NO. 20-5361

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

ALFRED BOURGEOIS AND BRANDON BERNARD,
Plaintiffs-Appellants,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia, Hon. Tanya S. Chutkan, No. 19-mc-145

EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS BRANDON BERNARD AND ALFRED BOURGEOIS FOR STAYS OF EXECUTION OR A PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiffs-Appellants Brandon Bernard and Alfred Bourgeois are scheduled for execution on December 10, 2020 and December 11, 2020, respectively. On December 6, 2020, the District Court denied a preliminary injunction on Plaintiffs-Appellants' claim under the Federal Death Penalty Act. On December 7, 2020, Plaintiffs-Appellants filed the instant appeal, and the District Court denied a stay of execution pending appeal.

Given the impending execution dates and in order to give this Court adequate time to consider the issues, Mr. Bernard and Mr. Bourgeois respectfully move the Court to stay their executions, or alternatively for preliminary injunctive relief, pending their appeal of the District Court's order denying their motion for preliminary injunctive relief. As explained below, Mr. Bernard and Mr. Bourgeois are likely to succeed on the merits of their appeal. Executing them before they can fully and fairly litigate the merits of their appeal pursuant to this Court's

expedited briefing schedule would result in irreparable harm by prematurely ending their lives.[1]

BACKGROUND

On July 25, 2019, after considering the matter for eight years, the Bureau of Prisons (BOP) announced a new execution protocol for carrying out federal death sentences using the barbiturate pentobarbital, along with an initial notice that the Government intended to execute Mr. Bourgeois on January 13, 2020, 172 days later. The Defendants issued an amended notice of the execution date on August 22, 2019. Shortly thereafter, Mr. Bourgeois, along with other plaintiffs scheduled to be executed, sought a preliminary injunction barring their respective executions while the legality of the new protocol was adjudicated. Mr. Bourgeois and his co-plaintiffs sought relief on several grounds, including in relevant part that the 2019 Protocol violates the Federal Death Penalty Act (FDPA), 18 U.S.C. § 3591 *et seq.*, which does not permit the creation of a uniform federal protocol for the implementation of death sentences without reference to state policy.

[1] Pursuant to D.C. Cir. Rule 8, the undersigned have notified counsel for Defendants-Appellees of their intent to file this motion.

In November 2019, the District Court granted a preliminary injunction, finding that Mr. Bourgeois and his co-plaintiffs were likely to succeed on the merits of their claim that the 2019 Protocol violates the FDPA, that the plaintiffs would suffer irreparable harm in the absence of relief, and that the equities tipped in the plaintiffs' favor. *See* Dkt. #50. This Court denied the Government's motion to stay or vacate the preliminary injunction. *See In re Federal Bureau of Prisons' Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Dec. 2, 2019), Doc. No. 1818236. The Government then sought the same relief in the Supreme Court, but without success. *See Barr v. Roane*, 140 S. Ct. 353 (2019).

In February 2020, Mr. Bernard filed a complaint seeking declaratory and injunctive relief against Defendants. Mr. Bernard's action was consolidated with this master case. At the time, Mr. Bernard had not yet received his execution date.

On April 7, 2020, a divided panel of this Court vacated the preliminary injunction. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020) (per curiam) ("*In re FBOP*"). In a per curiam opinion joined by Judges Katsas and Rao, and over a dissent from Judge Tatel, the court held that the plaintiffs' FDPA claim

failed on the merits. *See id.* at 112 (per curiam). Judges Katsas and Rao reached this conclusion for different reasons, which they each explained in separate concurrences. *See id.* at 113-21 (Katsas, J., concurring); *id.* at 129-33 (Rao, J., concurring). The Supreme Court denied certiorari. *See Bourgeois v. Barr*, No. 19A1050, 2020 WL 3492763 (U.S. June 29, 2020).

On June 1, 2020, Plaintiffs in these consolidated cases filed an Amended Complaint. In relevant part, Plaintiffs alleged that the 2019 Protocol violates the FDPA by failing to comply with state execution protocols and procedures, including those codified in state law. On September 20, 2020, the District Court granted summary judgment to Defendants despite agreeing with the merits of Plaintiffs' FDPA claim. *See* Dkt. #261. The District Court noted two important discrepancies between the Government's 2019 Protocol and several state statutes at issue: some state statutes dictate execution methods that differ from the 2019 Protocol (*e.g.*, a choice of electrocution or lethal injection), while others dictate aspects of the execution process (such as the scheduling of the execution at a particular time of day). *See id.* at 26-28. The District Court recognized that the FDPA requires the Government to follow both

types of statutes. *Id.* Nonetheless, the District Court concluded that the parties did not present a live controversy because Defendants stated that they intended to comply or would consider complying with those specific requirements. *Id.* at 27, 30.

Plaintiffs-Appellants thereafter filed a motion asking the District Court to alter or amend its judgment on the FDPA claim, raising (as relevant here) a claim that Defendants were required to comply with a Texas statutory provision requiring that executions be set for 6 p.m.[2] The court denied the motion. After highly expedited briefing and argument, this Court held in relevant part that Plaintiffs' FDPA claim presented no live controversy because "there was no conflict in this case, either because the government had committed to complying with the state statutes at issue [i.e., the 6 p.m. requirement] or because no Plaintiff had requested to be executed in accordance with them." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, — F.3d —, No. 20-5329, 2020 WL 6750375, at *11 (D.C. Cir. Nov. 18, 2020) (citing Dkt. #261 at 30-31). The Court

[2] Plaintiffs also noted in their reply brief that if an execution were delayed after midnight of the day an execution was supposed to take place, Article 43.141(c) would require that any rescheduled execution be set 91 days in the future. *See* Dkt. #298 at 8 n.3. The Court did not separately address that argument as framed in Plaintiffs' reply.

purposefully declined "to engage in a line-drawing exercise about whether a statute setting the time of execution is a procedure that implements 'the sentence in the manner prescribed by the law of the State in which the sentence is imposed.'" *Id.* (quoting 18 U.S.C. § 3596(a)).

On October 16, 2020, Defendants-Appellees scheduled Mr. Bernard's execution for December 10, 2020, providing him with only 55 days' notice of his execution. On November 20, 2020, Defendants-Appellees scheduled Mr. Bourgeois' execution for December 11, 2020, providing him with only 21 days' notice of his execution. Mr. Bernard and Mr. Bourgeois moved the District Court for preliminary injunctive relief to prevent Defendants-Appellees from executing them in violation of the FDPA as made enforceable by the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A).

Mr. Bernard and Mr. Bourgeois argued that their execution dates violate the FDPA because they conflict with Texas law, which requires a period of at least 91 days between the announcement and occurrence of an execution. *See* Tex. Code Crim. Proc. art. 43.141(c) ("An execution date may not be earlier than the 91st day after the date . . . [of] the order

setting the execution date."). With leave of court, Mr. Bernard and Mr. Bourgeois filed a supplemental complaint raising that claim. *See* Dkt. # 334.

