2020 WL 3492763, at *1 (U.S. June 29, 2020).

3. While review of the District Court's preliminary injunction on the FDPA claim was ongoing, Plaintiffs continued to press their remaining claims before the District Court. Pursuant to a *joint* motion, they filed an amended complaint on June 1, raising several additional statutory and constitutional claims. Defendants' response was due July 31. *See* Dist. Dkt. #92, #94, #87; Dist. Dkt. Minute Order (Mar. 18, 2020).

But just days after the D.C. Circuit issued its mandate—and while Plaintiffs' petition for certiorari was still pending—the Government set new execution dates: Lee on July 13, 2020, Purkey on July 15, 2020, and Honken on July 17, 2020. The Government also set an execution date for Keith Dwayne Nelson for August 28, 2020. Dist. Dkt #99.[1] Four days later, Plaintiffs moved for a preliminary injunction based on several of their remaining constitutional and statutory claims. Dist. Dkt # 102.

4. Today, the day of the first scheduled execution (Daniel Lee), the District Court granted a preliminary injunction. A22.[2] The court found that Plaintiffs are likely to succeed on their claim that the proposed method of execution violates the Eighth Amendment. "The scientific evidence before the court overwhelmingly indicates that the 2019 Protocol is very likely to cause Plaintiffs extreme pain and need-

[1] The Government did not set an execution date for Bourgeois.

[2] On July 9, 2020, the District Court for the Southern District of Indiana separately granted a preliminary injunction against Lee's execution, concluding that the Government violated the Administrative Procedure Act in scheduling Lee's execution. *See Peterson v. Barr*, No. 2:20-cv-00350 (S.D. Ind. July 9, 2020). The Seventh Circuit vacated that preliminary injunction on July 12, 2020. *Peterson v. Barr*, No. 20-2252 (7th Cir. July 12, 2020). Plaintiffs have asked this Court for a stay of the Seventh Circuit's order pending the filing of their petition for a writ of certiorari.

less suffering during their executions" by causing "flash pulmonary edema." A9-10. Such edema, in turn, "interferes with breathing, produces sensations of drowning and asphyxiation," and leads to "extreme pain, terror and panic." A10 (internal quotation marks omitted). The District Court then found that Plaintiffs had identified "two available and readily implementable alternative methods of execution that would significantly reduce the risk of serious pain: a pre-dose of opioid pain or anti-anxiety medication, or execution by firing squad." A18.

As before, the District Court further found that the remaining preliminary injunction factors favored Plaintiffs: Absent an injunction, the District Court concluded, Plaintiffs would suffer the irreparable harm of being executed under an unlawful procedure. A19. And the court found "that the potential harm to the government caused by a delayed execution is not substantial, and is outweighed by the irreparable harm Plaintiffs would face absent an injunction." A21. Finally, the Court determined "the public interest is served by preliminarily enjoining Plaintiffs' executions because it will allow judicial review of whether the United States Government's planned execution protocol complies with the Eighth Amendment, and to ensure that it does so in the future." A21.

The District Court subsequently denied the Government's motion to stay the preliminary injunction. Dist. Dkt Minute Order (July 13, 2020).

ARGUMENT

A stay pending appeal is available "only under extraordinary circumstances." *Ruckelshaus* v. *Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in cham-

bers). Accordingly, "[w]hen a matter is pending before a court of appeals, it long has been the practice of members of this Court to grant stay applications only 'upon the weightiest considerations.'" *Fargo Women's Health Org.* v. *Schafer*, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J, concurring) (quoting *O'Rourke* v. *Levine*, 80 S. Ct. 623, 624 (1960)). The Government has an "especially heavy" burden on this application. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C. J., in chambers). In determining a stay pending appeal, this Court considers the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 434 (2009).

The Government attempts to avoid the *Nken* standard by citing to cases where the Court granted stays pending appeals. *See* Appl. 20. While one of the cited cases, *San Diegans for the Mt. Soledad National War Memorial* v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers), added preliminary questions regarding the potential granting of certiorari and the result after such a grant, the Court has not dispensed with the four-factor test set forth above in stay applications. To the contrary, even in cases cited by the Government, the Court specifically referred to the four-factor standard for stays. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (Thomas, J., concurring in part, dissenting in part).

