CAPITAL CASE – EXECUTIONS OF COREY JOHNSON AND DUSTIN HIGGS SCHEDULED FOR 6:00 PM ON JANUARY 14 AND 15

NO. 21-5004
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES
COREY JOHNSON AND DUSTIN HIGGS,
Plaintiffs-Appellees,

v.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, et al.,
Defendants-Appellants.

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

EMERGENCY PETITION FOR REHEARING EN BANC AND, IF NECESSARY, AN ADMINISTRATIVE STAY, BY PLAINTIFFS-APPELLEES DUSTIN HIGGS AND COREY JOHNSON

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January 14, 2021

INTRODUCTION AND RULE 35(b)(1) STATEMENT

The Government intends to execute Plaintiffs-Appellees Corey Johnson and Dustin Higgs today and tomorrow, respectively. Plaintiffs both contracted COVID-19 less than a month ago and remain symptomatic. Within five days of learning of their diagnoses, Plaintiffs raised as-applied Eighth Amendment claims alleging that, while their lungs are still suffering damage from COVID-19, lethal injection of pentobarbital would cause torturous executions akin to death-by-waterboarding. The district court expeditiously ordered briefing and held a two-day evidentiary hearing. On January 12, 2021, the court entered a "*limited* injunction" until March 16, 2021 to permit the Plaintiffs time to recover from COVID-19 and thereby avoid torturous executions. A18. After 11:00 p.m. on January 13, 2021, a divided panel of this Court vacated the injunction and ordered any petition for rehearing to be filed by 9:00 a.m. on January 14, 2021. This petition follows.

En banc consideration is necessary to secure uniformity of this Court's decisions, and because this proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35(a)(1) & (2). The panel majority here applies *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020), in a manner that directly conflicts with this Court's earlier interpretation of *Lee* in *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123 (D.C. Cir. 2020). The question of exceptional importance is whether the Government can evade the strictures of the Eighth

Amendment merely by introducing "competing expert testimony," A4, that a district court hears and finds to be "unpersua[sive]," "inaccurate," and "troubling," A29-30.

Lee vacated an order preliminarily enjoining executions based on an Eighth Amendment claim that execution by injection of pentobarbital would cause severe suffering from flash pulmonary edema in *all* executions. 140 S. Ct. at 2591. The Supreme Court reasoned that, because the parties' written expert declarations presented competing opinions on whether all prisoners would experience pulmonary edema while sensate, the prisoners had "not made the showing required to justify last-minute intervention." *Id*. In order "to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously," the Court ordered the executions to proceed. *Id*. at 2591-92.

Thereafter, the district court dismissed the surviving plaintiffs' Eighth Amendment claim, reasoning that *Lee* had held "that whatever pain is caused by pulmonary edema arising from pentobarbital injections is a type of pain that is categorically permissible under the Eighth Amendment." *Execution Protocol Cases*, 980 F.3d at 133. This Court reversed. It ruled that plaintiffs raised a viable Eighth Amendment claim by alleging that "pulmonary edema will occur virtually instantaneously upon administration of the pentobarbital, at a time when the inmate is still capable of feeling pain, terror, and suffocation," and, "[a]s a result, it is

extremely likely, to the point of virtual medical certainty, that most, if not all, prisoners will experience excruciating suffering, including sensations of drowning and suffocation during the lethal injection process." *Id*. at 132. The district court had made "critical legal errors" in believing that *Lee* precluded Eighth Amendment relief based on the pain caused by pulmonary edema, and that *Lee* had done so "as a matter of law no matter what facts and science might show." *Id*. at 133.

The panel majority's opinion makes critical errors that conflict with *Execution Protocol Cases.* First, in disregarding the district court's clear and well-supported fact-findings made after an evidentiary hearing, the majority erroneously precludes relief "as a matter of law no matter what facts and science might show," *id*. at 133, whenever the Government proffers "competing expert testimony," A4. Second, the majority misapprehended the Government's "competing" expert evidence as presenting "close questions of scientific fact," A4. In truth, the questions were not close at all because the Government's experts presented unpersuasive testimony that was manifestly "inaccurate" and "troubling" to the district court. A29-30. Plaintiffs thus substantiated the very claim—albeit as applied only to them, based on a medical condition—that this Court found sufficient to state a claim for relief under the Eighth Amendment in *Execution Protocol Cases*, 980 F.3d at 132.

BACKGROUND

Following Plaintiffs' motions for a preliminary injunction, the district court conducted an evidentiary hearing on January 4 and 5, 2021. Drs. Kendall von Crowns, Todd Locher, Michael Stephen, and Gail Van Norman testified at the hearing. "Based on the declarations and live testimony," the district court granted a brief preliminary injunction barring Plaintiffs' executions until March 16, 2021, to allow Plaintiffs the opportunity to adequately recover from COVID-19. A31. The district court found that "Higgs has shown that if his execution proceeds as scheduled—less than a month after his COVID-19 diagnosis—*he will suffer* flash pulmonary edema within one or two seconds of injection but before the pentobarbital reaches the brain and renders him unconscious." *Id.* (emphasis added). This will subject Mr. Higgs "to a sensation of drowning akin to waterboarding[.]" A18. The district court also found it "undisputed that Johnson is suffering from symptoms of COVID-19" causing "damage to his alveoli-capillary membrane," and concluded that if Mr. Johnson were to be executed on January 14, pentobarbital would "burn the alveoli-capillary membrane which has already been damaged from COVID-19, triggering flash pulmonary edema, all before the pentobarbital even reaches [Mr. Johnson's] brain and begins to have an anesthetizing effect." A32.

In reaching its conclusions, the court credited Plaintiffs' expert Dr. Michael Stephen's "particularly persuasive and helpful" testimony regarding Plaintiffs' lung damage that "walked the court through a comparison of Higgs's lung images [from October 18, 2018 and December 30, 2020] to show the extensive damage caused by COVID-19." A28. The district court described this damage as "readily apparent" from a comparison of the x-rays, which reveals increased right-lung opacity in the form of interstitial markings that are "more visible as a result of inflammation caused by 'viral pneumonia from COVID-19.'" *Id.* (quoting Dkt. #389, Hrg. 97).[1]

The district court was "unpersuaded" by the rebuttal testimony offered by Dr. Todd Locher and specifically pointed out that his "failure to account for [] obvious differences" between Mr. Higgs's 2018 and 2020 x-rays was "concerning" and "undermine[d] his opinion that patients with mild COVID-19 symptoms are

[1] Defendants denied Mr. Johnson's request that an X-ray or CT scan be performed, as the District Court recognized. A32. Nonetheless, the district court found as a factual matter that such examinations were very likely to reveal extensive lung damage in light of Mr. Johnson's undisputed COVID-19 symptoms and the results of Mr. Higgs's chest x-ray. A31-33. As a matter of logic and fundamental fairness, Defendants cannot refuse to provide these tests while at the same time arguing that the lack of such tests counsels in their favor. *See Ernst v. City of Chi.*, No. 08 C 4370, 2018 WL 6725866, at *19 n.45 (N.D. Ill. Dec. 21, 2018) ("The court notes that this evidence would have been under the exclusive control of the Defendant, and the court will not penalize Plaintiffs for data that Defendants failed to provide to their own expert.")

unlikely to suffer extensive lung damage." A30, 32. The court noted that "one does not have to be an expert to see" that "the right lung in the 2020 image has more prevalent cloudier streaks when compared to the same lung in 2018." *Id.* With respect to Dr. Locher's opinion that "any findings on a CT scan would likely be minor in view of a normal chest x-ray," *id.* at 29 (quoting Dkt. #381-1 at ¶ 11), the court questioned why he "appeared to be relying on a less accurate measurement to postulate that a more accurate one would be less useful." *Id.* The court found that "Dr. Locher's live testimony cast further doubt on his credibility" because multiple inaccuracies in his sworn declaration made it "unclear how closely [Dr. Locher] had reviewed the relevant medical records." *Id.*

The court found that its "assessment of the live testimony" applied with equal force to Mr. Johnson's COVID-19 as-applied claim and that it could "infer from the expert testimony" that Mr. Johnson has suffered lung damage as a result of his symptomatic infection. A31-32. Even Dr. Locher does not dispute research indicating that at least 79% of symptomatic COVID-19 patients have lung damage. Dkt. #374-1 at 4; *see also* Dkt. #389, Hrg. 78; Dkt. #380-1 at ¶ 11 (Locher Decl.) (studies Dr. Locher cited in his declaration reported that between 44.5% and 94.8% of *asymptomatic* COVID-19 patients have lung damage visible on a CT scan).

With respect to flash pulmonary edema, the court credited Dr. Van Norman's "highly credible" testimony that "inmates with lung damage from

COVID-19 will experience flash pulmonary edema within a second or two after injection" because "COVID-19 causes severe damage to . . . the alveolar-capillary membrane," and pentobarbital is caustic such that "a high concentration dose will burn the [already damaged] alveoli-capillary membrane in the lungs within a second or two of injection." *Id.* at 25-26 (quoting Dkt. #389, Hrg. 192). The district court also credited Dr. Stephen's testimony on the subject. A28.

The court further found that "[a] person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain," *id.* at 26,. *Id.*; *see also* Dkt. #389, Hrg. 149. As Dr. Van Norman explained, although "some textbooks indicate that pentobarbital onset is anywhere from 30 seconds to two and a half minutes," Dkt. #389, Hrg.150, "the clinical effect" that renders a person insensate "occurs later than the onset," Hrg. 151. Given that pentobarbital "takes longer to reach peak effectiveness" than its initial onset, the district court conservatively found that Plaintiffs "will suffer the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection." A26.

Notably, the district court found that Dr. Antognini's declaration "did not adequately refute Dr. Van Norman's opinions." A27. Among other failures, Dr. Antognini "does not address Dr. Van Norman's explanation that injected pentobarbital will begin to attack damaged lungs before it reaches the brain, and

Dr. Antognini did not proffer how long it would take for an inmate to be rendered unconscious." *Id.*

As to Dr. Locher's statement that "there is no evidence in the medical literature suggesting an injection with pentobarbital would somehow exacerbate symptoms or physiologic abnormalities in patients with COVID-19," *id.* at 29 (quoting Dkt. #381-1 at ¶ 11), the court found that, "Dr. Van Norman explained that there are no such studies because no physician or scientist has administered massive overdoes of intravenous pentobarbital to COVID-19 patients." *Id*. at 26.

The district court granted the brief preliminary injunction—barring Plaintiffs executions only until March 16, 2021—on January 12, 2021. The next day a panel of this Court granted the Government's motion to vacate the preliminary injunction, over the dissent of Judge Pillard. A1.

ARGUMENT

The panel erred in departing from this Court's prior precedent and in misreading *Lee* so as to effectively preclude relief for Plaintiffs whenever Defendants offer *any* competing expert testimony, then compounded its error by fundamentally misreading the evidence presented below.

I. The Panel Erred in Vacating the Preliminary Injunction

"[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 that they "will be irreparably injured absent a stay." *Nken v. Holder*, 556 U.S. 418, 426 (2009). Plaintiffs satisfied those requirements below and continue to do so now. They have shown a likelihood of success on the merits as credited by the district court, based on late-developing claims that they brought at the earliest opportunity.

A. The Panel Misread *Lee* to Preclude Injunctive Relief Whenever Defendants Offer Competing Expert Testimony

The panel fundamentally misreads *Lee* as barring relief whenever Defendants offer *any* expert testimony at odds with the expert testimony offered by Plaintiffs. In *Lee*, however, the district court had not heard live testimony or evaluated the relative credibility of experts. In granting a preliminary injunction, the district court noted that it was "difficult to weigh competing scientific evidence at this relatively early stage." *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 219 (D.D.C. 2020), *vacated sub nom. Barr v. Lee*, 140 S. Ct. 2590. The panel's overbroad reading of *Lee*—suggesting that *any* competing expert testimony is sufficient to defeat a preliminary injunction, even after an evidentiary hearing—is starkly at odds with ordinary civil practice. *See* Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed. 1998) (when a motion for a preliminary injunction "depends on resolving a factual conflict by assessing the credibility of opposing witnesses, it seems desirable to

require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective plausibility of their affidavits."). Indeed, such a broad reading would effectively nullify a district court's power to hold a hearing to resolve factual disputes in a preliminary injunction posture as the court properly did here.

B. Plaintiffs' Entitlement to Relief Does Not Depend on "Close Questions of Scientific Fact"

The panel concluded that the district court improperly granted a preliminary injunction based on its evaluation of "competing expert testimony on close questions of scientific fact." A4. The majority's opinion, however, both understates key *undisputed* facts and wholly mischaracterizes aspects of the factual record before the district court.