In the decision under review, the District Court denied a preliminary injunction. ADD-1. The court first rejected Defendants' argument that the present FDPA claim is barred by law of the case, *res judicata*, or principles of waiver or forfeiture. ADD-7-10. The court then held that Plaintiffs-Appellants' execution dates violate the FDPA. ADD-10-13. Following Judge Rao's controlling opinion from this Court's April ruling, the District Court reasoned that "the FDPA requires the BOP to adhere to state laws and regulations governing executions which 'include details such as the time, date, place and method of execution,'" and that Article 43.141(c) governed the time and date of execution. ADD-13-14 (quoting *Execution Protocol Cases*, 955 F.3d at 134 (Rao, J., concurring)).

The court nevertheless ruled that Mr. Bernard and Mr. Bourgeois did not establish irreparable harm. Citing rulings in which the Supreme Court has vacated the District Court's injunctions in this case, the court reasoned that the extinguishment of the prisoners' meritorious FDPA claim did not itself establish irreparable harm. ADD-15. The court also

reasoned that the loss of 91 days of life does not "rise to the level of irreparable harm," because both prisoners were sentenced to death more than ten years ago, received more than the 20 days' notice required by the DOJ's regulations, and were given 50 days' notice as set forth in the non-binding Execution Protocol (although Mr. Bourgeois received only 21 days' notice of his second execution date). ADD-15-16 (citing 28 C.F.R. § 26.4(a). Also insufficient, the court reasoned, was Plaintiffs' diminished ability to seek clemency under an accelerated timetable. The court reasoned that neither prisoner was completely precluded from seeking executive clemency and that the President remains able to grant it if he so chooses. ADD-16. The District Court declined to examine the other factors governing a preliminary injunction.

On December 7, 2020, Plaintiffs-Appellants moved in the District Court for an injunction or stay of execution pending appeal. Dkt. #347. The District Court denied the motion. Dkt. #350.

ARGUMENT

"[A] stay of execution is an equitable remedy." *Hill v. McDonough*, 547 U.S. 575, 584 (2006). "Thus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute

them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id.* As part of this inquiry, the Court must also assess "whether the applicant will be irreparably injured absent a stay," "whether issuance of the stay will substantially injure the other parties interested in the proceeding," and "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). The first two factors of this standard, likelihood of success on the merits and irreparable harm, are the most critical. *Id.* at 434. To constitute irreparable harm, "the harm must be 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," and it "must be beyond remediation." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks and brackets omitted). Where, as here, the Government is the opposing party, the third and fourth factors merge. *Id.*

Plaintiffs-Appellants Bernard and Bourgeois have made the requisite showing on all four factors and are entitled to a stay as a result.

I. Plaintiffs-Appellants are Likely to Succeed on the Merits of Their Appeal

A. The District Court Correctly Held that Defendants-Appellees' Intent to Execute Plaintiffs-Appellants on December 10 and December 11 Violates the FDPA

The FDPA provides that when a death sentence "is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). Where, as here, both Plaintiffs-Appellants were sentenced in the state of Texas, the FDPA requires the government to carry out their executions in the manner prescribed by Texas law. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 133 (D.C. Cir. 2020) ("*In re FBOP*") (Rao, J., concurring) ("[T]he federal government is . . . bound by the FDPA to follow the level of detail prescribed by state law.").

The FDPA's requirement that state law govern the "implementation of the sentence" encompasses Article 43.141(c), which requires execution dates to be set "no earlier than the 91st day after the date . . . [of] the order setting the execution date." The FDPA's language, as Judge Rao observed in her controlling opinion, is considerably broader

than that of prior federal death penalty statutes, which "incorporated state law only to define the 'manner of inflicting the punishment of death.'" *Id.* (quoting An Act to Provide for the Manner of Inflicting the Punishment of Death § 323, 50 Stat. 304, 304 (June 19, 1937)). That distinction is critical. "Inflicting the punishment of death" can arguably be read to include only the "immediate action of execution," *id.*, which would exempt the government from complying with all other state laws governing the execution process. The FDPA now more broadly encompasses "implementation of the sentence." 18 U.S.C. § 3596(a). That language, Judge Rao explained, encompasses such aspects of the execution as "date, time, place, and method." *In re FBOP*, 955 F.3d at 134 (Rao, J., concurring).

That understanding of the FDPA is bolstered by the fact that the FDPA includes "one exception to the general rule that the federal government must follow state law—the federal government may choose state or federal facilities for executions." *Id.* at 134-35 (citing 18 U.S.C. § 3597(a)). That exception would not have been necessary unless state laws setting the place of execution otherwise would be characterized as pertaining to the "implementation" of death sentences. If laws governing

the place of executions concern the "implementation" of death sentences, laws governing the time of executions surely do as well. Certainly, DOJ's regulations consider both the place and time of execution to go hand-in-hand with implementing a death sentence. *See* 58 Fed. Reg. 4,898 (Jan. 19, 1993). Accordingly, Defendants-Appellees were required to adhere to Article 43.141(c)'s timing requirement pursuant to the FDPA.

The government relied below on decisions from other circuits, but those decisions are inapposite. *Peterson v. Barr*, 965 F.3d 549 (7th Cir. 2020), *United States v. Mitchell*, 971 F.3d 993 (9th Cir. 2020), and *LeCroy v. United States*, 975 F.3d 1192 (11th Cir. 2020), each held that markedly different state statutory provisions were not covered by the FDPA. *See Peterson*, 965 F.3d at 554 ("details such as witnesses"); *LeCroy*, 975 F.3d at 1198 (same); *Mitchell*, 971 F.3d at 998-99 (Petitioner must show more than a "'mere possibility' that the Bureau of Prisons might use protocols inconsistent with [state] procedures"). *United States v. Vialva*, 976 F.3d 458 (5th Cir. 2020), concerned the Texas requirement at issue here. But the Fifth Circuit evidently overlooked Judge Rao's statement in her controlling opinion that "implementation" would include details such as the "time, date, place, and method of execution," *Execution Protocol*

Cases, 955 F.3d at 134, as the *Vialva* court incorrectly stated that the D.C. Circuit judges agreed that the FDPA would not require compliance with procedures governing the timing of executions. *Vialva*, 976 F.3d at 462.

Because it is undisputed that Defendants-Appellees did not adhere to Article 43.141(c)'s 91-day notice requirement by scheduling Mr. Bernard's execution for only 55 days after his notice of execution and Mr. Bourgeois' execution for only 21 days after, Plaintiffs-Appellants have shown "a significant possibility of success on the merits," *Hill*, 547 U.S. at 584, of their FDPA claim.

B. The District Court Correctly Determined that Plaintiffs-Appellants Did Not Waive or Otherwise Forfeit Their FDPA Claim and that Res Judicata is Inapplicable

Although the government below urged the District Court not to reach the merits on a number of procedural grounds, the District Court correctly rejected those arguments. The District Court was well within its discretion to address Plaintiffs-Appellants' Article 43.141(c)-based FDPA claim on its merits, as a district court "enjoys broad discretion in managing its docket and determining the order in which a case should proceed." *Grimes v. District of Columbia*, 794 F.3d 83, 90 (D.C. Cir. 2015).

Because the District Court addressed Plaintiffs-Appellants' claim on the merits, this Court should do so as well.