The Government also points to capital cases where this Court summarily vacated a lower court's preliminary injunction, but those orders were based on a lower court's failure to make the requisite finding that the petitioner was likely to succeed on the merits. *See* Appl. 19-20 (citing *Dunn v. McNabb*, 138 S.Ct. 369, 369 (2017) (setting aside lower court order because it failed to find "a significant possibility of success on the merits" as required by *Hill v. McDonough*, 547 U.S. 573 (2016)); *Brewer v. Landrigan*, 562 U.S. 996 (2010) (setting aside lower court order because it failed to make the requisite finding that the execution is "sure or very likely to cause serious illness and needless suffering" as required by *Baze v. Rees*, 553 U.S. 35 (2008)).

As demonstrated below, the Government has not satisfied its "especially heavy" burden on the Application and a stay would alter the *status quo*, with an immediate, direct, and severe impact on Plaintiffs. Therefore, like the District Court, this Court should find that no stay is warranted, and that the District Court did not abuse its discretion by ordering the preliminary injunction at issue.

I. THE GOVERNMENT IS UNLIKELY TO SUCCEED ON APPEAL.

The District Court correctly held that Plaintiffs are likely to prevail on their claim that the 2019 Protocol "presents a 'substantial risk of serious harm'" in violation of the Eighth Amendment, and that "alternative method[s] of execution that will significantly reduce the risk of serious pain" are both "feasible and readily implemented." A9 (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015)). The Government is not likely to succeed in obtaining a reversal of that decision on appeal.

The District Court correctly held that Plaintiffs are likely to prevail on their claim that the 2019 Protocol "presents a 'substantial risk of serious harm'" in violation of the Eighth Amendment, and that "alternative method[s] of execution that will significantly reduce the risk of serious pain" are both "feasible and readily implemented." A9 (quoting *Glossip v. Gross*, 135 S. Ct. at 2737).

1. Plaintiffs are likely to prevail on their claim that the Government's planned use of pentobarbital is likely to cause extreme, needless pain and suffering in violation of the Eighth Amendment. A9. As the district court explained, Plaintiffs "have the better of the scientific evidence on this question." A12.

Plaintiffs are likely to succeed in showing that this conclusion, which rests on the district court's determination to credit Plaintiffs' experts over the Government's experts, was not clearly erroneous. *See Glossip*, 135 S. Ct. at 2740–41 (reviewing district court's findings about midazolam's ability to produce a sufficient level of unconsciousness for clear error, and finding the district court did not so err in crediting one expert over another). When "factual findings" are reviewed for clear error," there is a "serious thumb on the scale" in favor of the district court's findings. *U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). The reviewing court may not overturn the district court's finding "simply because [it is] convinced that [it] would have decided the case differently." *Glossip*, 135 S. Ct. at 2740 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

Ample evidence supports the district court's determination that the planned use of pentobarbital will likely cause needless suffering. As the court explained,

Plaintiffs' experts demonstrated that a majority of inmates executed using pentobarbital suffered flash pulmonary edema during their execution. A9-10 (citing expert declarations of Mark Edgar (available at Dist. Dkt. #26-12) and Gail Van Norman (available at Dist. Dkt. #24)). Flash pulmonary edema is an excruciating drowning sensation caused by foam or froth in the airways. Because it occurs "virtually immediately during and after high-dose barbiturate injection"—before prisoners become insensate, Van Norman Decl. at 36—conscious and sensate prisoners experience "sensations of drowning and asphyxia" that "result in extreme pain, terror and panic." Edgar Decl. at 21. This is the same feeling "is deliberately elicited in 'the enhanced interrogation technique' called waterboarding," and is "one of the most powerful, excruciating feelings known to man." Van Norman Decl. at 34.

The Government does not contest that flash pulmonary edema *will* occur. *See* A12. Indeed, it never even challenges the District Court's findings as clear error. Instead, it offers three rejoinders, none of which is compelling.