Defendants do not dispute that both Mr. Higgs and Mr. Johnson have been diagnosed with COVID-19 and that they "have been exhibiting symptoms consistent with that diagnosis, including shortness of breath, an unproductive cough, headaches, chills, [and] fatigue . . . ." A23. Moreover, Defendants' experts do not dispute that COVID-19 causes lung damage in a large majority of symptomatic patients, even when symptoms are mild. Dr. Locher does not dispute the research cited by Dr. Van Norman indicating that at least 79% of symptomatic COVID-19 patients have lung damage. Dkt. #374-1 at 4. In fact, studies that Dr. Locher cites in his own declaration find that between 44.5% and 94.8% of even

asymptomatic COVID-19 patients have lung damage visible on a CT scan. *See* Dkt. #389, Hrg. 78; Dkt. #380-1 at ¶ 11 (Locher Decl.). Further, COVID-related lung damage persists after symptoms have subsided for at least several weeks to 90 days – another point that Defendants do not dispute. *See* A25, A46 n.13.

With respect to flash pulmonary edema, "[i]t is further undisputed that Plaintiffs will suffer flash pulmonary edema as a result of [their executions], 'a medical condition in which fluid rapidly accumulates in the lungs causing respiratory distress and sensation of drowning and asphyxiation.'" A23. Defendants do not dispute the mechanism by which flash pulmonary edema occurs. As Dr. Van Norman testified, pentobarbital causes pulmonary edema because the drug is highly caustic, so that when the chemical contacts lung tissue, it begins damaging that tissue and causes fluid to leak into the lungs. *See generally* Hrg. 145-48. Finally, Defendants do not dispute that pentobarbital reaches the lungs before reaching the brain. A27 (explaining that Dr. Antognini, whom Defendants did not call for direct testimony, did not in his written declaration "address Dr. Van Norman's explanation that injected pentobarbital will begin to attack damaged lungs before it reaches the brain.").

Leaving aside the undisputed evidence, the panel's ruling describes three key factual issues on which it finds "genuinely disputed testimony" in the record. Add. 4. In all three instances, however, the panel misapprehends the evidence of

record and fails to acknowledge the district court's reasons for finding as it did.

Significant lung damage – The panel questions whether Plaintiffs' lungs are significantly damaged from COVID, pointing to Dr. Locher's description of "minimal" or "mild" symptoms. Add. 5-6. But the district court discounted Dr. Locher's testimony because he failed to notice significant symptoms from Mr. Higgs's medical records, including persistent coughing. Add. 29-30. Dr. Locher similarly failed to notice what Dr. Stephen and the district court described as obvious changes in Mr. Higgs's chest x-ray as between 2018 and December 2020. Add. 30. The district court that saw and heard the evidence, including the x-rays, found it "troubling that Dr. Locher did not account for these obvious differences between the two scans." Add. 30-31. The court reasonably discounted Dr. Locher's testimony because his analysis was lackadaisical. *Id.*; *see also* Add. 32 (discounting Dr. Locher's views as to Johnson in light of Dr. Locher's flawed analysis of Mr. Higgs's x-rays).

Unsatisfied with the district court's findings about Dr. Locher, the panel insists that two other doctors viewed Mr. Higgs's 2020 x-ray and concluded that he lacked significant lung damage. Add. 5 ("two government experts and the attending radiologist"). That surmise is inaccurate. In fact, pathologist Dr. Crowns never viewed the x-rays because they did not become available until the night after his testimony. Hrg. 38, 46. Dr. Crowns instead relied on the report of radiologist

Dr. Yoon, Add. 29-30, but Dr. Yoon did not testify or present a declaration, and the court noted the absence of any evidence as to whether Dr. Yoon "routinely reviews x-rays of COVID-19 patients." Add. 31.

Also erroneous is the panel's remark that "mild" cases of COVID-19 may result in lung damage in as few as 44.5% of cases. Add. 6. That figure describes a study of *asymptomatic* COVID patients. Hrg. 63; Locher Decl., Dkt. #380-1, at 3. Mr. Higgs and Mr. Johnson are both symptomatic, as Dr. Locher acknowledged despite his slipshod review of medical records. Hrg. 63-64; Add. 30. And Dr. Van Norman explained that 80% to 95% of symptomatic COVID patients suffer lung damage. Hrg. 166.

COVID-enhanced likelihood of flash pulmonary edema – The panel next found "substantial conflicting testimony" on the question of whether COVID will make Mr. Higgs or Mr. Johnson "more likely to experience flash pulmonary edema" from a massive overdose of pentobarbital. Add. 6. Once again, the panel misreads the record. First, the panel criticizes Dr. Van Norman's declaration because it does not more thoroughly substantiate her conclusion that COVID-initiated lung damage makes a person "susceptible to rapid and massive barbiturate damage." *Id.* But the district court did not rely solely on Dr. Van Norman's *declaration*. It also credited her live testimony that pentobarbital is "a caustic chemical" which is "going to attack an already leaky membrane." Add. 26-27. Dr.

Van Norman explained, at length, that COVID-related damage allows toxins to degrade the same lung tissues that are already compromised. *See also* Hrg. 153, 155, 157-58, 160-61, 192. "Everything we know about pulmonary physiology at the alveolar capillary membrane level says that if you already have a damaged alveolar capillary membrane and then you flood it with a toxic chemical, that you're at increased risk and increased heightened rapidity of getting pulmonary edema." Hrg. 165-66.

Second, the panel wrongly imputes to the district court a finding that Dr. Van Norman "did not provide support for her conclusions." Add. 6. From that premise the panel criticizes the district court for discounting Dr. Antognini's "conclusory" opinions, and it reasons that an injunction must be denied when "both sides' evidence on this point was shaky." *Id.* But the district court did *not* find both sides' evidence to be shaky. Far from stating that Dr. Van Norman failed to "provide support for her conclusions," the district court was merely describing *Dr. Antognini's* opinion to that effect. Add. 27 ("Although he faulted Dr. Van Norman for not providing support for her conclusions, Dr. Antognini's opinions regarding the effect of a pentobarbital injection on a person with COVID-19 symptoms were themselves conclusory."). The district court did not share that opinion, and indeed, it credited Dr. Van Norman's explanation when testifying. Add. 26-27.

Flash pulmonary edema before the prisoner is insensate – The panel also

errs by finding that the record "contains only conjecture on whether a lethal injection of pentobarbital would cause any edema before rendering the prisoner insensate." Add. 6-7. Dr. Van Norman testified that Plaintiffs Higgs and Johnson would experience edema "within a second or two" of the injection. Hrg. 192. The panel likens that testimony to Dr. Van Norman's earlier declaration about the "instantaneous" onset of flash pulmonary edema in healthy individuals, and it notes that *Lee* did not consider that evidence stay-worthy. Add. 7.

The panel errs because the evidence below is substantially broader than that in *Lee* – and was credited as such by the district court. First, Dr. Van Norman explained the mechanism by which pentobarbital works swiftly on COVID-damaged lung tissues by corroding them when "the drug has not even reached the brain at that point." Hrg. 192. Pulmonary edema begins "instantaneously" in light of the "synergistic effects" of the COVID infection and pentobarbital at the pulmonary-capillary membrane. Hrg. 160-61. Second, Dr. Stephen *also* testified to that effect and was found credible. Add. 27. He stated that flash pulmonary edema would occur "almost immediately" after injection of 5 grams of pentobarbital. Hrg. 98. Third, the district court discounted Dr. Antognini's views because Dr. Antognini nowhere addressed the causal mechanism described by Drs. Van Norman and Stephen and credited by the district court. Add. 27-28 (observing that Dr. Antognini "does not address Dr. Van Norman's explanation that injected

pentobarbital will begin to attack damaged lungs before it reaches the brain"). Neither did Dr. Antognini specify "how long it would take for an inmate to be rendered unconscious." *Id.* The district court, then, had ample reason to accept Dr. Van Norman's and Dr. Stephen's opinions instead of Dr. Antognini's.

II. If Additional Time Is Needed to Consider the Petition, the Court Should Issue an Administrative Stay

Alternatively, to the extent the Court requires additional time to consider Plaintiffs' petition for rehearing en banc, the Court should issue a temporary administrative stay enjoining their impending executions.

This Court may "enter an administrative stay of very short duration before receiving a response to give the Court more time to consider the matter." D.C. Circuit Handbook of Practice and Internal Procedures 33 (2020); *see also Garza v. Hargan*, No. 17-5236, 2017 WL 4707112, at *1 (D.C. Cir. Oct. 19, 2017) (per curiam) (granting administrative stay "to give the court sufficient opportunity to consider the emergency motion for stay"). The Court should exercise that discretion here in order to ensure that Plaintiffs' claims are not rendered moot. *See Central & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 308 n.23 (D.C. Cir. 1985); *F.T.C. v. Beatrice Foods Co.*, 587 F.2d 1225, 1228 (D.C. Cir. 1978).

CONCLUSION

For the foregoing reasons, Mr. Higgs and Mr. Johnson respectfully petition

the en banc Court to reverse the motions panel's order vacating the district court's preliminary injunction. If the Court needs more time to consider the petition, Plaintiffs respectfully ask the Court to grant an administrative stay enjoining their executions pending this Court's consideration.

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. 35(b)(2)(A) and D.C. Circuit Rule 35(b), because it contains 3,799 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 Times New Roman 14-point font.

/s/ Shawn Nolan
SHAWN NOLAN

January 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2021, 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. Counsel for parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Shawn Nolan
SHAWN NOLAN

ADDENDUM

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5004 **September Term, 2020**

1:19-mc-00145-TSC

Filed On: January 13, 2021

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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James H. Roane, Jr., et al.,

Appellees

v.

Jeffrey Rosen, Acting Attorney General, et al.,

Appellants

BEFORE: Pillard**, Katsas*, and Walker*, Circuit Judges

ORDER

Upon consideration of the emergency motion to stay or to immediately vacate an injunction, the opposition thereto, and the reply, it is

ORDERED that the motion be granted and that the preliminary injunction entered by the district court on January 12, 2021, be vacated. See Barr v. Lee, 140 S. Ct. 2590, 2591–92 (2020). It is

FURTHER ORDERED, on the court's own motion, than any petition for rehearing or rehearing en banc be filed no later than 9:00 a.m. on January 14, 2021.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until disposition of any timely petition for

* A statement by Circuit Judge Katsas, joined by Circuit Judge Walker, concurring in this order, is attached.

** A statement by Circuit Judge Pillard, dissenting from this order, is attached.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5004 **September Term, 2020**

rehearing or rehearing en banc. If no rehearing petition is filed by 9:00 a.m. on January 14, 2021, the Clerk is directed to issue the mandate forthwith. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5004 **September Term, 2020**

Katsas, *Circuit Judge*, joined by Walker, *Circuit Judge*, concurring:

Cory Johnson and Dustin Higgs are scheduled to be executed by lethal injection of pentobarbital sodium. They contend that this method of execution violates the Eighth Amendment as applied to their specific medical circumstances. Johnson and Higgs recently tested positive for COVID-19. They argue that the virus has damaged their lungs to the point that the drug will cause them to experience flash pulmonary edema—"a form of respiratory distress that temporarily produces the sensation of drowning or asphyxiation," *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020)—before it renders them insensate. The district court agreed and so preliminarily enjoined the impending executions. The government has filed an emergency motion to stay or vacate the preliminary injunction. I write to explain my vote to grant the motion and vacate the injunction.

A prisoner claiming that a specific method of execution violates the Eighth Amendment "faces an exceedingly high bar." *Lee*, 140 S. Ct. at 2591. The Eighth Amendment "does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019). Instead, it prohibits only methods of execution that "intensif[y] the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Id.* (cleaned up). To establish an Eighth Amendment violation, the prisoner must show that the disputed method presents "a substantial risk of severe pain," meaning that it is "*sure or very likely* to cause … needless suffering." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (cleaned up). The prisoner also must establish that a feasible alternative execution method would significantly decrease that suffering. *Bucklew*, 139 S. Ct. at 1125 (citing *Glossip*, 576 U.S. at 868–69). The Constitution affords a "measure of deference" to government choices in this area, and the Court has "yet to hold that a State's method of execution qualifies as cruel and unusual." *Id.* at 1124–25 (cleaned up).

In addition, to obtain a post-habeas stay of execution, the prisoner must show more than "competing expert testimony" on the question whether the government's chosen method is very likely to cause needless suffering. *Lee*, 140 S. Ct. at 2591 (2020); *see also Execution Protocol Cases*, 980 F.3d 123, 135 (D.C. Cir. 2020). This is partly because federal courts are not well suited to resolve "ongoing scientific controversies beyond their expertise." *Glossip*, 576 U.S. at 882 (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality)). Moreover, "[l]ast-minute stays," issued years after the crime and days before the execution, "should be the extreme exception, not the norm." *Lee*, 140 S. Ct. at 2592 (quoting *Bucklew*, 139 S. Ct. at 1134) (cleaned up).