In any event, the District Court correctly determined that Plaintiffs-Appellants did not waive or otherwise forfeit their FDPA claim by failing to raise it in their amended complaint, when "[n]either the Plaintiffs nor the court had any reason to anticipate that Defendants would not have conformed to the state law execution requirement." ADD-7. Defendants-Appellees initially scheduled Mr. Bourgeois' execution for January 13, 2020—172 days after the date of the scheduling order. Plaintiffs-Appellants thus had no reason to include an Article 43.141(c)-based FDPA claim in their amended complaint or any time after until after Defendants announced their intent on July 31, 2020, to execute Mr. Bernard's co-defendant, Christopher Vialva, on September 24, 2020—a mere 55 days later—and then carried out that execution as intended. By that point, however, the District Court had *already* dismissed Plaintiffs-Appellants' *other* FDPA claims and made clear that "Defendants were required to adhere to such laws." ADD-7; Dkt. #261 at 27-31 (September 20, 2020). Plaintiffs-Appellants could not have waived or forfeited a

claim they could not have raised. And even if they had done so, there are compelling reasons to excuse such forfeiture here, *see* Part I.C, *infra*.

The District Court was correct to conclude that res judicata did not apply. *See* ADD-8. "Res judicata does not preclude claims based on facts not yet in existence at the time of the original action." *Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002). Furthermore, this Court never addressed Plaintiffs-Appellants' FDPA claims on the merits—as is required to trigger res judicata—concluding instead that there was no live controversy. *See In re FBOP*, 2020 WL 6750375, at *11; *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

C. The District Court Erred by Finding that Plaintiffs-Appellants Would Not Be Irreparably Harmed Absent Preliminary Injunctive Relief

The District Court erred, however, when it concluded that Plaintiffs-Appellants were not entitled to preliminary injunctive relief despite Defendants-Appellees' statutory violations because Plaintiffs-Appellants failed to show irreparable harm. In so concluding, the District Court made four distinct errors. First, the District Court erred by failing to consider Plaintiffs-Appellants' interest in living for the full duration of the time accorded to them by statute. Second, the District Court

improperly minimized the harms associated with Plaintiffs-Appellants' inability to adequately apply for clemency. Third, the District Court failed to consider Plaintiffs-Appellants' reliance interests on the ninety-day period in litigating their various legal challenges. Fourth, the District Court erroneously read Supreme Court's recent summary rulings as establishing that a prisoner must demonstrate irreparable harm beyond the fact that his execution will moot a meritorious FDPA claim.

1. Defendants' Violation of the FDPA Irreparably Harms Mr. Bernard and Mr. Bourgeois By Depriving Them of Additional Months of Life

Despite being condemned to death, Mr. Bernard and Mr. Bourgeois are living people and each "consequently ha[ve] an interest in [their] life." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J. concurring in part and concurring in the judgment); *James v. Edwards*, 683 F. Supp. 157, 159 (E.D. La. 1987) (holding that "[t]he immediate threat of irreparable injury is very clear" where, if death row inmate's motion is granted, he "will have at least an additional thirty days of life beyond" his scheduled execution date). The District Court erred by failing to give this weighty interest any consideration.

Although, as the District Court observed, Plaintiffs-Appellants have been under a death sentence for years and received *some* notice before their executions, ADD-15-16, that is beside the point. As the District Court held, Article 43.141(c), as incorporated in the FDPA, requires that Plaintiff-Appellants receive ninety days of life between notice of execution and the execution date itself. Defendants' failure to follow the FDPA and provide the required notice decreased Plaintiffs-Appellants' life expectancy, and their lives, by thirty-five and sixty-nine days respectively, compared to the timeline required by Texas law and incorporated by federal statute. Courts have consistently held that the loss of life expectancy constitutes irreparable harm. *See, e.g.*, *Boldon v. Humana Ins. Co.*, 466 F. Supp. 2d 1119, 1207 (D. Ariz. 2006); *Farnam v. Walker*, 593 F. Supp. 2d 1000, 1013 (C.D. Ill. 2009). And because that loss can never be redressed, it constitutes "categorically irreparable" harm. *Nken*, 556 U.S. at 435.

2. Defendants-Appellees' Violation of the FDPA Irreparably Harms Plaintiffs-Appellants by Substantially Undermining Their Ability to Adequately Pursue Clemency

The District Court likewise erred when it minimized the clemency-related harms Plaintiffs-Appellants will suffer a result of the truncated

execution notice period. Under the District Court's view, Plaintiffs-Appellants suffered no irreparable harm because they were not *wholly* denied the opportunity to apply for and receive clemency. AR15. But irreparable harm does not arise only when litigants' rights are completely extinguished; it also arises where, as here, litigants are wrongly denied an effective opportunity to prosecute their claims. Clemency petitions by their nature must be pursued close to an execution date, when the relevant decisionmakers are known, and the attention of the public and the Executive has focused on the upcoming execution. That is no doubt partly why Article 43.141(c) provides the 91-day notice period that Defendants-Appellees unlawfully disregarded here. Defendants-Appellees' violation of the FDPA has deprived Plaintiffs-Appellants—both of whom have compelling cases for clemency—of time they are lawfully permitted, following receipt of a notice of execution, to pursue their applications and prevail on relevant decisionmakers to grant them.

Bernard. Defendants-Appellees' violation compelled Bernard to submit an updated clemency application last month based largely on years-old interviews with relevant witnesses. Bernard's representatives are seeking to supplement that application with more up-to-date

information regarding, among other things, the positive role Bernard has continued to play in the lives of his friends and family members during his incarceration, and his acts of kindness and generosity during that period. But time is short.

Bernard's substantial case for mercy grows stronger by the day. Indeed, in the two weeks since Plaintiffs-Appellants filed their preliminary injunction motion, Bernard's case for mercy has been the focus of an outpouring of supportive newspaper editorials, op-eds, and extraordinarily positive media reports.[3] The number of people who have sent letters to President Trump in support of Bernard's clemency application has grown from more than 16,000 to more than 167,000. With the full period the law guarantees him, Bernard's counsel would be able to build additional public support for Bernard's clemency application. Defendants' rush to execute Bernard deprives him of that opportunity, thereby causing him irreparable harm.

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[3] *See, e.g.*, Editorial Board, *Brandon Bernard Doesn't Deserve to Die*, Wash. Post, Nov. 29, 2020; CBS This Morning, *Former Prosecutor, Jurors Back Federal Inmate Who is Set to Die Next Week*, CBS News (Dec. 3, 2020), https://www.cbsnews.com/video/former-prosecutor-jurors-back-federal-inmate-who-is-set-to-die-next-week; *The* Prosecutor *Who Put Brandon Bernard On Death Row Has Changed Her Mind. Is It Too Late?*, Relevant Magazine (November 24, 2020).

Bourgeois. Bourgeois initially sought clemency in September 2019 based on his intellectual disability. After his initial execution date passed without a decision on clemency, the Office of the Pardon Attorney permitted Bourgeois to withdraw the petition with leave to resubmit "if a new date of execution is set." ADD-18. On December 8, 2020, Bourgeois submitted his "new application," raising a new ground related to cause of death and Bourgeois's culpability based on recently obtained evidence that the victim did not die from any injury inflicted on federal property, as is necessary to sustain Bourgeois's conviction. The petition also updates the intellectual disability ground, and it requests sufficient time for review an investigation of both grounds. But the 21-day notice given by the government does not allow the petition to proceed under the longer timeframe for submission and investigation set by federal regulations, much less allow adequate decision-making time. 28 CFR §§ 1.10(b) (30 days after notice of execution date to file petition; 15 days to file supporting documents), 1.6(a), (c).