First, the Government suggests that the District Court's "merits holding" directly "conflicts with a binding decision of this Court"—presumably *Bucklew v. Precythe*. Appl. 21. But the Application does not follow through on the promised conflict—it stops short of claiming that *Bucklew* actually established, as a matter of law, that pentobarbital cannot cause pain and suffering sufficient to establish an Eighth Amendment violation. *See* Appl. 23-38; *see also id.* at 5 (arguing the decision ignores "the clear import," not the holding, of *Bucklew*). That is for good reason. In *Bucklew v. Precythe*, the Court did not consider a facial challenge to the use

of pentobarbital, and it did not have before it a factual record containing the latest medical and scientific evidence regarding flash pulmonary edema. 139 S. Ct. 1112 (2019). The Court therefore did not address the risk of flash pulmonary edema at all. Rather, the prisoner in that case conceded that "the State's lethal injection protocol is constitutional in most applications," arguing only that his unique medical condition (cavernous hemangioma) made it likely that he would suffer unconstitutional pain from pentobarbital. *Id.* at 1118. Moreover, this Court found that Bucklew's claim largely rested on speculation about "exactly what procedures the State planned to use," even though he "had ample opportunity to conduct discovery and develop a factual record" before the State moved for summary judgment. *Id.* at 1131; *see id.* at 1122. Plaintiffs here, by contrast, have never made such a concession. And they have presented ample record medical evidence, even though they have not yet received the chance to conduct full discovery. *Bucklew* thus does not foreclose Plaintiffs' claim.

Second, the Government relies on "inapposite" cases to argue that the pain associated with this sensation—akin to recognized form of torture—is not sufficiently severe to render the 2019 Protocol in violation of the Eighth Amendment. A10.

As the district court found, neither *Baze*, *Glossip*, nor *In re Ohio Execution Protocol Litigation* involved a single-drug protocol or pentobarbital. Moreover, each of those cases rested on very different factual records. In *Baze*, the "alternative" use of pentobarbital "was not proposed to the state courts below," and so there were no "findings on the effectiveness of [a] barbiturate-only protocol." 553 U.S. at 56-

57. Here, Plaintiffs introduced substantial evidence regarding the issues associated with pentobarbital and potential alternatives. In *Glossip*, this Court held that the lower court did not clearly err in finding that pentobarbital was "unavailable to Oklahoma's Department of Corrections." 135 S. Ct. at 2738. Here, it is the district court's finding that pentobarbital would create a serious risk of pain that is entitled to clear error review.

Nor is the Sixth Circuit's conclusion in the Ohio litigation somehow dispositive here. For one, that case is tentative in its analysis of pulmonary edema. It states that the risk of feeling the sensation of drowning or asphyxiation "*looks a lot* like the risks of pain associated with hanging." *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 290 (6th Cir. 2019) (emphasis added). That does not establish that acute pulmonary edema is an insubstantial hazard as a matter of law.

More importantly, that case involved a three-drug protocol in which midazolam is the first drug, and the court's suppositions about the effects of midazolam do not apply to pentobarbital. As Plaintiffs' experts explained, pentobarbital carries a highly alkaline pH of 10.0 or higher, and it causes flash pulmonary edema based on the "direct toxic effect of alkaline pentobarbital solution on the lung capillaries." Edgar Decl. at 20; *see also* Van Norman Decl. at 32. Midazolam, by contrast, is a benzodiazepine rather than a barbiturate. It carries a strongly acidic pH of 3.0 to 3.5 instead of a highly alkaline one. *See In re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 244488, at *29 (S.D. Ohio Jan. 14, 2019), *aff'd*, 946 F.3d 287 (6th Cir. 2019). As Defendants' expert, Dr. Antognini, testified in the Ohio case, a

prisoner's blood is likely to buffer the acidic midazolam, thus diminishing the likelihood and severity of damage to lung tissue. *Id.* at *58. Thus, not only are pentobarbital and midazolam different drugs that work by different mechanisms and carry different effects of different severity, *see* Van Norman Decl. at 7 (effects of high-dose IV barbiturates), but also the risk of pulmonary edema associated with pentobarbital is *worse* than that associated with midazolam. *Compare Ohio Execution Protocol*, 946 F.3d at 290 (noting that "[*m*]*any and perhaps most* hangings were evidently painful for the condemned person"), *with* Van Norman Decl. at 8 ("The Federal Protocol … is *virtually certain* to cause prisoners excruciating suffering through their awareness of the sensations of suffocation and drowning caused by pulmonary edema." (emphasis added)).