Applying these standards, the Supreme Court in *Lee* allowed several executions to proceed through lethal injections of pentobarbital. The Court noted that pentobarbital is used for executions by five States, has been "used to carry out over 100 executions, without incident," and is "repeatedly invoked by prisoners as a less painful and risky alternative to the lethal injection protocols of other jurisdictions." *Lee*, 140 S. Ct. at 2591 (cleaned up). In preliminarily enjoining the *Lee* execution, the district court had found that "scientific evidence overwhelmingly indicate[d]" a lethal injection of pentobarbital is "very likely" to cause "extreme pain and needless suffering" from flash pulmonary edema before the prisoner has been rendered insensate. *Execution Protocol Cases*, 471 F. Supp. 3d 209, 218 (D.D.C. 2020); *see also id.* at 219 (finding that the plaintiffs "ha[d] the better of the scientific evidence"). Yet because the government presented "competing expert testimony" on that question, the Court held that the plaintiffs had not "made the showing required to justify last-minute intervention." *Lee*, 140 S. Ct. at 2591–92. The Supreme Court therefore vacated the preliminary injunction, which we had declined to disturb. *See id.*

In this case, the district court sought to distinguish *Lee* on the ground that Higgs and Johnson's COVID-19 symptoms will exacerbate the effect of pentobarbital on their lungs. Specifically, it found that Higgs and Johnson will experience a flash pulmonary edema within "one or two seconds" of the injection, before becoming insensate. *Execution Protocol Cases*, No. 19-mc-145 (TSC), ECF 394, at 3. But the same legal standards govern facial and as-applied challenges to the use of pentobarbital for executions. *See Bucklew*, 139 S. Ct. at 1126–28. And the district court based its finding on the same kind of evidence that the Supreme Court had found insufficient in *Lee*: competing expert testimony on close questions of scientific fact.

The district court's reasoning reflects three subsidiary factual determinations: first, that COVID-19 has severely damaged the plaintiffs' lungs; second, that this damage would make them experience a flash pulmonary edema sooner; and third, that they will experience this before they become insensate. The record reflects genuinely disputed testimony on each of those points.

To begin, it is unclear whether Higgs has suffered significant lung damage from COVID-19. Shauna Smiledge, a health service administrator at the prison where Higgs is incarcerated, summarized his medical records. Smiledge Decl., ECF 380-4. According to the records, Higgs was "seen by five different providers" between December 23 and December 29, "all of whom assessed [his] pulmonary status." *Id.* at 4. During that period, his oxygen saturation level consistently measured between 99% and 100%. *Id.* at 3–4. Higgs once said that his breathing "felt funny," but "did not report any other problems." *Id.*

On December 30, Higgs told his provider that he was "short of breath sometimes" but with the caveat, "Nothin's new. I'm fine." *Id.* at 4. Following an x-ray, Justin Yoon, the reviewing radiologist, read the scans to show only one abnormality: a "right apical reticular nodular density" that was "unchanged" since Higgs' last chest x-ray from two years ago. Locher Decl., ECF 380-1, at 4. Two government experts agreed with Yoon's assessment: pulmonologist Todd Locher, *id.*; H'rg Tr. at 59–60, and forensic pathologist Kendall Von Crowns, H'rg Tr. at 22. Locher thus concluded that Higgs' medical records reflect only "minimal symptoms" from COVID-19. Locher Decl., ECF 380-1, at 3.

Higgs contests that assessment. First, he has argued that his medical records understate his symptoms and reflect inadequate care. The district court declined to credit that argument, and for good reason: Higgs' medical records were updated daily; Smiledge saw no evidence that the records were inadequate, Smiledge Decl., ECF 380-4, at 3; and Higgs' own investigator reported that he "is asked three times a day how he is feeling," Johnson Decl., ECF 383-1, at 2. Second, through an expert, Higgs contests the government's interpretation of his x-rays. Michael Stephen, an intensive-care physician, testified that the x-rays show "significantly increased interstitial markings" on Higgs' lungs, which indicate "very acute COVID pneumonia." H'rg Tr. at 94, 96. The district court credited Stephen's testimony, based principally on its own independent interpretation of the x-rays. *See Execution Protocol Cases*, ECF 394, at 15 ("the right lung in the 2020 image has more prevalent cloudier streaks when compared to the same lung in 2018"). But that testimony, measured against the conflicting views of the two government experts and the attending radiologist, establishes at most "competing expert testimony" over whether Higgs has sustained appreciable lung damage. *See Lee*, 140 S. Ct. at 2591–92.

The same is true for Johnson. According to his medical records, Johnson reported a headache and dry cough on December 20. Locher Decl., ECF 380-1, at 4. On the six days following December 21, he reported an intermittent headache but no cough, at one point noting that his breathing had improved. *Id.* Between December 27–29, Johnson reported a "little cough," but on December 30 he told prison health officials, "I'm okay, I'm good." Smiledge Decl., ECF 380-4, at 5. Johnson recently submitted a declaration asserting that his cough had worsened since January 2, Johnson Decl., ECF 383-3, at 3–4, but updated medical records show that it was "improving" as of January 3, ECF 386-2 at 6.

The parties draw competing inferences from Johnson's mild symptoms. Plaintiffs' expert Gail Van Norman, an anesthesiologist, testified that Johnson had suffered "significant lung damage" that would persist for at least 90 days. Van Norman Decl., ECF

374-3, at 4–5.[1] She cited studies that COVID-19 patients with mild or no symptoms experience lung damage in anywhere between 56–94% of cases. Van Norman Decl., ECF 374-1, at 4. Locher responded that the literature varied on the extent to which individuals with mild cases of COVID-19 develop temporary lung damage, but one recent study found damage in as low as 44.5% of patients. Locher Decl., ECF 380-1, at 3. In any event, Locher testified that given Johnson's mild symptoms, any damage to his lungs would be minor. *Id.* at 4.

The record also contains substantial conflicting testimony on whether asymptomatic or mildly symptomatic COVID-19 patients would be more likely to experience flash pulmonary edema. Van Norman testified that a person with "COVID-related lung damage" would experience pulmonary edema "even earlier in the execution process" than would a person without it. Van Norman Decl., ECF No. 374-1, at 1. She reasoned that COVID-19 damages the lungs' "alveolar-capillary membrane, which is also the site of damage of massive barbiturate overdose," and that this damage would render COVID-positive patients particularly "susceptible to rapid and massive barbiturate damage." *Id.* at 2, 4. But her declaration cites no evidence for that second inference. Moreover, Joseph Antognini, who testified for the government and upon whom the Supreme Court relied in *Bucklew*, *see* 139 S. Ct. at 1131–32, described Van Norman's assertion as "entirely speculative," Antognini Decl., ECF 380-2, at 1, and based on "no published evidence," *id.* at 2. The district court credited Van Norman's testimony on these points because she has treated patients with COVID-19. Execution Protocol Cases, ECF 394, at 12. But that provides little basis for an opinion on the specific question of the relationship between pentobarbital and pulmonary edema. The district court further reasoned that, although Van Norman did not "provid[e] support for her conclusions," Antognini's opinions were "conclusory" as well. *Id.* at 12. But if both sides' evidence on this point was shaky, *Lee* requires denying a stay.

Finally, the record contains only conjecture on whether a lethal injection of pentobarbital would cause any edema before rendering the prisoner insensate. Antognini opined in his written declaration that Higgs and Johnson "are not at increased risk of developing pulmonary edema from pentobarbital prior to the onset of unconsciousness." Antognini Decl., 380-2, at 4. In contrast, Van Norman stated in her oral testimony, but not

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[1] Van Norman also based her assessment on what she described as a "clinically significant" drop recorded in Johnson's pulse oximetry reading from 99% to 97%. Van Norman Decl., ECF 374-3, at 3–4. But the district court accorded that opinion "minimal weight" because pulse oximetry readings are subject to minor variation and Johnson's readings were still within a normal range. *Execution Protocol Cases*, ECF 394, at 18.

her written declaration, that Higgs and Johnson would experience edema "within a second or two" of the injection, and thus at least thirty seconds before becoming insensate. H'rg Tr. at 192. Van Norman's testimony on this point is akin to evidence held insufficient to warrant a stay in *Lee*. There, Van Norman testified that the onset of pulmonary edema could be "virtually instantaneous" in even healthy persons injected with pentobarbital. Van Norman Decl., ECF 26-14, at 33. The Supreme Court declined to credit that thinly supported assertion in *Lee*. And we see no ground for distinguishing it from the near-identical claim that Van Norman has raised here.

Because the plaintiffs have failed to show more than "competing expert testimony" on the factual issues that undergird their method-of-execution challenge, they have not "made the showing required to justify last-minute intervention." *Lee*, 140 S. Ct. at 2591–92.

Apart from the merits, the balance of the equities also favors vacatur. Higgs and Johnson each committed multiple murders. *United States v. Higgs*, 353 F.3d 281, 289–91 (4th Cir. 2003); *United States v. Tipton*, 90 F.3d 861, 868–70 (4th Cir. 1996). Both men have exhausted all available direct and collateral challenges to their convictions and sentences. *Higgs v. United States*, 138 S. Ct. 2572 (2018); *Johnson v. United States*, 546 U.S. 810 (2005). They have had ample opportunity to file clemency petitions. And the Supreme Court repeatedly has stressed that the public has a "powerful and legitimate interest in punishing the guilty," *Calderon v. Thompson*, 523 U.S. 538, 556 (1998), which includes "an important interest in the timely enforcement of a [death] sentence," *Bucklew*, 139 S. Ct. at 1133 (2019).

For these reasons, I vote to vacate the preliminary injunction, as the Supreme Court did in *Lee*.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5004 **September Term, 2020**

Pillard, *Circuit Judge*, dissenting:

Cory Johnson and Dustin Higgs are housed at the Federal Correctional Institution in Terre Haute, Indiana, the site of a COVID-19 outbreak. On December 16, both men tested positive for the virus. In the days that followed, Johnson and Higgs quickly moved to enjoin executions that the government less than two months ago scheduled for January 14 and 15. Their supplemented and amended complaints alleged that the lung damage they suffer as a result of their COVID-19 infections substantially increases the risk that they will unnecessarily experience agonizing pain if they are executed pursuant to the government's lethal injection protocol this week. The government declined to postpone the executions, so the district court scheduled a two-day evidentiary hearing on this newly arising claim in the limited time that remained. Based on evidence developed at the hearing and in light of the existing record in these cases about the operation on the human body of the government's chosen lethal injection drug, the court found that executing the plaintiffs under the protocol at issue so soon after their COVID-19 diagnoses was indeed likely to cause them severe pain in violation of the Eighth Amendment. It thus granted "a *limited* injunction to allow [the plaintiffs] the opportunity to adequately recover from COVID-19." Mem. Op. 3, *In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 05-cv-2337 (D.D.C. Jan. 12, 2021) [hereinafter Mem. Op.].

The government now moves to stay that injunction. I would deny the government's motion because the traditional factors for equitable relief pending appeal weigh strongly in favor of the plaintiffs. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

There is no dispute in this case that Higgs and Johnson were diagnosed with COVID-19 and have demonstrated symptoms since those diagnoses consistent with COVID-19 infections. The issue here is what effect if any their infections will have on their executions. Since last summer, the plaintiffs have been litigating a claim that their executions pursuant to the government's single-drug lethal injection protocol would violate the Eighth Amendment. The basis for this claim is evidence that the drug the government uses under the protocol—a barbiturate called pentobarbital—"causes inmates to experience 'flash pulmonary edema,' a medical condition in which fluid rapidly accumulates in the lungs, causing respiratory distress and sensations of drowning and asphyxiation." *See In re Fed. Bureau of Prisons' Execution Protocol Cases* (*Protocol Cases*), 980 F.3d 123, 131 (D.C. Cir. 2020) (citation and internal quotation marks omitted). The caustic nature of pentobarbital is responsible for that effect; after the drug is injected into the veins, it burns membranes in the lungs that separate blood carrying oxygen from the air sacs that collect that oxygen, thereby causing the accumulation of fluid in the lungs. In November, we

reversed the district court's dismissal of this claim, holding that the plaintiffs had plausibly pleaded an Eighth Amendment claim. *Id*. at 131-35. We noted then that "[t]he government has not contested that most individuals who are executed through the lethal injection of pentobarbital experience flash pulmonary edema," but identified a key remaining factual dispute as whether "the condition occurs only after the inmate has been rendered insensate." *Id*. at 131.

The challenge before us is related to that one, but both factually and legally distinct. The plaintiffs allege with expert support that COVID-19 causes its own damage to the lungs, including to the membranes susceptible to burning by pentobarbital. Because of this damage, the district court credited the plaintiffs' evidence that they will experience flash pulmonary edema more quickly than they might absent their infections, "caus[ing] them to experience the sensation of drowning caused by flash pulmonary edema almost immediately after injection but before they are rendered unconscious." Mem. Op. 2.

The government's motion requires that we engage in two nested inquiries, considering the plaintiffs' Eighth Amendment claim through the lens of the burden the government bears in seeking the "exceptional remedy of [a stay] pending appeal." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017). To make out their Eighth Amendment method-of-execution claim, the plaintiffs have to (1) show their method of execution presents "a 'substantial risk of serious harm'" and (2) identify an alternative method that reduces the risk and is "feasible" and "readily implemented." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50, 52 (2008)). In granting the preliminary injunction, the district court found that the plaintiffs were likely to succeed in establishing both of those elements. Our task is to determine whether to step in and stay the district court's order. Before we may do so, we must determine: "(1) whether the [government] has made a strong showing that [it] is likely to succeed on the merits; (2) whether [the government] 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*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

In my view, each of these four factors individually supports denying the government's requested stay; together, they require as much.