Under these circumstances, the harm to Bourgeois is manifest and irreparable. He was compelled to file his petition before counsel's investigation was complete, and now his counsel, his family, and the

public cannot utilize the usual 15-day period to present support. The Attorney General's ability to investigate and the President's opportunity to consider the petition is almost nonexistent. Moreover, with the full 91-day period, Bourgeois would be able to seek clemency from the incoming Biden administration, as well as the Trump administration. The loss of this opportunity is particularly harmful given that the incoming President-Elect has stated that he favors eliminating the federal death penalty. *See, e.g.*, https://joebiden.com/justice/# ("Biden will work to pass legislation to eliminate the death penalty at the federal level . . . .").

3. Defendants-Appellees' Violation of the FDPA Irreparably Harms Plaintiffs-Appellants by Depriving Them of the Opportunity to Fully Litigate Pending Claims

The District Court also erred by failing to consider Plaintiffs-Appellants' interest in having ninety days during which to fully litigate appropriate legal challenges. The Texas legislature adopted the 91-day requirement in Article 43.141(c) to promote transparency and fair process, and further "to provide death-penalty defendants with a significant time period within which to prepare final pleadings in either state or federal court." *In re Carter*, 541 S.W.3d 743, 744–45 (Tex. Crim. App. 2017) (Newell, J., concurring); *see also* 2015 Texas Senate Bill No.

1071, Texas Eighty-Fourth Legislature ("Requiring sufficient notice of the scheduling of execution dates will ensure that defendants have an opportunity to fairly prepare for the impending execution.").

Bernard is currently litigating a § 2241 habeas petition in the District Court for the Southern District of Indiana, along with a motion to stay his execution, raising a *Brady* claim based on his discovery of the government's withholding of critical exculpatory evidence. *Bernard v. Warden*, No. 2:20-cv-00616 (S.D. Ind. filed Nov. 24, 2020). Defendants' disregard of the Texas statute requires Bernard's § 2241 petition to be litigated with far less time than Mr. Bernard would otherwise have.

Bourgeois continues to litigate a claim that his intellectual disability prevents his execution. A district court stayed Bourgeois execution in March. *See Bourgeois v. Warden*, No. 219 CIV 00392, 2020 WL 1154575 at *6 (S.D. Ind. Mar. 10, 2020). That stay was vacated only last week, when the Seventh Circuit denied rehearing and issued its mandate following an adverse panel opinion, and over the dissent of two judges. *See Bourgeois v. Watson*, 977 F.3d 620 (7th Cir. 2020); *Bourgeois v. Watson*, No. 20-1891 (7th Cir. Dec. 1, 2020) (per curiam order). Defendants have forced Mr. Bourgeois to bring an *extremely* expedited

petition for certiorari, depriving him of the full benefit of a ninety-day notice period and causing him irreparable harm.

4. Plaintiffs-Appellants Will Suffer Irreparable Harm if Their FDPA Claim is Mooted by Execution

Finally, the District Court wrongly construed the Supreme Court's recent summary rulings as establishing that a prisoner must demonstrate irreparable harm beyond the fact that his execution will moot a meritorious FDPA claim that entitles them to additional days of life. *See* ADD-15. The Supreme Court's summary rulings vacating preliminary injunctions issued on *other* grounds do not address irreparable harm arising here. Nor does this Court's holding that no irreparable harm arises from the government's failure to obtain a prescription, in violation of the FDCA, *see In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5329, 2020 WL 6750375, at *10 (D.C. Cir. Nov. 18, 2020), immunize Defendants from injunctive relief for their *FDPA* violation, which plainly subjects Plaintiffs-Appellants to distinct, concrete irreparable harm. There, the Court held that any harm from the lack of a prescription was speculative. Here, by contrast, Plaintiffs-Appellants have meritorious claims entitling them at least to additional

days of life, the deprivation of which is an indisputably concrete injury. In that situation, executing Plaintiffs-Appellants and cutting off their right to litigate their FDPA claim constitutes irreparable harm. *Nken*, 556 U.S. at 435 (recognizing irreparable harm where alien's removal completely cut off his ability to litigate the propriety of removal, even absent any other demonstrated harm).

II. Plaintiffs Will Suffer Irreparable Harm Absent a Stay of Execution

For the reasons explained in connection with the District Court's irreparable harm analysis, Plaintiffs-Appellants have demonstrated that they will suffer irreparable harm in the absence of stays pending appeal.

III. The Balance of Equities Favors A Stay of Execution

The balance of equities and public interest factors "merge when the Government is the opposing party." *Nken*, 556 U.S. at 435. Here, these two factors favor a stay of execution. As the court below has previously explained in this case, the balance of the equities favors Plaintiffs because "the potential harm to the government caused by a delayed execution is not substantial" and "[t]he public interest is not served by executing individuals before they have had the opportunity to avail

themselves of legitimate procedures to challenge the legality of their executions." Dkt. #50 at 14.

These conclusions are consistent with the principle that "[t]he public interest is . . . served when administrative agencies comply with their [legal] obligations." *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009). By contrast, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Newby*, 838 F.3d at 12. In the capital punishment context, "the public's interest in seeing justice done lies not only in carrying out the sentence imposed years ago but also in the lawful process leading to possible execution." *Montgomery v. Barr*, No. 20-3261, 2020 WL 6799140, at *11 (D.D.C. Nov. 19, 2020). When the government decides to take a life, the public interest demands that it do so in a considered and deliberate manner. The seriousness of a person's offenses of conviction does not alter that analysis.

The government has no legitimate interest in carrying out an execution on an illegal schedule. Indeed, by doing so the government would compromise the public interest, among other things by undermining public confidence in the "lawful process leading to possible execution." *Montgomery*, 2020 WL 6799140, at *11. Furthermore, any

harm to the government can easily be eliminated, as Defendants can schedule Plaintiffs-Appellants' executions for a later date as soon as they have cured the defects in their procedures. That cure would further the public interest, which is served when agencies comply with their procedural obligations.

Against Plaintiffs-Appellants' interest in continuing to live for the additional 91 days that Texas law affords them through the FDPA, Defendants advanced in the court below a comparatively diminished interest in executing them both this week.[4] *See, e.g.*, Dkt. #337 at 22. In doing so, the Government ignores its own delays over a period of several years. Defendants admit that Plaintiffs-Appellants were sentenced to death years ago and completed their initial post-conviction proceedings

[4] The recent COVID-19 outbreak at FCC Terre Haute further undermines the Government's interest in carrying out the executions this week. The number of active cases at USP Terre Haute has more than doubled in the past four days. *Compare* Dkt. #344 at 17 (22 active cases as of December 3, 2020) *with* https://www.bop.gov/coronavirus/ (52 active cases as of December 7, 2020) (last visited Dec. 7, 2020). The outbreak at FCI Terre Haute, which is part of the same complex, is even more dire at the moment, with 172 cases. Given the large number of BOP employees and others traveling to Terre Haute for the executions, the risk of additional COVID-19 spread further undermines the government's interest in immediate executions.

in 2014. It is unclear why an FDPA-required postponement of three months would materially injure the public.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants Bourgeois and Bernard respectfully move this Court to stay their scheduled executions pending their appeal of the District Court's order of December 6, 2020.