Moreover, as the District Court pointed out (at A11), that case held plaintiff had failed to provide necessary evidence supporting his contentions. Here, Plaintiffs "amassed an extensive factual record," including experts concluding "that there is a 'virtual medical certainty' that the 2019 Protocol will result in 'excruciating suffering.'" The Government completely ignores this element of the District Court's decision.

Third, the Government continues to argue that flash pulmonary edema does not present a serious risk of harm because Plaintiffs will not be sensate or alive at the time it occurs. *See* Dist. Dkt. 122-2, ¶ 22. This again simply ignores the District Court's fact-based conclusion that the Plaintiffs "have the better of the scientific evidence" on this point. A12. As Dr. Van Norman explained, pentobarbital is not like-

ly to render Plaintiffs "insensate or dead before they experience" flash pulmonary edema. A12; *see also* Van Normal Decl. at 7 ("it is extremely likely that prisoners given even high doses of barbiturates retain consciousness long enough to experience pain and suffering during the execution process using single-dose pentobarbital"). That is because pentobarbital is a barbiturate; although barbiturates can render a person unresponsive, they will not prevent the prisoner from being sensate. Van Norman Decl. at 13. The distinction between consciousness and responsiveness is critical: Even if "the patients *appear to be* unconscious by all clinical measures and are unresponsive," the barbiturate nevertheless "will permit extreme pain and suffering during the execution process." *Id.* at 7 (emphasis added). In support, she marshaled scientific evidence, "eyewitness accounts," and autopsy findings. A12. Dr. Antognini, by contrast, relied on studies that examined only unresponsiveness, not unconsciousness—thus glossing over this crucial distinction. *See* Van Norman Suppl. Decl. at 4, 8 (available at Dist. Dkt. #123). Accordingly, the district court's decision to credit Dr. Van Norman over Dr. Antognini, and its associated findings, was not clearly erroneous.

Although pentobarbital has been used to carry out other executions, *cf.* Appl. 6 (asserting, without citation, over 100 similar executions), those past examples merely prove Plaintiffs' points. The autopsies of those executed using pentobarbital demonstrate that it is a "virtual medical certainty that most, if not all, prisoners will experience excruciating suffering [related to pulmonary edema], including sensations of drowning and suffocation, as a result of [the] injection of 5 grams of pen-

tobarbital." Van Norman Decl. at 7, 35; see Am. Compl. ¶¶ 76-82 (flash pulmonary edema "occurs in the vast majority [of], if not all," judicial lethal injections using pentobarbital).

This evidence corroborates witness reports of pentobarbital executions, which describe sensate prisoners continuing to breathe after experiencing acute symptoms including burning sensations, labored breathing, gasping, and other signs of severe pain and respiratory distress. For example, in 2018, five people who were executed in Texas through the use of compounded pentobarbital said that they felt as if they were burning before they finally died, indicating that the drug used was subpotent.[3] In 2015, Georgia canceled an execution because the compounded pentobarbital came out of suspension and was therefore unusable.[4] Similarly, Michael Lee Wilson in Oklahoma exclaimed during his execution (which was administered with compounded drugs) that he felt his "whole body burning." *See* Compl. Ex. 4, *Taylor v. Apothecary Shoppe, LLC*, No. 4:14-cv-00063 (N.D. Okla. Fild Feb. 11, 2014), Dkt. #2, Decl. of Dr. Larry D. Sasich ¶ 60. And when Eric Robert was executed in South Dakota using solely compounded pentobarbital, witnesses reported that he appeared to clear his throat and gasp heavily, at which point his skin turned bluish-purple. He

[3] *See* McDaniel, *Inmates Said the Drug Burned as They Died. This is How Texas Gets its Execution Drugs*, BUZZFEED NEWS (Nov. 28, 2018), https://www.buzzfeednews.com/article/chrismcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas.