The government focuses on the first factor, arguing that it is likely to succeed in defeating the plaintiffs' method-of-execution claim. The government lacks the "strong showing" required to establish a likelihood of success on the merits. *Id.* It argues that the district court "*could not* have found" the plaintiffs established their Eighth Amendment

claim, asserting that their as-applied COVID-19 challenge does not rise above a battle of the experts. Mot. to Stay 13 (emphasis added). But the government's persistence in highlighting its experts' disagreements with the plaintiffs' experts, *see id.* at 12-13, sidesteps the district court's factfinding after a hearing with live testimony and fails to acknowledge the deference we owe to that factfinding. The court considered the competing evidence and expert testimony offered by the government but repeatedly found that the plaintiffs' evidence and experts were more persuasive and credible. *See, e.g.*, Mem. Op. 10-11 (plaintiffs' witness was "highly credible" and "provided credible and persuasive responses to criticism of her opinions"); *id.* at 13 (plaintiffs' witness "was particularly persuasive and helpful"); *id.* at 14 (government's witness's declaration was unpersuasive and his "live testimony cast further doubt on his credibility"). And for good reason. For instance, one of the government's two witnesses to testify at the evidentiary hearing demonstrated basic misunderstandings of the two plaintiffs' medical records and asserted that x-rays of Higgs's lungs before and after his diagnosis were "unchanged" despite what the district court pointed out were differences on the x-rays visible to even a lay person. *Id.* at 15. In seeking a stay of the district court's order, the government offers no basis for disturbing the district court's carefully considered evidentiary and credibility factual findings.

As the Supreme Court has reminded us—including specifically in the death penalty context— "we review the District Court's factual findings under the deferential 'clear error' standard. This standard does not entitle us to overturn a finding 'simply because [we are] convinced that [we] would have decided the case differently.'" *Glossip*, 576 U.S. at 881 (alterations in original) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). Here, the district court weighed expert declarations, live expert testimony, and the two plaintiffs' medical records, including Higgs's x-rays showing injury to his lungs. Based on that evidence, it found as a matter of fact "that as a result of their COVID-19 infection, [the plaintiffs] have suffered significant lung damage such that they will experience the effects of flash pulmonary edema one to two seconds after injection and before the pentobarbital has the opportunity to reach the brain." Mem. Op. 3. It also found based on detailed expert testimony that the rapid accumulation of fluid in the lungs during flash pulmonary edema would "subject Plaintiffs to a sensation of drowning akin to waterboarding." *Id.* The government has not shown that any of those findings were clearly erroneous, so we cannot overturn them. *See Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009).

The government contends that, even accepting the district court's factual findings, the facts do not support the plaintiffs' claim. It first suggests that the district court applied the wrong legal standard, "fail[ing] to determine whether inmates have carried their burden of providing evidence that the challenge method 'is *sure or very likely* to result in needless

suffering.'" Mot. to Stay 11 (quoting *Glossip*, 576 U.S. at 881). But the district court expressly recited exactly that burden, Mem. Op. 8 (quoting *Baze*, 553 U.S. at 49-50), and then went on to find that the plaintiffs "*will suffer* the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection," *id.* at 11 (emphasis added). The government argues that the district court was wrong to apply a preponderance of the evidence standard, relying on the Supreme Court's guidance that "federal courts should not 'embroil [themselves] in ongoing scientific controversies beyond their expertise.'" Mot. to Stay 12 (alteration in original) (quoting *Glossip*, 576 U.S. at 882); *see also id.* at 11-14. But what the *Glossip* Court drew from that consideration of judicial competence was not a heightened procedural standard of proof, as the government suggests, but rather a demanding substantive standard. As the Court's next statement made clear, "an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain." *Glossip*, 576 U.S. at 882. That is precisely what the district court found the plaintiffs did here.

The government alternatively suggests that the Supreme Court's decision turning away an as-applied Eighth Amendment challenge to a single-drug pentobarbital protocol in *Bucklew v. Precythe*, 139 S. Ct. 1112, 1130 (2019), forecloses plaintiffs' claim here. "Here, as in *Bucklew*," the government argues, the plaintiffs' claim "rests . . . on a brief period of alleged pain before pentobarbital renders them unconscious." Mot. to Stay 15. But "[a]t no point did *Bucklew* hold that any particular period of excruciating suffering is a non-event for Eighth Amendment purposes." Opp. to Mot. 10. Nor did it address the execution protocol or allegations of flash pulmonary edema at issue here. It could not have done so given that, as we have previously noted, neither that protocol nor those allegations were before the *Bucklew* Court. *See Protocol Cases*, 980 F.3d at 130-31, 134-35.

Closer to the claim at hand, the government argues that *Barr v. Lee*, 140 S. Ct. 2590 (2020)—in which the Supreme Court on July 14, 2020, vacated an order preliminary enjoining all of the then-scheduled executions in this case—requires that we also vacate the narrow, time-limited relief before us today. But neither these plaintiffs' current, as-applied claims nor the factual findings the district court made on the evidentiary record after last week's hearing were before the court in *Lee*. The Eighth Amendment claim the Supreme Court in *Lee* held unlikely to succeed was that execution by lethal injection of pentobarbital alone likely caused flash pulmonary edema and associated suffering in all persons subject to that method. The plaintiffs' evidence at that stage was limited to expert declarations.

In vacating that preliminary injunction, the Court in *Lee* underscored that the government had "produced competing expert testimony of its own," and that the paper

record failed to make "the showing required to justify last-minute intervention by a Federal Court." *Id.* at 2591. Here, by contrast, the plaintiffs' focused, as-applied challenges arise from the extraordinary circumstance of facing execution while infected with COVID-19. The district court found that Higgs and Johnson's pulmonary impairment from the disease exposes them to an elevated, substantial, and unnecessary risk of severe pain. Plaintiffs had no basis to raise such claims before their diagnoses,[2] so can hardly be disparaged as requesting "last-minute" court intervention. The government has again produced expert evidence seeking to rebut the plaintiffs' new claims, as it did in *Lee*. But the record now, unlike then, includes factual findings the district court made based on an evidentiary hearing at which it observed live witness testimony and weighed the individual experts' competencies and credibility. *Cf. id.* at 2594 (Sotomayor, J., dissenting) (noting "no factfinder ha[d] adjudicated" those claims). And at this hearing, one of the plaintiffs' experts who the district court found credible testified that, even assuming the government was right about the factual dispute in *Lee*—that is, that a healthy individual executed with pentobarbital would be unconscious when flash pulmonary edema occurred (a claim with which the expert disagreed)—it was nonetheless "certain" that an individual diagnosed with COVID-19 would be sensate at the onset of flash pulmonary edema and thus experience the accompanying "sensation of drowning and suffocation." Tr. of 1/5/21 Mot. Hearing at 115, *Protocol Cases*, No. 19-mc-145 (D.D.C. Jan. 7, 2021), ECF No. 389.

The government has also failed to make a strong showing that the plaintiffs are likely to fail on the second element of their method-of-execution claim. The plaintiffs identified two alternative methods of execution, each of which the district court found is feasible and would significantly reduce the risk of severe pain. The first is a two-drug protocol that would add a pre-dose of an opioid pain medication, such as morphine or fentanyl—a method of execution we have previously observed "has been used by both states and the federal government, and is still used in a number of jurisdictions." *Protocol Cases*, 980 F.3d at 133. The government emphasizes that we have not before reached the issue of

[2] Indeed, just a week before those diagnoses, the district court dismissed as speculative Higgs' challenge to his scheduled execution based on the risk that he would contract COVID-19. *See* Mem. Op. 1, *In re FBOP Protocol Cases*, No. 19-mc-145 (D.D.C. Dec. 9, 2020), ECF No. 354. Higgs had filed a complaint in September raising concerns that he was particularly vulnerable to COVID-19 because of his asthma. *See* Complaint at 26-27, *In re FBOP Protocol Cases*, No. 19-mc-145 (D.D.C. Sept. 1, 2020), ECF No. 229-1. The government dismissed Higgs' allegations about COVID-19 at Terre Haute as "dated" two months later. *See* Mem. in Support of Mot. to Dismiss Higgs' Complaint at 10 n.3, *In re FBOP Protocol Cases*, No. 19-mc-145 (D.D.C. Nov. 3, 2020), ECF. No. 306-1.

whether the plaintiffs can actually succeed in establishing that such a method is an adequate alternative, and that the plaintiffs here have failed to offer evidence sufficient to do so. *See* Mot. to Stay 18. But the district court itself found based on expert testimony that the proposed two-drug protocol "is likely to be as effective as it is easily and quickly administered." Mem. Op. 23; *see also id.* at 21 (citing expert declaration). The second is execution by firing squad—a method that two Justices have suggested could be a constitutionally permissible alternative. *See Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring); *Arthur v. Dunn*, 137 S. Ct. 725, 733-34 (2017) (Sotomayor, J., dissenting from the denial of certiorari). The government argues here that the difference in pain between execution by firing squad and the government's existing lethal injunction protocol is not sufficient to support an Eighth Amendment claim. But again, the district court found otherwise, citing evidence that suggests "execution by firing squad would significantly reduce the risk of severe pain." Mem. Op. 24. On neither of these proposed alternatives does the government even seek to establish that the district court's factual findings are clearly erroneous.

More importantly, under the unique circumstances of this case, holding off on the plaintiffs' executions until they can recover from COVID-19 itself constitutes a clearly adequate alternative "method" of execution. The plaintiffs' as-applied COVID-19 claim is unlike other method-of-execution challenges insofar as they do not seek to avoid entirely the method of execution the government has chosen. All they ask is that they not be executed in that manner while suffering from COVID-19. Holding off on their executions until they recover is an alternative course that is both feasible and readily implemented, as the government's repeated scheduling and rescheduling of various execution dates since 2019 makes clear. As the district court found, the gratuitous pain to the plaintiffs' COVID-19-infected lungs "would not occur were [their] execution[s] to be delayed." Mem. Op. 16. Proceeding with the executions as scheduled would thus "cruelly superadd[] pain to the death sentence," *Bucklew*, 139 S. Ct. at 1125, imposing on the plaintiffs "needless suffering" in violation of the Eighth Amendment. *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 50).

The government's briefing on the other three stay factors only underscores that each weighs even more heavily in the plaintiffs' favor than the first. As for irreparable injury—a "critical" factor in the traditional stay standard, *Nken*, 556 U.S. at 434—the government will suffer none in the absence of a stay. All that the district court's order requires is that the government delay executing the plaintiffs until March. "After suspending federal executions for over seventeen years," the district court observed, "the government announced a new Execution Protocol and a resumption of executions in July 2019, and since July [2020] has

executed eleven inmates. Any potential harm to the government caused by a brief stay is not substantial." Mem. Op. 29.

Issuance of the stay, on the other hand, would clearly cause the other parties in this case substantial, irremediable harm: Plaintiffs would be executed via a method that the district court has determined is likely under the current circumstances to cause them agonizing, readily avoidable pain. And the public interest most evidently weighs in favor of denying the stay. The Court has made clear that "the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew*, 139 S. Ct. at 1133 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). But 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). Proceeding with the executions of inmates infected with COVID-19 poses serious health risks not only to inmates but also the prison officials responsible for administering the death penalty and those choosing to or charged with witnessing it. Given that the district court has delayed the executions only long enough to ensure the plaintiffs no longer suffer from COVID-19, its order appropriately balances an interest in timely enforcement against the likelihood of unconstitutional harm to the plaintiffs and health risks to the public.

* * *

Following a series of eleven executions carried out by the federal government since July 2020—including nine executions of plaintiffs in this case—Johnson and Higgs are the only federal inmates left on death row who face a scheduled execution. The government insists that these final scheduled executions must proceed as planned. It fails to explain why they must take place this week. To be sure, the Supreme Court has emphasized that "[l]ast-minute stays should be the extreme exception, not the norm," in death penalty cases, and that "'the last-minute nature of an application' that 'could have been brought' earlier . . . 'may be grounds for denial of a stay.'" *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill*, 547 U.S. at 584). But Johnson's and Higgs' claims could not have been brought earlier. As soon as they knew of their COVID-19 diagnoses, they notified the district court; within days, they supplemented their complaints. The district court then held an evidentiary hearing in the limited time it had available, and, based on the evidence presented at that hearing, granted a limited preliminary injunction, delaying the plaintiffs' executions only long enough for them to recover from COVID-19. Contrary to the government's assertion, nothing about the issuance of this injunction was "untimely." Mot. to Stay 1. The district court ably responded to evolving circumstances and carefully assessed the plaintiffs' unique method-

of-execution challenge—a category of Eighth Amendment claim that the Supreme Court, even in establishing a high substantive bar, has nonetheless continued to leave available to death row inmates like the plaintiffs here.

Our task is to determine whether the government is entitled to a stay of the district court's injunction pending appeal. For the above reasons, I believe the government has failed to meet the high burden required to second-guess the district court's factfinding and stay its order. Any desire on the part of the government to check two more executions off its list does not justify concluding otherwise. I would thus deny the stay.