Dated:
December 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and D.C. Circuit Rule 32(c), because it contains 5193 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(f), according to the count of Microsoft Word.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

December 8, 2020

/s/ Ginger D. Anders
Ginger D. Anders

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Ginger D. Anders
Ginger D. Anders

ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,	)	
LEAD CASE: *Roane, et al. v. Barr*	)	Case No. 19-mc-145 (TSC)
THIS DOCUMENT RELATES TO:	)	
Bernard v. Barr, 20-cv-0474	)	
Bourgeois v. U.S. Dep't of Just., 12-cv-782	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, (ECF No. 345), Plaintiffs' motion for a preliminary injunction, (ECF No. 335), is hereby DENIED.

Date: December 6, 2020

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,	
LEAD CASE: *Roane, et al. v. Barr*	Case No. 19-mc-145 (TSC)
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Bourgeois v. U.S. Dep't of Just., 12-cv-782	

MEMORANDUM OPINION

Plaintiffs Brandon Bernard and Alfred Bourgeois are scheduled to be executed on December 10th and 11th respectively. Both Plaintiffs, who were sentenced to death in Texas federal district court, have moved for a preliminary injunction barring their executions from proceeding as scheduled. Plaintiffs argue that in failing to provide them with a ninety-one day notice of their executions pursuant to Article 43.141(c) of the Texas Code of Criminal Procedure, Defendants violated § 3596(a) of the Federal Death Penalty Act (FDPA), which requires federal executions to be carried out "in the manner prescribed by the law of the State in which the sentence was imposed." Bernard received fifty-five days' notice, and Bourgeois received twenty-one days' notice.

For the reasons set forth below, the court finds that Defendants violated § 3596(a) of the FDPA, but that Plaintiffs have failed to demonstrate irreparable harm arising out of that statutory violation. Thus, Plaintiffs' motion for preliminary injunction will be DENIED.

BACKGROUND

This court and the U.S. Court of Appeals for the District of Columbia Circuit have set forth the facts of this case in prior opinions, and the court will therefore confine the facts here to those relevant to Plaintiffs' motion.

I. Procedural History

On July 25, 2019, after considering the matter for eight years, the Bureau of Prisons (BOP) announced a new execution protocol (the 2019 Protocol) using the barbiturate pentobarbital for carrying out federal death sentences, along with a notice that the Government intended to execute Bourgeois on January 13, 2020. *See* Press Release, Dep't of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse. Shortly thereafter, Bourgeois, along with four other plaintiffs who were at that time scheduled to be executed in December 2019 and January 2020, sought a preliminary injunction barring their respective executions until their challenges to the 2019 Protocol had been fully litigated.

The court granted a preliminary injunction, finding that Bourgeois and the other plaintiffs were likely to succeed on the merits of their claim that the 2019 Protocol violates the FDPA, that they would suffer irreparable harm in the absence of relief, and that the equities tipped in the Plaintiffs' favor. (ECF No. 50.) In February 2020, Bernard filed a complaint seeking declaratory and injunctive relief, which was consolidated with the master case.

On April 7, 2020, a divided panel of the D.C. Circuit vacated the preliminary injunction. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020). In a per curiam opinion joined by Judges Katsas and Rao, with Judge Tatel dissenting, the Court

held that the plaintiffs' FDPA claim failed on the merits. *See id.* at 112 (per curiam). Judges Katsas and Rao reached this conclusion for different reasons, explained in separate concurrences. *See id.* at 113–21 (Katsas, J., concurring); *id.* at 129–33 (Rao, J., concurring).

In light of the D.C. Circuit's decision, Plaintiffs in the consolidated action filed an Amended Complaint on June 1, 2020, alleging in part, that the 2019 Protocol violates the FDPA by failing to comply with state execution protocols and procedures, including those codified in state law. (ECF. No. 92, ¶¶ 143–49.)

On September 20, 2020, the court granted summary judgment in favor of Defendants as to Plaintiffs' FDPA claims. (*See* ECF No. 261.) In accordance with the D.C. Circuit's April 7 Opinion, the court found that while the FDPA required Defendants to adhere to the level of detail prescribed in state laws and regulations governing executions, Plaintiffs had failed to identify a live controversy or actual disagreement with respect to their FDPA claim. (*Id.* at 27, 30.) Rather than promptly appealing the court's decision to the D.C. Circuit, Plaintiffs moved to alter or amend the judgment on the FDPA claim, (ECF No. 298), which the court denied, (ECF No. 305).

On October 16, 2020, Defendants scheduled Bernard's execution for December 10, 2020, providing him fifty-five days' notice. (ECF No. 296.)

Given Bernard and plaintiff Orlando Hall's impending executions, the D.C. Circuit set an expedited briefing schedule and heard oral argument on November 16, 2020. To avoid any jurisdictional concerns during the pendency of the appeal, Plaintiffs moved for the entry of final judgment in this court, which was entered on November 16, 2020. (ECF Nos. 313, 315.)

The Court of Appeals issued a decision two days later, holding in relevant part that this court did not err in granting summary judgment for Defendants on Plaintiffs' FDPA claim, agreeing with this court's conclusion that "there was no conflict in this case, either because the

government had committed to complying with the state statutes at issue or because no Plaintiff had requested to be executed in accordance with them." *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5329, 2020 WL 6750375, at *11 (D.C. Cir. Nov. 18, 2020) (citing ECF No. 261 at 27–28). The D.C. Circuit declined "to engage in a line-drawing exercise about whether a statute setting the time of execution is a procedure that implements 'the sentence in the manner prescribed by the law of the State in which the sentence is imposed.'" *Id.* (quoting 18 U.S.C. § 3596(a)). But because the Court found that this court erred in dismissing Plaintiffs' Eighth Amendment claims, it remanded the case.

Hall was executed on November 19, 2020. On November 20, 2020, Defendants scheduled Bourgeois' execution for December 11, 2020, providing him twenty-one days' notice. (ECF No. 330.)

II. Plaintiffs' Supplemental Complaint and Motion for Preliminary Injunction

Bernard and Bourgeois notified the court in the parties' November 24, 2020 joint status report that they planned to move for a preliminary injunction and sought leave to file a supplemental complaint on the grounds that "the setting of their execution dates conflicts with Texas death penalty procedures that the Government is required to follow under the [FDPA]." (ECF No. 332.) Over Defendants' opposition, the court granted Plaintiffs leave to file a supplemental complaint addressing only the legality of their scheduled execution dates and issued an expedited briefing schedule on their motion for preliminary injunction so as "to provide the court sufficient time to rule on the pending motions, to hold any hearings that may be required, and to allow adequate time for appeal." (ECF No. 333.)

On November 25, 2020, Bernard and Bourgeois filed their Supplemental Complaint and motion for preliminary injunction, alleging a single-count violation of the FDPA. (ECF

No. 334.) Plaintiffs seek to "prevent Defendants from executing them in violation of the FDPA," (ECF No. 336, Pl. Mem. at 4), arguing that Defendants violated their rights under the FDPA by failing to provide ninety-one days' notice of their executions in accordance with Article 43.141(c) of the Texas Code of Criminal Procedure. (*Id.* ¶ 16.) They argue that without injunctive relief, they will be deprived "of their interests in preparing for their executions, in fully litigating their pending claims, and in their lives." (*Id.* at 9.)