[4] *See* Hunzinger, *Secret Sedative: How Missouri Uses Pentobarbital in Executions*, St. Louis Public Radio (Aug. 18, 2017), https://news.stlpublicradio.org/post/secret-sedative-how-missouri-uses-pentobarbitalexecutions.

opened his eyes and they remained open until his death; his heart continued to beat for ten minutes after his breathing ceased. *See id.* ¶¶ 61-62.

In sum, by adopting pentobarbital without measures to mitigate the near certainty of flash pulmonary edema, the Protocol creates a demonstrated risk of severe pain.

2. Plaintiffs are likely to demonstrate that there are known, feasible, readily available alternatives which the Government could employ to minimize their risk of serious harm. That is not surprising. As this Court has explained, this is not a particularly high bar: "[A]n inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1136 (2019) (Kavanaugh, J., concurring); *id.* at 1129-30 (majority op.) ("we see little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative").

First, the Government could administer a pre-dose of an opioid pain or anti-anxiety medication, like morphine or fentanyl. A13. Unlike pentobarbital, these drugs have "'analgesic,' (i.e. pain-relieving), properties." Van Norman Decl. at 9. Lower doses of Pentobarbital, by contrast, "actually are 'antalgesic,' meaning they augment feelings of pain." *Id.* Administering a fast-acting analgesic would "inhibit the activity of the pain neurons," thereby significantly reducing the risk that Plaintiffs would experience pain and suffering during their executions. Decl. of Craig W. Stevens, Ph.D. at 3-4 (Dist. Dkt. #25).

Although the Government argues that this is not a feasible alternative because it has not been adopted in other States, that misstates the relevant standard. As Justice Kavanaugh explained in *Bucklew*—the case the Government cites for this proposition—"all nine Justices" agreed that "the alternative method of execution need not be authorized under current state law." 139 S. Ct. at 1136 (Kavanaugh, J., concurring). Moreover, contrary to the "bare-bones," "unsupported" alternatives proposed in *Baze* and *Bucklew*, *Bucklew*, 139 S. Ct. at 1121, 1129-30, Plaintiffs have proposed a "simple[]," straightforward alternative that "is supported by substantial scientific evidence," A15. And in any event, as the Government itself admitted after misstating the status of state law in their opposition to the motion for a preliminary injunction, Nebraska has in fact used a pre-dose opioid as part of its lethal-injection protocol. Dist. Dkt. # 113. Georgia and Idaho also administer a pre-dose sedative as part of their one-drug protocols. AR11, 52.

Second, the Government could instead execute Plaintiffs by firing squad. Three states currently authorize this execution method; it is feasible and readily implemented; and both recent and historical evidence suggest this "would significantly reduce the risk of severe pain." A16. The Government highlights certain risks associated with a firing squad, again, without confronting the District Court's factual finding that it is associated with a much lower risk of a botched execution. *Compare* Appl. 28-29, *with* A16. Even if the sample sizes differ, the court's finding is not a clear error. The Government also misrepresents Plaintiffs' position; they do

not claim the Constitution "*mandate[s]*" a firing squad, Appl. 29, only that it is an acceptable *alternative* to method that violates the Constitution.

3. The Government lacks a "legitimate penological justification" for refusing to implement these readily available alternatives. *Bucklew*, 139 S. Ct. at 1124. As an initial matter, the Government does not claim that it lacks such a rationale for refusing to adopt the firing squad alternative, thereby admitting that is has no such justification for refusing that available, feasible alternative. Instead, it focuses its arguments on pre-administering an opioid or anti-anxiety medication. Appl. 29-30. In support, the Government offers three rationales, gleaned from a mere three pages of the 1000+ page Administrative Record. None is persuasive.