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:	)	
Roane v. Barr, 05-cv-2337	)	

MEMORANDUM OPINION

With over 376,000 Americans dead and more than twenty-one million infected, the COVID-19 pandemic "need[s] no elaboration." *Merrill v. People First of Ala.*, 141 S. Ct. 25, 26 (2020) (Sotomayor, J., dissenting). And with each day bringing a new record number of infections, "the COVID-19 pandemic remains extraordinarily serious and deadly." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 73 (2020) (Kavanaugh, J., concurring).

Among the most susceptible to the spread of COVID-19 is the prison inmate population. As several outbreaks have shown, "COVID-19 can overtake a prison in a matter of weeks." *Valentine v. Collier*, 141 S. Ct. 57, 62 (2020) (Sotomayor, J., dissenting) (discussing one facility which recorded over 200 cases, 5 deaths, and 12 hospitalizations in less than three weeks). This is unsurprising given that most inmates are unable to socially distance, have limited access to adequate testing, and are often housed in buildings with poor circulation.

Despite the pandemic, and the current record high rates of infections and fatalities, Defendants intend to go forward with the scheduled executions of Plaintiffs Cory Johnson and Dustin Higgs on January 14 and 15, 2021, although both men have been diagnosed with COVID-

19. Higgs and Johnson are housed at the Federal Correctional Institution in Terre Haute, Indiana, a facility experiencing its own "massive COVID-19 outbreak." Michael Balsamo & Michael R. Sisak, *Execution staff have COVID-19 after inmate put to death*, AP News (Dec. 8, 2020), https://apnews.com/article/prisons-coronavirus-pandemic-executions-terre-haute-indiana-e80af6a566bbff50ed5e9a097c305dbb.

Defendants intend to carry out the executions according to the procedures set forth in the Federal Bureau of Prisons 2019 Execution Protocol (the 2019 Protocol), which includes a lethal injection of five grams of pentobarbital. Plaintiffs received notice of their diagnoses less than a month before their executions—after Defendants assured the court that "allegations regarding the prevalence of COVID-19 at [] Terre Haute . . . are dated" and that adequate procedures were in place to protect the inmate population. (ECF No. 306-1 at 10 n.3.) Plaintiffs have asked the court to enjoin their executions, arguing that injection of a lethal dose of pentobarbital given their COVID-19 infections will cause them to suffer an excruciating death. Specifically, they argue that damage to their lungs and other organs will cause them to experience the sensation of drowning caused by flash pulmonary edema almost immediately after injection but before they are rendered unconscious.

Defendants argue that Plaintiffs' claims here are the same as those previously rejected by the Supreme Court. (*See* ECF No. 380, Defs. Opp'n at 17.)[1] The court disagrees. Plaintiffs have

[1] Citing Sixth Circuit precedent, Defendants also argue that "even if any of the inmates did briefly experience the effects of 'flash' pulmonary edema prior to becoming insensate, it would not suffice to establish a violation of the Eighth Amendment." (Def. Opp'n at 16 (citing *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 298 (6th Cir. 2019) (holding that pulmonary edema does not "qualify as the type of serious pain prohibited by the Eighth Amendment.")).) This is at odds with D.C. Circuit precedent, which found that flash pulmonary edema could indeed give rise to an Eighth Amendment violation. *See Execution Protocol Cases*, 980 F.3d at 132. Defendants similarly contend that in *Bucklew*, the Supreme Court "rejected an Eighth Amendment challenge to a single-drug pentobarbital protocol "as applied to a prisoner with a

pleaded as-applied Eighth Amendment challenges based on their specific health conditions. Moreover, they allege that their health has been worsened by their infection with COVID-19, an illness which has resulted in a global pandemic for the better part of a year. Given these unique circumstances, the court held an evidentiary hearing to assess the credibility of the parties' expert opinions.

Having heard and reviewed the expert testimony, the court finds that Plaintiffs are likely to succeed on the merits of their as-applied Eighth Amendment challenge. Specifically, they have demonstrated that as a result of their COVID-19 infection, they have suffered significant lung damage such that they will experience the effects of flash pulmonary edema one to two seconds after injection and before the pentobarbital has the opportunity to reach the brain. This will subject Plaintiffs to a sensation of drowning akin to waterboarding, a side effect that could be avoided were Defendants to implement certain precautions, such as administering a pre-dose analgesic or carrying out the execution by firing squad.

For the reasons set forth below, and in light of these unprecedented circumstances, the court will grant a *limited* injunction to allow Plaintiffs the opportunity to adequately recover from COVID-19, at which point it will evaluate whether to extend the injunction in light of any new medical evidence submitted by the parties.

I. BACKGROUND

After a hiatus of more than fifteen years, on July 25, 2019, the Department of Justice announced plans to resume federal executions. *See* Press Release, Dep't of Justice, Federal

unique medical condition that could only have increased the baseline risk of pain associated with pentobarbital." (Defs. Opp'n at 17 (discussing *Bucklew*, 140 S. Ct. at 2159).) The D.C. Circuit disagrees. "Allegations regarding flash pulmonary edema were not [] before the Supreme Court in *Bucklew*." *Execution Protocol Cases*, 980 F.3d at 131.

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. To implement these executions, the Federal Bureau of Prisons (BOP) adopted a new execution protocol: the 2019 Protocol. (ECF No. 39-1, Admin. R. at 1021–75.)

On September 1, 2020, the court granted Higgs' unopposed motion to intervene in *Roane v. Gonzales*, No. 05-2337, a case brought by several death row inmates (including Plaintiff Cory Johnson) challenging the legality of the 2019 Protocol. (ECF Nos. 229, 229-1.)[2] Higgs' claims were largely the same as those asserted by the other Plaintiffs, with one exception: he brought an as-applied challenge under the Eighth Amendment, alleging that because of his asthma and because he believed that had contracted COVID-19 in February 2020, he faced a unique and individualized risk of serious harm if executed using pentobarbital. (ECF No. 229-1 ¶¶ 166–72.)

Defendants moved to dismiss Higgs's as-applied claim, (*see* ECF No. 306), arguing that the claim was speculative because Higgs did not allege that he had tested positive for COVID-19, nor had he actually suffered lung damage from the disease. The court agreed and granted the motion on December 9, 2020. (ECF Nos. 354–55.)

During a status conference on December 17, 2020, Higgs' counsel reported that Higgs had tested positive for COVID-19. Higgs was granted leave to file a Second Amended and Supplemental Complaint, (ECF No. 370), in which he alleges that his heart condition, combined with his asthma, puts him at a greater risk of pulmonary edema, which is further aggravated by

[2] The case originated as a challenge to the federal government's death penalty procedures in 2005 but was subsequently amended to challenge the 2019 Protocol.

his COVID-19 diagnosis.[3] Higgs also filed a second motion for a preliminary injunction. (ECF No. 371, Higgs Mot.)

On December 16, 2020, Johnson also tested positive for COVID-19 and was also permitted to file a supplemental complaint and motion for a preliminary injunction. (*See* ECF No. 372; ECF No. 373.) Johnson's allegations are similar to Higgs' except Johnson does not allege any underlying medical conditions, and he has experienced slightly different symptoms. (*See generally* ECF No. 375, Johnson Mot.)

Defendants argue that Plaintiffs have shown only that there is competing testimony between credible experts, which is insufficient to succeed on a method-of-execution Eighth Amendment claim.

On January 4 and 5, the court held an evidentiary hearing to assess the expert testimony proffered on Plaintiffs' COVID-19 related claims. Drs. Kendall von Crowns and Todd Locher testified for Defendants and Drs. Gail Van Norman and Michael Stephen testified for Plaintiffs.[4]

II. ANALYSIS

A preliminary injunction is an "extraordinary remedy" requiring courts to assess four factors: (1) the likelihood of the plaintiff's success on the merits, (2) the threat of irreparable harm to the plaintiff absent an injunction, (3) the balance of equities, and (4) 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

[3] Higgs has another Amended and Supplemental Complaint and accompanying motion for a preliminary injunction pending before the court. (*See* ECF Nos. 343–44.) The court will address that motion for a preliminary injunction in a separate opinion.

[4] The court also briefly heard from Dr. Mitchell Glass, who was slated to testify in favor of Plaintiffs, but his testimony was stricken on Defendants' unopposed motion.

on one factor could make up for a weaker showing on another." *Sherley v. Sebelius,* 644 F.3d 388, 392 (D.C. Cir. 2011). It has been suggested, however, that a movant's showing regarding success on the merits "is an independent, free-standing requirement for a preliminary injunction." *Id.* at 393 (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring)).

A. Likelihood of Success on the Merits

Plaintiffs bringing an Eighth Amendment challenge to a method of execution face a high bar. They must demonstrate that the 2019 Protocol presents a "substantial risk of serious harm," and they must identify an alternative method of execution that will significantly reduce the risk of serious pain and that is feasible and readily implemented. *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)); *see also Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) (confirming that "anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test."). Indeed, the Supreme Court "has yet to hold that a State's method of execution qualifies as cruel and unusual." *Bucklew*, 139 S. Ct. at 1124.

The court has been down this road before. In July, it enjoined four executions on the basis that the use of pentobarbital would subject Plaintiffs to suffer a cruel and unusual death in violation of the Eighth Amendment. In so ruling, the court found that Plaintiffs had provided scientific evidence that "overwhelmingly" indicated they would suffer the effects of flash pulmonary edema, including a sensation of drowning, while they were still conscious. (ECF No. 135 at 9.) The court weighed the declarations of several experts, including Drs. Gail Van Norman and Joseph Antognini.

On appeal, the Supreme Court vacated this court's injunction, concluding that Plaintiffs were unlikely to succeed on the merits of their Eighth Amendment claim. *See Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). The Court noted that pentobarbital "has become a mainstay of state executions . . . [h]as been used to carry out over 100 executions, without incident," and was upheld "as applied to a prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter." *Id.* The Court acknowledged Plaintiffs' expert declarations regarding flash pulmonary edema but noted that "the government has produced competing evidence of its own, indicating that any pulmonary edema occurs only *after* the prisoner had died or been rendered fully insensate." *Id.* In light of the competing evidence—and despite this court's assessment that Plaintiffs' evidence was more credible—the Supreme Court found that Plaintiffs had "not made the showing required to justify last-minute relief." *Id.* It further emphasized that "[l]ast-minute stays" must be "the extreme exception, not the norm." *Id.* (quoting *Bucklew*, 139 S. Ct. at 1134).

Given the Supreme Court's decision in *Lee*, this court subsequently dismissed Plaintiffs' general Eighth Amendment claim, finding that "no amount of new evidence will suffice to prove that the pain pentobarbital causes reaches unconstitutional levels." (ECF No. 193 at 4.) The D.C. Circuit reversed. "By pleading that the federal government's execution protocol involves a 'virtual medical certainty' of severe and torturous pain that is unnecessary to the death process and could readily be avoided by administering a widely available analgesic first, the Plaintiffs' complaint properly and plausibly states an Eighth Amendment claim." *In Re Fed. Bureau of Prisons Execution Protocol Cases*, 980 F.3d 123, 133 (D.C. Cir. 2020). However, the Court of Appeals noted that Plaintiffs had a "difficult task ahead [] on the merits" and that if all they could produce was a "'scientific controvers[y]' between credible experts battling between 'marginally

safer alternative[s],' their claim is likely to fail on the merits." *Id.* at 135 (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008)).

1. Substantial Risk of Serious Harm

In order to succeed on their Eighth Amendment claim, Plaintiffs must show that execution under the 2019 Protocol presents a risk of severe pain that is "sure or very likely to cause serious illness and needless suffering" and gives rise to "sufficiently imminent dangers," such that prison officials cannot later plead "that they were subjectively blameless." *Baze*, 553 U.S. at 49–50 (citations omitted). Although the Supreme Court has cautioned against federal courts becoming "boards of inquiry charged with determining 'best practices' for executions," *id.* at 51, this question necessarily requires some weighing of scientific evidence. *See, e.g.*, *Glossip*, 576 U.S. at 881 (affirming district court's findings that midazolam was "highly likely" to render inmates unable to feel pain during execution).

It is undisputed that both Higgs and Johnson have been diagnosed with COVID-19 and have been exhibiting symptoms consistent with that diagnosis, including shortness of breath, an unproductive cough, headaches, chills, fatigue, etc. To date, neither has been hospitalized or required treatment in an intensive care unit.

It is further undisputed that Plaintiffs will suffer flash pulmonary edema as a result of the 2019 Protocol, "a medical condition in which fluid rapidly accumulates in the lungs causing respiratory distress and sensation of drowning and asphyxiation." *See Execution Protocol Cases*, 980 F.3d at 131. Thus, the question is whether these two Plaintiffs will experience the symptoms of flash pulmonary edema while they are still conscious, an issue that has been the subject of much debate amongst the experts in this case. After the Supreme Court's decision in *Lee*, this court has found that the question of whether an inmate, *absent aggravating factors*, will suffer

flash pulmonary edema while sensate is one on which reasonable minds can differ. (*See* ECF No. 261 at 38.)[5]

But the issue presently before the court is whether Plaintiffs will suffer flash pulmonary edema while sensate given the extensive lung damage they have suffered from COVID-19. The court had not previously received expert testimony on this issue. And having no meaningful way to resolve the dispute on the expert declarations alone, it exercised its discretion and held an evidentiary hearing.