DISCUSSION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008) (citations omitted); *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017). The D.C. Circuit has traditionally evaluated claims for injunctive relief on a sliding scale, such that "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011).

I. Likelihood of Success on the Merits

Plaintiffs contend that in failing to provide them ninety-one days' notice of their executions, Defendants have violated Article 43.141(c) of the Texas Code of Criminal Procedure and, by extension, the FDPA's requirement that the "implementation of [a death] sentence" be "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). The court finds that the Plaintiffs have demonstrated a likelihood of success on the merits of this claim.

A. Forfeiture and Res Judicata

As a threshold matter, Defendants argue that Plaintiffs are unlikely to succeed on their Article 43.141(c) claim because it is barred by res judicata or has otherwise been waived or forfeited. In their view, Plaintiffs could have presented an Article 43.141(c) claim before this court entered summary judgment on September 20, 2020 or final judgment on November 16, 2020.

These procedural arguments are unpersuasive. The court found Plaintiffs' prior FDPA claims presented no live controversy either because the government had committed to complying with the state statutes at issue or because no plaintiff had requested to be executed in accordance with them—a view shared by the D.C. Circuit. *See Execution Protocol Cases*, 2020 WL 6750375, at *11 ("As we agree with the district court that there is no live controversy, we find it unnecessary here to engage in a line-drawing exercise about whether a statute setting the time of execution is a procedure that implements 'the sentence in the manner prescribed by the law of the State in which the sentence is imposed'" (quoting 18 U.S.C. § 3596(a)). And like Plaintiffs' other FDPA claims, a claim premised on Article 43.141(c) would not have presented a live controversy at the time the court issued its summary judgment ruling because Plaintiffs had not yet received notice of their executions. Neither the Plaintiffs nor the court had any reason to anticipate that Defendants would not have conformed to the state law execution requirement, particularly after the court stated that Defendants were required to adhere to such laws. (*See* ECF No. 261 at 30–31 ("Putting aside the question of whether agreeing to execute an inmate after 6 p.m. can be characterized as an act of "grace," Defendants must comply with the Texas provision because it is incorporated into the FDPA by virtue of D.C. Circuit precedent.").); *see*

also Execution Protocol Cases, 955 F.3d at 133 (Rao, J., concurring) ("[T]he federal government is [] bound by the FDPA to follow the level of detail prescribed by state law.").

Thus, res judicata does not apply because Plaintiffs' Article 43.141(c) claim could not have been raised earlier. *See Drake v. FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002) ("Res judicata does not preclude claims based on facts not yet in existence at the time of the original action."). Indeed, it is questionable whether there has been a final judgment on the *merits* of Plaintiffs' state-law FDPA claims as those claims were dismissed for failure to present a live controversy. *See Capitol Hill Grp. v. Pillsbury, Winthrop, Show, Pittman, LLC*, 569 F.3d 485, 490 (D.C. Cir. 2009) (explaining that a claim is only barred by res judicata if, inter alia, "there has been a final, valid judgment on the merits"); *see also Jackson v. City of Cleveland*, 925 F.3d 793, 807 (6th Cir. 2019) ("Generally, a claim may not be adjudicated on its merits unless it is ripe."); *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 n.3 (10th Cir. 2003) ("A finding [that a] claim is unripe does not constitute an adjudication on the merits for purposes of claim preclusion."); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3532.1 (1984) ("[I]t should be clear that dismissal for lack of ripeness is not a decision on the merits for purposes of preclusion by judgment.").

Furthermore, Defendants provide no authority for the proposition that a plaintiff has forfeited, or is otherwise barred from asserting, an unripe or premature claim when that claim eventually presents a live controversy.

The court is also not convinced that Plaintiffs have waived their Article 43.141(c) claim. Bernard raised the Article 43.141(c) claim on appeal to the D.C. Circuit, but that claim was never addressed, likely due to the truncated time frame and limited scope of the appeal. *See Execution Protocol Cases*, 2020 WL 6750375, at *11 ("In this expedited process, we are particularly

mindful to decide no more than what is necessary to resolve the appeal."). Therefore, the court does not see how the Article 43.141(c) claim could fairly be viewed as waived. *Accord Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 717 (D.C. Cir. 1986) ("The rule in this circuit is that litigants must raise their claims on their initial appeal and not in subsequent hearings following a remand.").

Even assuming Plaintiffs' current FDPA claim could be precluded on the basis of the law-of-the-case or waiver doctrines, the court is not willing to do so given the stakes involved, the pace at which the government is moving to carry out these executions, the interest in promptly adjudicating claims on the merits, and the limited prejudice to Defendants. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739–40 (D.C. Cir. 1995) ("Law of the case is a prudential rule rather than a jurisdictional one . . . [which] 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power'" (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)); *id.* at 740 ("For both core law-of-the-case preclusion and its diluted waiver variant, the bases for exceptions are broader than for conventional issue or claim preclusion.").

Defendants also contend that the court erred in granting Plaintiffs leave to file a supplemental complaint. The crux of Defendants' argument appears to be that Plaintiffs cannot supplement their complaint after the entry of final judgment without seeking relief from that judgment—thus, in their view, "the proper course for Bernard and Bourgeois to seek to reinsert Tex. Code Crim. Proc. Art. 43.141(c) into this litigation would have been to file a Rule 60(b) motion for relief from judgment or, at a minimum, to file another Rule 59(e) motion to alter or amend the Court's final judgment on the FDPA claim." (ECF No. 337, Def. Opp'n at 13.)

Fed. R. Civ. P 15(d) "permit[s] a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." The rule "is intended to give the court broad discretion in allowing a supplemental pleading." Fed. R. Civ. P. 15(d) advisory committee's note to 1963 amendment. Plaintiffs' Article 43.141(c) claim involves conduct that occurred after they filed their Amended Complaint on June 1, 2020 and that is clearly relevant to the ongoing federal execution protocol litigation. Because the court retains jurisdiction over the consolidated action on remand from the D.C. Circuit, the court determined that granting leave to file a supplemental complaint was appropriate, particularly given the tight deadline for ruling on the requested injunctive relief. Furthermore, it is not unprecedented for a court to allow the filing of a supplemental complaint after the entry of judgment or on remand after an appeal. *See, e.g.*, *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 226–27 (1964) (holding that plaintiffs could file a supplemental complaint challenging conduct occurring after original injunction granted); 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1509 (3d ed. 1998) ("A motion to file a supplemental pleading also may be made on remand after an appeal.")

Permitting Plaintiffs to supplement their complaint does not substantially prejudice Defendants, particularly since the court ultimately denies the injunctive relief sought therein. *See Banks v. York*, 448 F. Supp. 2d 213, 214 (D.D.C. 2006) ("Leave to file a supplemental complaint is left to the Court's discretion, and should be freely granted where such supplementation will promote the economic and speedy disposition of the controversy between the parties, will not cause undue delay of trial, inconvenience and will not prejudice the rights of any other party." (internal quotation marks omitted)). It is in the interest of all parties to this

litigation—and the public—to have the issues resolved promptly on the merits before an execution. Thus, the court exercised its "broad discretion" accordingly.