First, BOP claims it declined to adopt the alternative proffered here because of issues "in obtaining multiple lethal injection drugs." Appl. 29. But the information it cites in support focuses entirely on issues associated with using "pentobarbital as the first anesthetic" in a three-drug protocol, AR871, and on obtaining drugs like midazolam and diazepam, AR930-31. That has no bearing on whether BOP would be able to obtain the more widely available drugs identified here, or whether it could reasonably have adopted a one-drug pentobarbital protocol with a pre-dose sedative. Indeed, the Government has not even attempted to argue in its motion before this Court that the actual drugs *Plaintiffs* have proposed are not available.

Second, the Government argues that multi-drug protocols are harder to administer. Appl. 29. But again, the Administrative Record focuses on whether to

adopt the three-drug protocols that faced substantial challenges and administration issues in the States, as opposed to a one-drug pentobarbital protocol. The pages cited by the Government do not demonstrate that it ever considered—let alone rejected—the adoption of the kind of procedure proposed here. *See Glossip*, 135 S. Ct. at 2738 (finding a legitimate reason for not adopting a proposed alternative where "the record shows that Oklahoma has been unable to procure those drugs despite a good-faith effort to do so").

Third, the Government claims that a one-drug protocol is "simpl[er]." AR871. But simplicity alone cannot serve as a legitimate justification for declining to adopt a feasible, readily available alternative that would mitigate a substantial risk of serious pain. It will always be "simpler" to retain an existing execution protocol than to adopt a new one. If that rationale, standing alone, were sufficient, the Eighth Amendment's protections would be rendered meaningless. The same is true of the Government's argument that because this has "never been" done, it cannot be constitutionally compelled.

In any event, the use of an opioid in a "pentobarbital protocol" is *not*, in fact, novel. Appl. 29. Defendants themselves acknowledge that Nebraska recently carried out a four-drug execution with the use of fentanyl. *See* Dkt. #113 at 1 ("Defendants' Notice of Correction"). The Nebraska method and Plaintiffs' proposal share the same core feature: the use of fentanyl as an analgesic to prevent the prisoner from experiencing severe pain from the drugs administered thereafter. It

therefore rings hollow for Defendants to argue that they are "choosing not to be the first to experiment with a new method of execution." *Bucklew*, 139 S. Ct. at 1130.

As for the firing squad, as this Court has explained, neither *Baze* nor *Glossip* "suggest that traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available." *Bucklew*, 139 S. Ct. at 1125. And contrary to the Government's suggestion, this Court has not held that lethal injection necessarily produces a more "dignified" death than other constitutional methods of execution, like a firing squad. Moreover, unlike the alternative proposed by *Bucklew*, this alternative method of execution is not "an entirely new method" that has "never been used to carry out an execution" or lacks a "track record of successful use." *Id.* at 1130 (internal quotation marks omitted); *see* Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* 177, App. A (2014) (available at Dkt. #111-1) (explaining that, from 1900 to 2010, zero out of 34 firing squad executions were "botched").

II. THE GOVERNMENT WILL SUFFER NO IRREPARABLE HARM ABSENT A STAY, AND THE EQUITIES STRONGLY DISFAVOR A STAY.

Even if the Government were likely to succeed on the merits, it cannot satisfy the equitable prerequisites to obtaining a stay. After waiting for years to implement Plaintiffs' death sentences, it will not be *irreparably* harmed by a short additional delay while Plaintiffs' novel legal claims are considered in an orderly fashion. *Cf. Roane*, 140 S. Ct. at 353 (Alito, J., respecting the denial of stay or vacatur) (find-

ing it "preferable" for review to be conducted in the court of appeals "before the executions are carried out"). On the contrary, it is Plaintiffs who will be irreparably harmed if they are executed without any meaningful opportunity to litigate an appeal of these claims. And the public interest, too, favors resolution of these claims through the ordinary channels of appellate review.