"A preliminary injunction may be granted on less formal procedures and on less extensive evidence than a trial on the merits, but if there are genuine issues of material fact raised . . . an evidentiary hearing is required." *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004) (internal citations omitted); *but see* LCvR 65.1(d) ("The practice in this jurisdiction is to decide preliminary injunction motions without live testimony *where possible*." (emphasis supplied)). And where "a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question on the basis of documents alone, without an evidentiary hearing." *Cobell*, 391 F.3d at 262 (citing *Prakash v. Am. Univ.*, 727 F.2d 1174, 1181 (D.C. Cir. 1984)); *see also* Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed. 1998) (explaining that when a motion for a preliminary injunction "depends on resolving a factual conflict by assessing the

[5] In denying injunctive relief for Plaintiffs' Food, Drug, and Cosmetic Act claim, the court previously found that they had failed to demonstrate that they were sure to suffer flash pulmonary edema while they were sensate. (*See* ECF No. 261 at 40.) But in doing so, the court did not find that Defendants' experts had definitively answered the question. Rather, the court found that given the expert testimony—which did not involve individual medical records—Plaintiffs had failed to meet their burden. Furthermore, that dispute centered on the question of whether *every* plaintiff executed with pentobarbital would suffer flash pulmonary edema before being rendered insensate. The dispute here involves aggravating factors not previously before the court.

credibility of opposing witnesses, it seems desirable to require that the determination be made on the basis of their demeanor during direct and cross-examination, rather than on the respective plausibility of their affidavits.”).

i. COVID-19 Lung Damage – Higgs

Dr. Gail Van Norman, an anesthesiologist and professor in the Department of Anesthesiology and Pain Medicine at the University of Washington in Seattle, opined that “the COVID-19 virus leads to significant lung damage” and that “[f]or prisoners experiencing COVID-related lung damage at the time of their execution, flash pulmonary edema will occur even earlier in the execution process, and before brain levels of pentobarbital have peaked.” (ECF No. 374-1, Van Norman Supp. Decl. at 1.) “To a reasonable degree of medical certainty, these prisoners will experience sensations of drowning and suffocation sooner than a person without COVID-related lung damage and, therefore, their conscious experience of the symptoms of pulmonary edema will be prolonged.” (*Id.*) She explained that COVID-19 causes “severe damage to many areas in the airways and lungs, but most specifically to the alveolar-capillary membrane, which is also the site of damage of massive barbiturate overdose.” (*Id.* at 2.) These effects “can be seen by radiography in . . . at least 79% of patients who have symptomatic COVID-19 infection, even when such infections are mild.” (*Id.*) Damage to the lungs may eventually resolve, though studies indicate that “severe pulmonary functional changes have been demonstrated for more than 90 days after infection.” (*Id.*; *see also id.* at 5 (listing studies).) She reiterated these points during her direct examination.

The court found Dr. Van Norman highly credible. She testified that she has personally tended to patients hospitalized with COVID-19 who needed airway management, which included administering anesthesia. (*See* ECF No. 389, H’rg Tr. at 145.) She also testified that when

pentobarbital is injected, it flows first to the heart and is then pumped to the lungs before going to the rest of the body. (*Id.* at 147.) Because pentobarbital is caustic, a high concentration dose will burn the alveoli-capillary membrane in the lungs within a second or two of injection. (*Id.* at 192.) A person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain. (*Id.* at 147–48.) Dr. Van Norman also explained that while pentobarbital's anesthetic effect can take anywhere from thirty seconds to two-and-a-half minutes, it takes longer to reach peak effectiveness. (*Id.* at 150.) Thus, Plaintiffs will suffer the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection.

Dr. Van Norman provided credible and persuasive responses to criticism of her opinions. In his fifth amended declaration, Defendants' expert, Dr. Joseph Antognini criticized Dr. Van Norman for not: 1) providing published evidence that asymptomatic or mildly symptomatic patients have increased propensity for pulmonary edema when administered lethal doses of pentobarbital; 2) providing published evidence that pulmonary damage increases the risk of pulmonary edema from pentobarbital; and 3) specifying when the onset of the pulmonary edema might occur in someone who has suffered COVID-19 lung damage. (ECF No. 380-2, Antognini 5th Supp. Decl. ¶¶ 3–5.) As to the first two criticisms, Dr. Van Norman explained that there are no such studies because no physician or scientist has administered massive overdoes of intravenous pentobarbital to COVID-19 patients. (*Id.* at 153.) Dr. Van Norman also stated that, in her opinion, inmates with lung damage from COVID-19 will experience flash pulmonary edema within a second or two after injection, before pentobarbital has reached the brain. (*Id.* at

192 (explaining that pentobarbital is "a caustic chemical" which is "going to attack an already leaky membrane").)[6]

The court found Dr. Antognini's opinions less helpful.[7] Although he faulted Dr. Van Norman for not providing support for her conclusions, Dr. Antognini's opinions regarding the effect of a pentobarbital injection on a person with COVID-19 symptoms were themselves conclusory. In fact, Dr. Antognini cited two studies in his entire declaration, neither of which involved COVID-19. His declaration did not indicate whether he even treats COVID-19 patients. (Antognini Fifth Supp. Decl. ¶ 5.) Relying in large part on his prior testimony, he stated that "unconsciousness occurs when a clinical dose of pentobarbital is administered (around 500 mg—a tenth of the execution dose)." (*Id.*) This statement does not address Dr. Van Norman's explanation that injected pentobarbital will begin to attack damaged lungs before it reaches the brain, and Dr. Antognini did not proffer how long it would take for an inmate to be rendered unconscious. Thus, his declaration did not adequately refute Dr. Van Norman's opinions.

Dr. Michael Stephen corroborated Dr. Van Norman's theory regarding lung damage. During his testimony, Dr. Stephen, an associate professor in the Department of Medicine and Division of Pulmonary and Critical Care at Thomas Jefferson University, who actively treats and reviews x-rays of COVID-19 patients, interpreted x-rays of Higgs' lungs taken in October 2018 and December 2020. Dr. Stephen testified that Higgs' lungs were severely hyperinflated, as

[6] On cross examination, Dr. Van Norman admitted that she was opposed to the death penalty, but the court has no reason to believe her opposition has biased her scientific assessments, particularly in light of other evidence in the record.

[7] Defendants did not call Dr. Antognini as a witness and Plaintiffs declined to call him for cross-examination.

shown by the fact that on the x-ray, his lungs could not fit on one lung plate. (H'rg Tr. at 99.) Consequently, he explained, the radiologist had to take three views, which in Dr. Stephen's experience was very rare absent a very serious obstructive lung disease such as asthma. (*Id.*) Dr. Stephen also explained that chest x-rays typically only show seven to nine ribs, but Higgs' x-ray films showed eleven ribs, which indicated that Higgs has so much air in his lungs from poorly controlled asthma that his diaphragm is being pushed down, causing the x-ray to capture more ribs than it normally would. (*Id.*) Dr. Stephen also noted evidence of a tabletop (or flat) diaphragm that has become exaggerated between 2018 and 2020, suggesting severely poorly controlled asthma. (*Id.* at 99–100.)

Dr. Stephen's testimony was particularly persuasive and helpful, as he walked the court through a comparison of Higgs' lung images to show the extensive damage caused by COVID-19. As was readily apparent, the right lung exhibited more opacity in certain areas in 2020 than in 2018. (*Id.* at 95.) Dr. Stephen described these opacities as interstitial markings, which are more visible as a result of inflammation caused by "viral pneumonia from COVID-19." (*Id.* at 97.) Because of this inflammation, he concluded that Higgs' alveoli-capillary membrane has already been breached by COVID-19 particles, and white blood cells are flooding into his lungs to combat them. (*Id.* at 97.) Thus, he concluded, Higgs' heart will be pumping very hard to supply blood to the inflamed parts of the lung, a condition that places Higgs at high risk for pulmonary edema. (*Id.* at 98.)

To rebut Drs. Van Norman and Stephen's testimony, Defendants submitted a declaration from Dr. Todd Locher. Interpreting studies relied upon by Drs. Van Norman and Stephen, Dr. Locher opined that "asymptomatic and mildly symptomatic cases [of COVID-19] have a lower percentage of lung involvement." (ECF No. 381-1, Locher Decl. ¶ 11.) After reviewing both

Higgs' and Johnson's medical records, Dr. Locher concluded that both men were experiencing "minimal symptoms." (*Id.* ¶ 12.) With regard to Higgs' x-rays, Dr. Locher agreed with Dr. Justin Yoon, the interpreting radiologist proffered by the government, that there was no "acute cardiopulmonary process" and that Higgs had clear lungs "except for an unchanged right apical reticular nodular density." (*Id.*) He concluded that there was "no evidence [] of lung involvement due to COVID-19." (*Id.*)

Dr. Locher further noted that "there is no evidence in the medical literature suggesting an injection with pentobarbital would somehow exacerbate symptoms or physiologic abnormalities in patients with COVID-19." (*Id.* ¶ 14.) Thus, he concluded, "if pulmonary edema were to occur upon the injection of 5 g of pentobarbital, it is not likely that these inmates would experience pulmonary edema more quickly or severely than inmates who have been diagnosed with COVID-19." (*Id.*)

The court is unpersuaded by this testimony. For one, as Dr. Van Norman explained, there have been no studies involving the injection of large doses of pentobarbital in COVID-19 patients, nor would one expect any. Dr. Locher also stated that a chest x-ray is not as sensitive as a CT scan in detecting lung involvement for COVID-19, but nevertheless concluded that "any findings on a CT scan would likely be minor in view of a normal chest x-ray." (*Id.* ¶ 13.) He appeared to be relying on a less accurate measurement to postulate that a more accurate one would be less useful.

Dr. Locher's live testimony cast further doubt on his credibility. On cross-examination, it was unclear how closely he had reviewed the relevant medical records. For instance, his declaration stated that Higgs was not experiencing any symptoms on December 29, 2020, despite the fact that Higgs' medical records indicates he had a persistent cough. (*Compare* Locher Decl.

¶ 12 ("On 12/29/2020, the medical record reports no shortness of breath, sore throat or other symptoms"), *with* ECF No. 380-4, Smilege Decl. at 58 ("Cough (Duration/Describe: persistent").) Similarly, Dr. Locher's declaration states that Johnson exhibited no symptoms of COVID-19 on December 22 and 23, whereas the records clearly indicate Johnson reported a headache on December 22. (*Compare* Locher Decl. ¶ 12, *with* Smiledge Decl. at 138.) Dr. Locher confirmed during cross-examination that a headache is indeed a common symptom of COVID-19. (H'rg Tr. at 65.) These inaccuracies alone do not cast Dr. Locher's entire testimony in doubt, but they do call into question the amount of time he spent reviewing the evidence, particularly in light of his conclusion that Higgs and Johnson have had mild cases of COVID-19, and the implication that their cases have mostly resolved. (*See* Locher Decl. ¶ 12.) Indeed, Dr. Locher stated that it would not surprise him if either Higgs or Johnson reported persistent shortness of breath into January. (Hr'g Tr. at 72.)

More concerning was Dr. Locher's interpretation of Higgs' x-rays. In his declaration, Dr. Locher agreed with Dr. Yoon, the reviewing radiologist that Higgs' 2020 x-ray indicated a "stable chest examination without acute cardiopulmonary process" and that Higgs has "[c]lear lungs except for unchanged right apical reticular density" when compared to the 2018 x-rays. (Locher Decl. ¶ 12.) He reiterated his opinion that Higgs' 2020 x-ray was "unchanged compared to the previous file dated in October 2018" aside from a small upper right lobe shadow. (H'rg Tr. at 60.) Comparing the two images, one does not have to be an expert to see that this statement is inaccurate. As Dr. Stephen pointed out, the right lung in the 2020 image has more prevalent cloudier streaks when compared to the same lung in 2018. The opacity is present in the left lung, but not to the same extent, which suggests that this is not merely an imaging error. It is troubling that Dr. Locher did not account for these obvious differences between the two

scans, even when asked about Dr. Stephen's assessment by Defendants' counsel during direct examination. Instead, he merely stated his disagreement with Dr. Stephen. (*See id.*)

And while Dr. Locher reached the same conclusion as Dr. Yoon, the court has little information on Yoon, who was not called to testify and who did not submit a declaration in support of his conclusions.[8] The court does not know if Dr. Yoon routinely reviews x-rays of COVID-19 patients.

Based on the declarations and live testimony, the court finds that Higgs has shown that if his execution proceeds as scheduled—less than a month after his COVID-19 diagnosis—he will suffer flash pulmonary edema within one or two seconds of injection but before the pentobarbital reaches the brain and renders him unconscious. Though the Eighth Amendment does not guarantee a painless death, it does prohibit needless suffering. *See Baze*, 553 U.S. at 49–50. The pulmonary edema that Higgs will endure while he is still conscious would not occur were his execution to be delayed. A *brief* injunction will allow Higgs' lungs to sufficiently recover so that he may be executed in a humane manner. Thus, Higgs has successfully demonstrated a substantial risk of serious harm.[9]

ii. COVID-19 Lung Damage – Johnson

Despite the lack of x-ray evidence in Johnson's case, the court reaches the same conclusion for Johnson for several reasons. The assessment of the live testimony above applies

[8] Dr. Yoon's interpretation of Higgs' 2020 x-ray is included in Higgs' BOP medical record. (*See* Smiledge Decl. at 107.)