B. Article 43.141(c)

The court finds that Plaintiffs are likely to succeed on the merits of their claim. In failing to provide Plaintiffs ninety-one days' notice of their executions, Defendants have violated Texas Code of Criminal Procedure Article 43.141(c) and, by extension, § 3596(a) of the FDPA.

The court has already set forth its analysis of FDPA § 3596(a) in its September 20, 2020 Memorandum Opinion. (*See generally* ECF No. 261 at 26–31.) That provision requires that in carrying out an execution, "the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. § 3596(a). The controlling D.C. Circuit opinion (written by Judge Rao) holds that the FDPA requires the government to carry out executions consistent with the level of detail provided by state laws and regulations. *See Execution Protocol Cases*, 955 F.3d at 133 (Rao, J., concurring); *see also id.* at 146 (Tatel, J., dissenting) (explaining that the FDPA, "best understood, requires federal executions to be carried out using . . . procedures set forth not just in [state] statutes and regulations, but also in protocols issued by state prison officials"). This includes details such as the time, date, place, and method of execution, which is precisely the type of state statute at issue here. *Id.* at 134 (quoting Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4,898, 4,901–02 (Jan. 19, 1993)).

Article 43.141 of the Texas Code of Criminal Procedure provides that an order must be entered setting the execution date of a "condemned person," that such an order must be sent to "the attorney who represented the condemned person" not later than the second business day

after the order is entered, and that "[a]n execution date may not be earlier that the 91st day after" the order is entered. Tex. Code Crim. Proc., Art. 43.141(b)–(c). The Texas Court of Criminal Appeals has unambiguously held that "notice of an execution date must be given to capital defendants" and "all executions must be set at least ninety-one days in advance." *Battaglia v. State*, 537 S.W.3d 57, 67 n.53 (Tex. Crim. App. 2017) (citations omitted) (emphasis added); *accord Murphy v. Collier*, 139 S. Ct. 1475, 1479–80 (2019) (citing Tex. Code Crim. Proc., Art. 43.141(c) (Alito, J., dissenting from grant of application for stay on other grounds) ("Under Texas law, a new death warrant may be issued, but such a warrant may not set a date less than 90 days in the future.").

Plaintiffs were sentenced to death in Texas federal district court. Thus, it is undisputed that Texas law applies. And since Defendants have only provided Bernard a fifty-day-notice and Bourgeois a twenty-one-day notice of execution, Defendants have violated the FDPA.

Defendants argue that the court's interpretation is inconsistent with that of several Circuits, which have interpreted the D.C. Circuit's April 2020 Opinion to govern only the procedures that "implement death." *See, e.g.*, *United States v. Vialva*, 976 F.3d 458, 462 (5th Cir. 2020) (finding that Article 43.141(c)'s ninety-one day notice requirement is not incorporated by the FDPA); *LeCroy v. United States*, 975 F.3d 1192, 1198 (11th Cir. 2020) (finding that § 3596(a) "does not extend to ensuring a lawyer's presence at execution"); *United States v. Mitchell*, 971 F.3d 993, 995–97 (9th Cir. 2020) ("[W]e hold that procedures that do not effectuate death fall outside the scope of 18 U.S.C. § 3596(a)."); *Peterson v. Barr*, 965 F.3d 549, 554 (7th Cir. 2020) (concluding that § 3596(a) "cannot be reasonably read to incorporate every aspect of the forum state's law regarding execution procedure" and finding that state law governing execution witnesses falls outside the scope of the FDPA). The court is not bound by

other Circuits' interpretation of D.C. Circuit precedent and cannot square those Circuits' reading with the language in either Judge Rao or Judge Tatel's opinions.

Judge Rao explained that "the ordinary meaning of 'implementation of the death sentence' includes more than 'inflicting the punishment of death' . . . [it includes] additional procedures involved in carrying out the sentence of death." *Execution Protocol Cases*, 955 F.3d at 133 ("the term 'implementation' is commonly used to refer to a range of procedures and safeguards surrounding executions"). She also explained that "implementation" would include details such as the time, date, place, and method of execution, all of which can fairly be read to include the state statutes Plaintiffs have identified. *Id.* at 134 (quoting Implementation of Death Sentences in Federal Cases, 58 Fed. Reg. 4,898, 4,901–02 (Jan. 19, 1993)).

Judge Tatel's dissent appears to acknowledge that the federal government need not follow every execution procedure in state protocols. *Id.* at 141. But he did not address whether a de minimis exception applied to procedures in the state statutes and regulations. *See id.*

The D.C. Circuit was presented with this court's reading of the April 2020 Opinion and declined to correct or revise it.[1] The court is bound by the Circuit's ruling and the controlling precedent at issue was clear: the FDPA requires the BOP to adhere to state laws and regulations governing executions which "include details such as the time, date, place and method of execution." *See id.* at 134 (Rao, J., concurring) (quoting Implementation of Death Sentences in

[1] Judges Tatel, Katsas, and Rao have all served on panels addressing this court's interpretation of their prior Execution Protocol opinions, but none have taken issue with this court's reading of those opinions. *See* Order, *In Re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5285 (D.C. Cir. Sept. 21, 2020) (Henderson, Tatel, Katsas, JJ.); *id.*, 2020 WL 6750375 (Millett, Pillard, Rao, JJ.).

Federal Cases, 58 Fed. Reg. 4,898, 4,901–02 (Jan. 19, 1993)). Since Defendants did not adhere to Texas law governing the time and date of an execution, they have violated the FDPA.

Defendants also argue that Article 43.141(c) applies only to state law officials, not to federal officials implementing a death sentence imposed by a federal court. The court reached a similar conclusion regarding a Georgia law providing "a judge of the superior court of the county where the case was tried" the power to reschedule an execution if certain conditions are met. (*See* ECF No. 263 (citing Ga. Code Ann. § 17-10-40(a).) But whereas the Georgia statute clearly outlined the powers of a particular state official, Article 43.141(c) is more ambiguous; it states that "[a]n execution date may not be earlier than the 91st day after the date the convicting court enters the order setting the execution date." While Defendants are correct that in the federal system, the convicting court does not set the execution date, this provision can be read in harmony with the FDPA to require ninety-one-days' notice.[2]

II. Irreparable Harm

"A finding of a statutory violation does not automatically require the court to issue an injunction." *Mylan Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, (D.D.C. 2000) (citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to [enjoin the conduct] under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.")). Plaintiffs must also demonstrate irreparable harm

[2] In any event, this is a distinction without a difference—the court has found that Plaintiffs have failed to demonstrate irreparable harm. The court reached the same conclusion regarding Georgia Code § 17-10-40(a) (which, if applicable, would have entitled plaintiff to a rescheduled execution date): "It is not clear how a violation of this statute constitutes irreparable harm . . . [since] a violation of § 17-10-40 in no way bars the Government from setting a new execution date." (ECF No. 263 at 4–5 (internal quotation marks and citations omitted).)

that is "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," and it "must be beyond remediation." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)) (internal quotation marks and brackets omitted).