1. The Government has not shown that it would be harmed—much less irreparably so—absent a stay. *Nken*, 556 U.S. at 434.

The Government contends that it has an interest in timely implementing Plaintiffs' death sentences. Appl. 7. But the Government had taken no steps to schedule these executions until the summer of 2019. As the District Court recognized in issuing a preliminary injunction in November 2019: The "eight years [that the government] waited to establish a new protocol undermines its arguments regarding the urgency and weight of [its] interest." A20; *see Purkey*, 2020 WL 3603779, at *11. The Government's assertions of irreparable harm are not any stronger now just because the Government professes a sudden interest in executing Plaintiffs' sentences before courts have had an opportunity to evaluate the Protocol's legality. Indeed, the Government has not explained or justified its sudden urgency to execute these prisoners. *See Conforte* v. *Comm'r of Internal Revenue*, 459 U.S. 1309, 1311 (1983) (Rehnquist, J., in chambers) ("[A]n applicant detracts from the urgency of his situation where he * * * offers no explanation for his procrastination."); *Osorio-Martinez v. Attorney Gen. of the U.S.*, 893 F.3d 153, 179 (3d Cir. 2018) ("[T]he fact that the Government has not—until now—sought to remove [Special

Immigration Juvenile] applicants, much less designees, undermines any urgency surrounding Petitioners' removal.").

Nor do the supposed practical problems involved in rescheduling the executions, Appl. 19-20, justify a stay. It is well settled that financial harm does not constitute irreparable harm for purposes of the stay analysis. *See, e.g.*, *Buchanan* v. *Evans*, 439 U.S. 1360, 1365 (1978) (Brennan, J., in chambers); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Moreover, even assuming the Government has spent money and time preparing, those expenditures are the result of its decision to schedule these executions while challenges to the legality of the Protocol were still pending in both this Court and the District Court. The Government created this emergency by announcing new execution dates while this litigation was pending. It cannot now claim that the administrative burden of delaying the execution constitutes irreparable harm.

2. Plaintiffs, in contrast, would suffer irreparable harm of the highest order if the preliminary injunction is stayed. The District Court has already found on two separate occasions that the harm to Plaintiffs would be "manifestly irreparable" if Plaintiffs were "unable to pursue their claims" and were "executed under a procedure that may well be unlawful." A19; *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, 2019 WL 6691814, at *7. "No member of the D.C. Circuit challenged [that finding]" and "Defendants do not dispute that irreparable harm is likely." A19. There is no basis for reaching a different conclusion now.

If the preliminary injunction is stayed, Plaintiffs will be executed, and the District Court found based on the "overwhelming evidence" before it that "it is a 'virtual medical certainty that" during their executions, they "will experience excruciating suffering, including sensations of drowning and suffocation.'" A10 (quoting Van Norman Decl. ¶ 18). The harm of being executed is inarguably "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016); *see* A19-20. Further, such harm is clearly "beyond remediation" absent injunctive relief. *League of Women Voters*, 838 F.3d at 8. Indeed, the harm here is not just a death that is procedurally unlawful, although that would be sufficient, *see Regents of the Univ. of Calif.*, 140 S. Ct. at 1909; the harm is a death that, as the District Court found, is extremely likely to be both excruciating and terrifying. *See* A12.

Staying the mandate also risks "foreclos[ing] . . . review," which constitutes "irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers); *accord, e.g.*, *John Doe Agency*, 488 U.S. at 1309 (Marshall, J., in chambers. Allowing the Government to execute Petitioners before proceedings have concluded risks "effectively depriv[ing] this Court of jurisdiction." *Garrison*, 468 U.S. at 1302. Indeed, a *stay* is usually warranted when mootness is likely to arise. *See Chafin v. Chafin*, 568 U.S. 165, 178 (2013) (suggesting that the threat of mootness warrants "stays as a matter of course"). That is all the more reason to *deny* the extraordinary relief when mootness would be the consequence of granting it.