[9] Higgs also alleges that his COVID-19 diagnosis, given his severe asthma, makes it more likely that he will experience flash pulmonary edema while still conscious. Higgs does not allege that his asthma alone will cause him to suffer these effects. Having already found that Higgs' COVID-19 symptoms will cause him to suffer from flash pulmonary edema while sensate, the court need not determine whether and to what effect asthma has damaged his lungs.

with equal force to Johnson's COVID-19 as-applied claim. It is undisputed that Johnson is suffering from symptoms of COVID-19, which, as Drs. Van Norman and Stephen have shown, means he has suffered damage to his alveoli-capillary membrane. Were he to be injected with pentobarbital in his current state, the drug would travel first to his heart and then to his lungs. As the drug courses through his lungs, it will burn the alveoli-capillary membrane which has already been damaged from COVID-19, triggering flash pulmonary edema, all before the pentobarbital even reaches his brain and begins to have an anesthetizing effect.

And though Johnson's lungs have not been x-rayed (despite a request by Plaintiffs, *see* ECF No. 386), the court can infer from the expert testimony that Johnson has suffered COVID-19 related lung damage. Here again, Dr. Antognini's declaration failed to adequately account for the biological sequence of events that occurs after injection, particularly given COVID-19 symptoms. And Dr. Locher's failure to account for obvious changes in Higgs' x-ray undermines his opinion that patients with mild COVID-19 symptoms are unlikely to suffer extensive lung damage.

The record contains several pulse oximetry readings taken from Johnson over the course of his illness, the interpretation of which was also debated amongst the experts. But the court found this evidence less helpful. As Dr. Van Norman explained in a supplemental declaration she prepared for Johnson, "[a] clear change from 99% to 97%, as Mr. Johnson's pulse oximetry results show, is clinically significant and indicates significant changes have occurred in gas exchange in the lungs, particularly in the setting of early COVID-19 infection." (ECF No. 374-3, Van Norman Decl. Re Johnson ¶ 11.) She explained that "pulse oximetry is both a late and relatively crude method of examining impairments in oxygen exchange in the lungs." (*Id.* ¶ 9.)

Thus, "a person's oxygen level can fall by 80% and still show 100% SaO_2 [(the reading captured by a pulse oximetry test)]." (*Id.* ¶ 10.)

Dr. Antognini disputed this characterization. In his view, "[i]t is misleading to state that going from 99% to 97% is a trend," a change which is "clinically insignificant" because Johnson's pulse oximetry readings have been in the normal range. (Antognini 5th Supp. Decl. ¶ 7.) Dr. Antognini also explained that "[p]ulse oximetry readings are subject to variation and depend considerably on the placement of the probe, the amount of circulation to the finger, motion artifact, etc." (*Id.*)

Dr. Van Norman did not address this critique and did not appear to account for the fact that pulse oximetry readings are subject to variation or that, despite a drop in his pulse oximetry readings, Johnson's oxygen saturation level have remained in the normal range. In fact, even if the court accepts Dr. Van Norman's assertion that a decrease in pulse oximetry *could* signal a steep deprivation of oxygen, it is unclear whether that has occurred in Johnson's case and to what extent. (*See* Van Norman Decl. Re Johnson ¶ 9.) In any event, Dr. Van Norman confirmed that *"[e]ven if [Johnson's] pulse oximetry readings had not decreased* at this point in his infection, the studies I previously cited indicate that he is experiencing ongoing damage to the alveolar capillary membrane that will persist for a prolonged period of time after symptoms resolve." (*Id.* ¶ 12.) The court further notes that Johnson received a 98% reading in a pulse oximetry test performed on January 2, 2021. (*See* ECF No. 387-1 at 3.) Because the interpretation of these results is unclear, the court will accord them minimal weight.

Nevertheless, given the testimony proffered for Higgs and the relative weight the court has afforded the experts, Johnson has demonstrated a substantial risk of serious harm.

iii. Heart Issues – Higgs

Higgs' claim based on his heart conditions was less compelling and, standing alone, would not be enough to show a likelihood of success on an as-applied challenge. Ultimately, Higgs has not convincingly shown that his heart conditions make him more likely to suffer the effects of flash pulmonary edema before he is rendered insensate.

Higgs suffers from various heart conditions, including structural heart disease (by virtue of left atrial enlargement) and mitral valve disease (with moderate mitral valve regurgitation and anterior leaflet dysfunction). (Stephen Decl. ¶ 12.) Dr. Stephen explained that Higgs' enlarged left atrium ineffectively pumps blood to the left ventricle, putting Higgs at risk for fluid backup in his lungs (pulmonary edema). (*Id.* ¶ 13.) An injection of pentobarbital, a cardiac depressant, will induce a sudden onset of congestive heart failure and flash pulmonary edema. (*Id.* ¶ 14.) Dr. Joel Zivot offered similar opinions in his declaration. (*See generally* ECF No. 374-6 ¶¶ 7–9, 19.)

Again, Dr. Locher's declaration was of little value to the court. Dr. Locher confirmed that studies show that "COVID-19 can affect cardiac structure and function which may lead to pulmonary edema." (Locher Decl. ¶ 8.) He qualified his statement by noting that such studies were only performed on symptomatic and hospitalized patients, although he also acknowledges that Higgs is symptomatic. Dr. Locher's other opinions on the issue exhibited the same inconsistencies as his assessment of COVID-19 related lung damage. For instance, Dr. Locher stated that "there is no way for anyone to know if Mr. Higgs has any cardiac decompensation without performing a physical exam, laboratory studies such as serum troponin level . . .[or] a current EKG and echocardiogram." (*Id.* ¶ 8). He then went on to say that such an evaluation would not be helpful for a patient with minimal or no symptoms. (*Id.*) Dr. Locher also

contended that there is no evidence in the medical literature to suggest mitral regurgitation would lead to earlier or more severe pulmonary edema after an injection of five grams of pentobarbital. (*Id.* ¶ 8). The court does not find this argument persuasive—it is not surprising that there is a lack of evidence in the medical literature, given that individuals with mitral regurgitation (or any individuals) are not routinely injected with a lethal dose of pentobarbital.

Dr. Crowns' declaration was more persuasive.[10] He opined that Higgs' mitral valve prolapse/regurgitation is a common condition that presents no symptoms in most people. (ECF No. 380-5, Crowns Decl. ¶ 4.) He further stated that Higgs has not shown signs that he is progressing to heart failure. (*Id.* ¶ 5.) A May 2019 echocardiogram revealed a preserved left ventricular ejection fraction well within a "normal" range. (*Id.*) And during a cardiac consultation in November 2020, Higgs denied any chest pain, palpitations or shortness of breath, and confirmed that he can participate in vigorous exercise. (*Id.*) Thus, Crowns opined that Higgs is not suffering from heart failure and his heart condition would not cause him to experience flash pulmonary edema while sensate. (*Id.* ¶ 6.)[11]

The court has no meaningful way of resolving this dispute. Unlike the expert testimony regarding his lung damage, Higgs' cardiac history indicates that he has a heart abnormality that has not materially impacted his overall health. And despite the abnormality, Higgs' cardiac

[10] Plaintiffs point out that in an earlier evidentiary hearing, Dr. Crowns described "a case report of an individual who developed flash pulmonary edema [upon administration of pentobarbital], but he had underlying heart issues, specifically mitral valve issues . . . So, in his situation, his flash pulmonary edema was the result of a compromised heart." (Higgs Mot. at 9 (quoting ECF No. 271 at 18).) Dr. Crowns asserted that this statement was taken out of context, noting that the study to which he was referring included one patient who had clear symptoms of heart failure. (Crowns Decl. ¶¶ 3–4.)

[11] Though Plaintiffs established that Crowns is not an expert in anesthesiology, the court finds his assessment of Higgs' cardiac health credible.

measurements fall within a normal range. Higgs' experts opine that his heart conditions weaken his heart and are therefore highly likely to cause him to suffer flash pulmonary edema while sensate. But given credible expert testimony on both sides, and absent abnormal measurements showing deteriorating cardiac health, the court cannot find that Higgs has a *substantial* risk of suffering flash pulmonary edema during his execution because of his heart condition.

Higgs also theorizes that his COVID-19 diagnosis will further aggravate his heart condition. However, there is no evidence showing that Higgs has suffered cardiac damage as a result of his COVID-19 diagnosis. Indeed, none of the experts raised any flags about Higgs' cardiac measurements. And while the court accepts the scientific conclusion—proffered by both sides—"that COVID-19 can affect cardiac structure and function which may lead to pulmonary edema" (Locher Decl. ¶ 8), Higgs' own expert testified that COVID-19 impacts patients in different ways, (*see* Stephen Decl. ¶ 11). Based on the evidence before it, the court cannot conclude that Higgs will succeed on this as-applied challenge.

2. Known and Available Alternatives

i. Pre-dose of opioid pain or anti-anxiety medication

Plaintiffs proffer evidence that a pre-dose of certain opioid pain medications, such as morphine or fentanyl, will significantly reduce the risk of severe pain during the execution. (Higgs Mot. at 11–12 (quoting ECF No. 25, Decl. of Craig Stevens, ¶¶ 15–16).) Defendants argue that no state currently uses analgesics in its execution procedures, that pentobarbital alone is sufficiently painless, and that BOP has concluded that a one-drug protocol is preferable, because it will reduce "the risk of errors during administration" and "avoid the complications inherent in obtaining multiple lethal injection drugs and in navigating the expiration dates of multiple drugs." (Defs. Opp'n at 29–30 (citation omitted).)

The court finds Defendants' positions unavailing. While they contend that "no State adds an opioid to an execution protocol using pentobarbital," and the government is therefore not required to do so, (*Id.* at 30 (citing *Bucklew*, 139 S. Ct. at 1130)), this argument misses the mark. As this court has previously noted, Nebraska recently used a pre-dose of fentanyl to reduce the risk of serious pain during an execution (ECF No. 135 at 15), whereas in *Bucklew*, the plaintiff presented only "reports from correctional authorities in other States indicating that additional study [was] needed to develop a protocol" for the proposed execution mechanism. *Bucklew*, 139 S. Ct. at 1129. Even if Defendants were correct, however, the fact that other states do not use pain medication would not be dispositive. *See Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) ("I write to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law. . . . Importantly, all nine Justices today agree on that point.").

Finally, Defendants contend that BOP has "legitimate reasons" for choosing not to use a pre-dose of an opioid because it has concluded that a one-drug protocol will reduce "the risk of errors during administration" and "avoid the complications inherent in obtaining multiple lethal injection drugs and in navigating the expiration dates of multiple drugs." (Defs. Opp'n at 30 (citations to Admin. R. omitted).) The court does not question BOP's conclusions regarding the administrative efficiency of a one-drug protocol. It does, however, question Defendants' conclusion that the administrative ease of administering and procuring a single drug over two drugs—apparently without having made a good faith attempt at the latter, *cf. Glossip*, 576 U.S. at 878–79—is a "legitimate penological reason" to select a particular method of execution despite evidence that the risk of pain associated with that method is "substantial when compared to a known and available alternative." *Bucklew*, 139 S. Ct. at 1125 (quoting *Glossip*, 576 U.S. at

878); *see also Henness v. DeWine*, 141 S. Ct. 7, 9 (2020) (Sotomayor, J., statement on denial of certiorari).

The Supreme Court has previously found a "legitimate penological reason" where a particular drug "hasten[ed] death," *Baze*, 553 U.S. at 57–58 (plurality op.); where a state chose "not to be the first to experiment with a new method of execution" that had "no track record of successful use," *Bucklew*, 139 S. Ct. at 1130 (citation omitted); and where a state was unable to procure particular drugs "despite a good-faith effort to do so," *Glossip*, 576 U.S. at 868–79 (detailing state's efforts and implying without stating that this reason was "legitimate"). Defendants have presented no evidence that they have tried to either procure or administer the two-drug protocol proffered by Plaintiffs, or that any such efforts were unsuccessful. *Cf.* Admin. R. at 869 (asserting that manufacturers would "most likely" resist efforts to use fentanyl in executions); *Execution Protocol Cases*, 980 F.3d at 133 ("The combination of drugs as part of lethal injection protocols has been used by both states and the federal government, and is still used in a number of jurisdictions. The two-drug protocol also fits squarely within the plain text of the federal execution protocol." (citations omitted)). Nor have Defendants provided this court with any authority to support their contention that administrative concerns are a sufficient "legitimate penological reason" under the Supreme Court's Eighth Amendment jurisprudence.

In sum, Plaintiffs have proposed a simple addition to the execution procedure that is likely to be as effective as it is easily and quickly administered. *See Bucklew*, 139 S. Ct. at 1129.

ii. Firing squad.