Given the Supreme Court's repeated vacatur of this court's prior injunctions and the D.C. Circuit's finding that Plaintiffs were not entitled to injunctive relief despite Defendants' violation of the Food, Drug, and Cosmetic Act, *see* 2020 WL 6750375, at *10, the court cannot find that Plaintiffs have demonstrated irreparable harm to warrant injunctive relief. The Supreme Court has made clear that the prospect of an inmate being executed prior to their claims being fully litigated will not serve as a basis for injunctive relief. (*See* Pl. Mem. at 9); *see also Barr v. Lee*, 140 S. Ct. 2590 (2020) (vacating this court's preliminary injunction and permitting executions to proceed notwithstanding pending claims); *Barr v. Purkey*, No. 20A10, 2020 WL 4006821 (U.S. July 16, 2020) (same); *Barr v. Hall*, No. 20A99, 2020 WL 6798770 (U.S. Nov. 19, 2020) (same).

And while "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life" pending his execution, *See Ohio Adult Parole Auth. v. Woodard*, 532 U.S. 272, 288 (1998) (O'Connor, J. concurring in part and concurring in the judgment), providing fewer days' notice than Plaintiffs may be entitled does not rise to the level of irreparable harm when Plaintiffs have been under a death sentence for well over a decade, have received the minimum twenty-day notice required by federal law, 28 C.F.R. § 26.4(a), and have

been given the fifty-day notice set forth in the 2019 Execution Protocol, (*see* ECF No. 171, Admin. R. at 1093).[3]

Plaintiffs also have not been deprived of the opportunity to seek clemency. (*See* Pl. Mem. at 8). Both have already submitted clemency petitions, and the decision whether to grant those petitions now rests with the President. And while the court is certainly sympathetic to the argument that such petitions would likely receive more favorable treatment from the incoming administration, Plaintiffs have not provided authority suggesting that an injunction may be issued on this basis.

Having found that Plaintiffs have failed to establish the requisite irreparable harm, the court need not address the remaining factors for injunctive relief. *See Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974) ("The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.").

[3] Bourgeois was initially notified in July 2019 of a January 2020 execution date and therefore has been on notice of the government's intent to execute him for sixteen months. This is consistent with the 2019 Execution Protocol which states that "[i]f the date designated [for an execution] passes by reason of a stay of execution, then a new date will be promptly designated by the Director of the BOP when the stay is lifted." (Admin. R. at 1093 (internal citations omitted)).

CONCLUSION

Though Plaintiffs are likely to succeed on the merits of their claim, they are unable to demonstrate that they have been irreparably harmed by Defendants' failure to adhere to Article 43.141(c) of the Texas Code of Criminal Procedure and, by extension, the FDPA. Accordingly, Plaintiffs' motion for a preliminary injunction will be DENIED. The court will issue an order accordingly.

Date: December 6, 2020

Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

From: US Pardon Attorney (imailagent) <uspardon.attorney@usdoj.gov>
Sent: Monday, January 27, 2020 10:06 AM
To: Victor Abreu <Victor_Abreu@fd.org>
Cc: Pete Williams <Pete_Williams@fd.org>; Katherine Thompson <Katherine_Thompson@fd.org>
Subject: RE: Alfred Bourgeois, Case Number C288830 (Intranet Quorum IMA00814282)

January 27, 2020

Mr. Pete Williams
Mr. Victor J. Abreu
Ms. Katherine Thompson
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street
Suite 540 West -- The Curtis
Philadelphia, PA 19106-3323

Dear Mr. Williams, Ms. Thompson, and Mr. Abreu,

This responds to your email of January 27, 2020, advising that you wish to withdraw the clemency application for commutation of a sentence of death on behalf of your client, Alfred Bourgeois.

In accordance with your request, we have administratively closed his clemency file without further action. If he decides to renew his application in the future, *i.e.*, if a new date of execution is set, he may submit a new application, or you may submit a new application on his behalf.

Sincerely,

The Office of the Pardon Attorney

No. 20-5361

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

ALFRED BOURGEOIS AND BRANDON BERNARD,
Plaintiffs-Appellants,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia,
Hon. Tanya S. Chutkan, No. 19-mc-145

RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiffs-Appellants Brandon Bernard and Albert Bourgeois state that they are not corporate entities and that this is neither a criminal case nor a bankruptcy case.

.

Dated: December 8, 2020

Respectfully submitted,

/s/ Ginger D. Anders

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No. 20-5361

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

ALFRED BOURGEOIS AND BRANDON BERNARD,
Plaintiffs-Appellants,

v.

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia,
Hon. Tanya S. Chutkan, No. 19-mc-145

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

This is an appeal from an order of the U.S. District Court for the District of Columbia, denying a preliminary injunction.

Appellants are Brandon Bernard and Alfred Bourgeois.

Appellees are the United States Department of Justice, William P. Barr, Timothy J. Shea, Stephen M. Hahn, Michael Carvajal, Jeffrey E. Krueger, Donald W. Washington, Nicole C. English, T.J. Watson, and William E. Wilson.

Plaintiffs appearing before the district court were Brandon Bernard, Alfred Bourgeois, Chadrick Evan Fulks, Norris G. Holder, Jr., Cory Johnson, Daniel Lewis Lee, Keith Nelson, Wesley Ira Purkey, James H. Roane, Jr., Julius Robinson, and Richard Tipton. Intervenor-plaintiffs appearing before the district court were Anthony Battle, Orlando Hall, Dustin Lee Honken, Jeffrey Paul, and Bruce Webster.

Defendants appearing before the district court were the United States Department of Justice, William P. Barr, Mark Bezy, Radm Chris A. Bina, John F. Caraway, Alan R. Doerhoff, Kerry J. Forestal, Eric H. Holder, Jr., Newton E. Kendig II, Jeffrey E. Krueger, Paul Laird, Harley G. Lappin, Michele Leonhart, Charles L. Lockett, Joseph McClain, Michael B. Mukasey, Charles E. Samuels, Jr., Karen Tandy, T.J. Watson, and Thomas Webster. Richard Veach appeared as intervenor-defendant.

There are no amici in this Court or the district court.

B. Rulings Under Review

Appellants seek review of the December 6, 2020 order of the district court (ECF No. 346) denying, for the reasons set forth in the accompanying memorandum opinion (ECF No. 345), Plaintiffs' motion for a preliminary injunction.

No official citations for these orders exist.

C. Related Cases

Appellants appeal from the district court's orders in the consolidated case *In The Matter of The Federal Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-145 (D.D.C.). This consolidated case has been before this Court before. See *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 20-5329 (affirming in part, reversing in part, and remanding, Nov. 18, 2020); *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 20-5285 (dismissed as moot on October 23, 2020); *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 20-5260 (injunction vacated on August 27, 2020); *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 20-5252 (dismissed as moot on September 16, 2020); *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 20-5210 (dismissed as moot on July 31, 2020); *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 20-5206 (dismissed as moot on July 22, 2020)' *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 20-5199 (dismissed as moot on July 15, 2020); *In re FBOP Execution Protocol Cases (Execution Protocol Cases)*, No. 19-5322 (D.C. Cir. 2020).

Dated: December 8, 2020

Respectfully submitted,

/s/ Ginger D. Anders

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