3. The Government attempts to sideline the harms that Plaintiffs will suffer by faulting them for not seeking a second preliminary injunction sooner, while the first preliminary injunction remained in place. But a preliminary injunction is extraordinary relief that parties should not seek as part of a belt-and-suspenders approach. One of the factors is whether there is a likelihood of irreparable harm absent injunctive relief. Asking for a second, independent preliminary injunction while the first was still in place would likely have been futile. Anticipating this argument, the Government suggests that Plaintiffs could still have *sought* and *briefed* a preliminary injunction in the meantime. Appl. 17 n.3. That misdiagnoses the problem. The delay attributable to Plaintiffs' seeking and briefing a second PI is negligible, since the motion was fully briefed approximately two weeks from the date the D.C. Circuit's mandate issued in the first appeal.

The Government also misrepresents the relevant timeline. The Government and Plaintiffs filed a *joint* motion to extend the time to file the amended complaint based on the novel coronavirus outbreak. Dist. Dkt. # 87. That motion, signed by counsel for the Government, asked the district court to order that the amended complaint be filed by June 1, with Defendants' responsive motion due on July 31. Plaintiffs timely filed their amended complaint and, one week after the first preliminary injunction was vacated and four days after their executions were rescheduled, filed their second motion for a preliminary based on those amended claims. They then engaged in highly expedited briefing to ensure that motion was ripe for decision in a week and a half. And Plaintiffs did not stand pat the entire

time the motion was pending: As the execution dates drew near last week, they requested a status conference on the case.

Indeed, the Government seems to recognize that Plaintiffs are not to blame for any purported delay in this case, instead lambasting the District Court. But that District Court did not act in a dilatory fashion by failing to issue a ruling over the weekend, given the rapidly unfolding events in the Southern District of Indiana and the Seventh Circuit. The Government's accusations that the District Court engaged in "dilatory" conduct and "enabled" the plaintiffs are beyond the pale. In any event, Plaintiffs have consistently and diligently pursued their arguments and should not be punished for the entirely ordinary delays associated with efficient litigation.

Although the Government casts about for someone else to blame, *it* created the illusion of urgency in this case by setting such an accelerated timetable for executions despite the pendency of multiple "novel and complex" legal claims. A18 n.6. The Government waited eight years to promulgate a new execution protocol, then simultaneously set dates knowing full well that legal challenges to the protocol had been pending for years. It scheduled Plaintiffs' executions while their petition for certiorari was pending, a mere 72 hours after the District Court's preliminary injunction was lifted, even though its own responsive motion to the amended complaint was not due for over a month.

4. Finally, "the public is not served by short-circuiting legitimate judicial process, and is greatly served by attempting to ensure that the most serious punish-

ment is imposed in a manner consistent with our Constitution" and laws. A22. The public interest lies in ensuring that agencies act in accordance with the Constitution and federal law. *See League of Women Voters*, 838 F.3d at 12. This interest is only heightened in the context of executions. The public would be ill-served if Plaintiffs were executed pursuant to an unlawful protocol, or before being given a full opportunity to test the protocol's legality. *See Purkey*, 2020 WL 3603779, at *11 ("[T]he public interest is surely served by treating this case with the same time for consideration and deliberation that we would give any case. Just because the death penalty is involved is no reason to take shortcuts—indeed, it is a reason not to do so.").

The Government nonetheless claims that a preliminary injunction is inappropriate given the public's interest in finality. The preliminary injunction, however, does not undermine the finality of Plaintiffs' convictions, as Plaintiffs do not challenge their convictions or their sentences here.

The Government also errs in claiming that victims' families will be harmed absent a stay. *See* Appl. 37. The Government's argument is belied by the fact that the family of the victims in Lee's case has told DOJ multiple times that they oppose Lee's execution—as have the trial judge and the prosecutor. Indeed, several family members of the victims in Lee's case sought a preliminary injunction against Lee's execution based on the risks that traveling to witness the execution would involve in light of COVID-19. *See* Order, *Peterson v. Barr*, No. 2:20-cv-350-JMS-DLP (S.D. Ind. July 10, 2020). As the court concluded in granting that injunction (which was

subsequently vacated on APA grounds): "[T]he public's interest in a prompt, orderly execution should give way to their interest in treating [the victims in Lee's case] with fairness, respect, and dignity." *Id.* at 13. Just so.

CONCLUSION

The Application should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.2(b), I certify that the document contains 28 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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