Alternatively, Plaintiffs proffer execution by firing squad. (Higgs Mot. at 12–13; ECF No. 92 ¶ 114(c).) Because that method of execution is feasible, readily implemented, and would significantly reduce the risk of severe pain, it satisfies the *Blaze-Glossip* requirements for

proposed alternatives. Execution by firing squad is currently legal in three states, Utah, Oklahoma, and Mississippi, and can hardly be described as "untried" or "untested" given its historical use as a "traditionally accepted method of execution." *Bucklew*, 139 S. Ct. at 1125, 1130. Moreover, the last execution by firing squad in the United States occurred just over a decade ago, on June 18, 2010, in Utah.

Both the historical use of firing squads in executions and more recent evidence suggest that, in comparison to the 2019 Protocol, execution by firing squad would significantly reduce the risk of severe pain. *See, e.g.*, Deborah Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 Wm. & Mary L. Rev. 551, 688 (1994) ("A competently performed shooting may cause nearly instant death"); Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty* app. A at 177 (2014) (calculating that while 7.12% of the 1,054 executions by lethal injection between 1900 and 2010 were "botched," none of the 34 executions by firing squad had been, the lowest rate of any method).[12]

Defendants point to two cases from other Circuits in which courts appeared skeptical of these conclusions. (Defs. Opp'n at 30–31.) But again, they overlook the Supreme Court's

[12] Defendants contend that Sarat "does not discuss execution by firing squad" and that "there is insufficient data in the cited appendix to draw any statistically significant conclusions," given that there "were only two executions by firing squad" since 1980. Setting aside the inconsistency of Defendants' arguments—first claiming that Sarat does not discuss firing squads, and then critiquing the data Sarat provides on that precise subject—Defendants simply misrepresent the facts. Although Sarat's work does not contain a specific chapter devoted to execution by firing squad, it does contain specific mentions of firing squads throughout the main text and associated footnotes, *see* Sarat, *supra* at 4, 10–11, 167, 219 n.131, and the referenced appendix provides data on all executions performed in the United States from 1900 through 2010, including the rate of botched executions separated by execution method. *Id.* app. A at 177. While only two executions by firing squad have been performed since 1980, Defendants inexplicably choose to ignore the first statistics provided in the Appendix, which note that there were 34 executions by firing squad between 1900 and 2010, none of which were botched. *Id.*

guidance in *Bucklew* that a plaintiff's burden in identifying an alternative method of execution "can be overstated" and that there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." 139 S. Ct. at 1128–29. Indeed, members of the Court, including at least one Justice in the *Bucklew* majority, have opined that the firing squad may be an immediate and sufficiently painless method of execution. *See, e.g.*, *id.* at 1136 (Kavanaugh, J., concurring); *Arthur v. Dunn*, 137 S. Ct. 725, 733–34 (2017) (Sotomayor, J., dissenting from denial of cert.) ("In addition to being near instant, death by shooting may also be comparatively painless."). Moreover, given that use of the firing squad is "well established in military practice," *Baze*, 553 U.S. at 102 (Thomas, J., concurring in the judgment), Defendants are, if anything, more capable than state governments of finding "trained marksmen who are willing to participate," and who possess the skill necessary to ensure death is near-instant and comparatively painless. *Cf. McGehee v. Hutchinson*, 854 F.3d 488, 494 (8th Cir. 2017).

Defendants also argue that the court should defer to the government's "legitimate reason[]" for choosing not to adopt the firing squad as a method of execution—that legitimate reason being the government's interest in "preserving the dignity of the procedure" in light of what they deem the "'consensus' among the States that lethal injection is more dignified and humane." (Defs. Opp'n at 32–33 (quoting *Baze*, 553 U.S. at 57, 62 (plurality op.).) Yet in *Baze,* the plurality opinion, joined by three Justices, found that the "consensus" to which Defendants refer went "not just to the method of execution, but also to the specific three-drug combination" at issue in that case. *Baze*, 553 U.S. at 53. The same plurality also found that the state's decision to administer a paralytic agent as part of its execution protocol did not offend the Eighth Amendment where the state's interest in "preserving the dignity of the procedure" by preventing convulsions that "could be misperceived as signs of consciousness or distress" was coupled with

the "the States' legitimate interest in providing for a quick, certain death," and the paralytic had the effect of "hastening death." *Id.* at 57–58.

In his opinion concurring in the judgment in *Baze*, Justice Stevens noted that concern with the "dignity of the procedure" alone constituted a "woefully inadequate justification." "Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable . . . is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain." *Id.* at 73 (Stevens, J., concurring in the judgment); *cf. Bucklew*, 139 S. Ct. at 1130 (finding that "choosing not to be the first to experiment with a new method of execution" that had "no track record of successful use" constituted a "legitimate reason." (citation omitted)). Defendants' argument that the *perception* of a method of execution as less dignified or "more primitive" is a "legitimate penological reason" for declining to adopt a different protocol thus misconstrues the standard set by the Supreme Court's precedent on this issue.

The court does not find that execution by firing squad would be an acceptable alternative in every case. In this case, however, Defendants could readily adopt Plaintiffs' proposal.

Finally, Defendants argue that Plaintiffs' stated preference for execution by firing squad is disingenuous. But Plaintiffs have argued for it at length throughout this litigation, (*see, e.g.*, ECF No. 92), and have shown that it is readily implemented, available, and would significantly reduce the risk of severe pain. *Cf. Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (rejecting possibility of execution by firing squad where the plaintiff had chosen not to plead it as an alternative).

iii. Postponement

Plaintiffs have alternatively proffered the option of delaying their execution until they have recovered from COVID-19. (Higgs Mot. at 13–14.) This is not, as precedent requires, "a known and available alternative method of execution," *see Glossip*, 576 U.S. at 864, but rather an alternative *date* of execution. Even so, the court is likewise unpersuaded by Defendants' contention that postponing the executions "directly contradicts [Plaintiffs'] general Eighth Amendment claim and belies every argument they have made in support of that claim over the last 15 months." (Defs. Opp'n at 34.) If lethal injection of pentobarbital will create a significant risk of suffering even in otherwise healthy persons, as Plaintiffs have long attested, then the risk to an individual with severe respiratory illness, such COVID-19, would only be heightened. This proposal therefore does not contradict Plaintiff's other arguments.

Plaintiffs have 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. Thus, they have established a likelihood of success on the merits of their claims that the 2019 Protocol's method of execution constitutes cruel and unusual punishment in violation of the Eighth Amendment.

B. <u>Irreparable Harm</u>

In order to prevail on a request for preliminary injunction, irreparable 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) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)) (internal quotation marks and brackets omitted). Here, without injunctive relief, Plaintiffs would be subjected to an

excruciating death in a manner that is likely unconstitutional. This harm is manifestly irreparable. *See Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020) (explaining that "prospective violation[s] of . . . constitutional right[s] constitute[] irreparable injury for [equitable-relief] purposes" (internal quotation marks omitted)).

Other courts in this Circuit have found irreparable harm in similar, but less dire circumstances. *See, e.g.*, *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (finding irreparable injury where plaintiffs faced detention under challenged regulations); *Stellar IT Sols., Inc. v. USCIS*, No. 18-2015, 2018553 U.S. at 49 WL 6047413, at *11 (D.D.C. Nov. 19, 2018) (finding irreparable injury where plaintiff would be forced to leave the country under challenged regulations); *FBME Bank Ltd. v. Lew*, 125 F. Supp. 3d 109, 126–27 (D.D.C. 2015) (finding irreparable injury where challenged regulations would threaten company's existence); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 19 (D.D.C. 2009) (finding irreparable injury where challenged regulations would limit guest workers).

Defendants argue that Plaintiffs have failed to demonstrate irreparable harm given "the absence of any evidence that [Plaintiffs], as a result of contracting COVID-19, will experience pulmonary edema prior to falling insensate." (Defs. Opp'n at 36.) But, for the reasons discussed above, the court has found otherwise. Furthermore, Defendants appear to imply that if Plaintiffs experience flash pulmonary edema for thirty seconds, at most, that would not constitute irreparable harm. (*See id.* at 35–36.) The court has already addressed this argument. *See* supra n.1. The Eighth Amendment does not permit "substantial" and "needless" suffering so long as it will only be experienced for a short time. *See Baze*, 553 U.S. at 49–50. Here, the risk of substantial suffering can be avoided by using one of Plaintiffs' proffered alternatives or by waiting several weeks to allow Plaintiffs to recover from a novel disease before executing them.

Thus, Plaintiffs have sufficiently shown they will suffer irreparable harm if their executions proceed as planned.

C. Balance of Equities

The need for closure in this case—particularly for the victims' families—is significant. *See Calderon v. Thompson*, 523 U.S. 538, 556 (1998) ("Only with an assurance of real finality can the [government] execute its moral judgment in a case . . . [and] the victims of crime move forward knowing the moral judgment will be carried out."). And this court is mindful of the Supreme Court's caution against last minute stays of execution. *See Bucklew*, 139 S. Ct. at 1134. But the government's ability to enact moral judgment is a great responsibility and, in the case of a death sentence, cannot be reversed. After suspending federal executions for over seventeen years, the government announced a new Execution Protocol and a resumption of executions in July 2019, and since July of this year has executed eleven inmates. Any potential harm to the government caused by a brief stay is not substantial. Indeed, the government has not shown that it would be significantly burdened by staying these two executions for several more weeks until Plaintiffs have recovered from COVID-19. Accordingly, the court sees no reason why this execution *must* proceed this week. Thus, the balance of the equities favors a stay.

D. Public Interest

The court is deeply concerned that the government intends to execute two prisoners who are suffering from COVID-19 infection, particularly given that the disease impacts individuals in drastically different ways and can have particularly devastating long-term effects, even for those with mild symptoms. This is to say nothing of the fact that executing inmates who are positive for COVID-19 in a facility with an active COVID-19 outbreak will endanger the lives of those performing the executions and those witnessing it. This is irresponsible at best, particularly

when a temporary injunction will reduce these risks. The public interest is not served by executing individuals in this manner. *See Harris v. Johnson*, 323 F. Supp. 2d 797, 810 (S.D. Tex. 2004) ("Confidence in the humane application of the governing laws . . . must be in the public's interest.").

Thus, the court finds that all four factors weigh in favor of injunctive relief, and once again finds itself in the unenviable position of having to issue yet another last-minute stay of execution. Nonetheless, this is the nature of death penalty litigation, and this court has had a disproportionate number of such claims given the nature of the case. Moreover, this result could not have been avoided given that Plaintiffs were diagnosed with COVID-19 in late December, at which point Plaintiffs filed amended complaints. The court held an evidentiary hearing to assess the likelihood of success on the merits of these claims and scheduled that hearing at the earliest possible date.

III. CONCLUSION

The court finds that Plaintiffs have demonstrated a likelihood of success on the merits and that absent a preliminary injunction, Plaintiffs will suffer irreparable harm. It further finds that the likely harm that Plaintiffs would suffer if the court does not grant injunctive relief far outweighs any potential harm to Defendants. Finally, because the public is greatly served by attempting to ensure that the most serious punishment is imposed in a manner consistent with our Constitution, the court finds that it is in the public interest to issue a preliminary injunction.

Accordingly, for the reasons set forth above, the court will GRANT Plaintiffs' motions for a preliminary injunction. The injunction will remain in effect until March 16, 2021.[13] A corresponding order will be issued simultaneously.

Date: January 12, 2021

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

[13] The court calculated this date based on Dr. Van Norman's assessment that COVID-19-related lung damage can persist for as long as ninety days after infection. (*See* Van Norman Decl. at 6.) Both Plaintiffs tested positive for COVID-19 on December 16, 2020. The court will not enjoin these executions indefinitely, however. Accordingly, it will consider extending the injunction only if Plaintiffs can provide *demonstrated* evidence of continued lung damage from COVID-19. And the court expects that Defendants will, in good faith, comply with reasonable requests for follow-up medical assessment which, at the bare minimum, should include an x-ray for each Plaintiff in several weeks.

NO. 21-5004
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES
COREY JOHNSON AND DUSTIN HIGGS,
Plaintiffs-Appellees,
v.

JEFFREY A. ROSEN, ACTING ATTORNEY GENERAL, et al.,
Defendants-Appellants.

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

EMERGENCY PETITION FOR REHEARING EN BANC AND, IF NECESSARY, AN ADMINISTRATIVE STAY, BY PLAINTIFFS-APPELLEES DUSTIN HIGGS AND COREY JOHNSON

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

Appellees are Corey Johnson and Dustin Higgs.

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, Dusti Higgs, Dustin Lee Honken, Jeffrey Paul, and Bruce Webster.

Defendants appearing before the district court were the United States Department of Justice, Jeffrey Rosen, 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 January 11, 2021 order of the district court (ECF No. 395) granting, for the reasons set forth in the accompanying memorandum opinion (ECF No. 394), Plaintiffs Higgs's and Johnson's motion for a preliminary injunction.

No official citations for these orders exists.

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 Case*s, 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. 20-5361 (D.C. Cir. 2020) (dismissed as moot January 8, 2021); *In re FBOP Execution Protocol Cases* (E*xecution 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 Case*s (*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 Case*s (*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).

Respectfully submitted,

Dated: January 14, 2021

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RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiffs-Appellees Corey Johnson and Dustin Higgs state that they are not corporate entities and that this is neither a criminal case nor a bankruptcy case.

Respectfully submitted,

Dated: January 14, 2021

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