[ORAL ARGUMENT NOT YET SCHEDULED]

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

IN RE: IN THE MATTER OF THE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

JAMES H. ROANE, JR., et al.,
Appellees

v.

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

No. 20-5345

EMERGENCY MOTION TO STAY OR IMMEDIATELY VACATE AN INJUNCTION BARRING FEDERAL EXECUTIONS

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INTRODUCTION AND SUMMARY

Yesterday, in the early hours of the morning, this Court affirmed the district court's denial of an injunction barring the federal government from carrying out multiple federal executions due to an asserted violation of the Federal Food, Drug, and Cosmetic Act (FDCA). Although this Court concluded that the FDCA applies to lethal-injection drugs, and that the federal execution protocol should be set aside to the extent it is inconsistent with that statute's prescription requirement, the Court also held that the district court had correctly declined to enter permanent injunctive relief precluding plaintiffs' executions on that basis. This Court reversed the district court's dismissal of plaintiffs' Eighth Amendment claim for failure to state a claim, but made clear that injunctive relief was unavailable on that ground as well.

Nonetheless, hours after this Court's order, the district court yesterday invited plaintiff Orlando Hall to file "any motion for expedited relief" "[i]n light of the D.C. Circuit's order reversing this court's dismissal of Plaintiffs' Eighth Amendment claim" by 4 p.m. yesterday. Minute Order, No. 1:19-mc-145 (D.D.C. Nov. 18, 2020). Instead of complying with the substance or procedure outlined in that order, Hall waited until after 10 p.m. to file a motion seeking relief—not in connection with his reinstated Eighth Amendment claim, but rather on the basis of his bid for an FDCA-based injunction that this Court had just considered and rejected. Notably, Hall's arguments and request in district court mirrored those in the Supreme Court stay application he had already filed at that point; that application remands pending.

Notwithstanding black-letter law-of-the-case principles and the mandate rule, the district court accepted Hall's open invitation to redecide the propriety of issuing injunctive relief under the FDCA based on the same information before this Court, hours after this Court had just rejected such a request, even extending that injunctive relief beyond Hall to all plaintiffs. And incredibly, despite this Court's August vacatur of an FDCA-based injunction unsupported by a finding of concrete irreparable harm, the district court once again issued an FDCA-based injunction unsupported by any finding of concrete irreparable harm. Instead, the only harms on which the court rested its eleventh-hour ruling are a bare statutory violation and a desire to afford plaintiffs more time to litigate their Eighth Amendment claim—harms that this Court has already rejected as a basis for an injunction.

Even apart from those dispositive defects, the district court's injunction is unjustifiable in light of the remaining equitable factors. While courts' discretion in applying those factors is broad, it is not unbounded, and the district court's extraordinary decision to halt Hall's impending federal execution because of the government's failure to secure a prescription for the pentobarbital used therein falls outside any reasonable application of equitable powers. This Court should immediately and summarily vacate or stay that order to allow the government to recommence the now-halted execution procedures in Terre Haute, where family members of Lisa Rene—the 16-year old girl Hall kidnapped, raped, beat, and buried

alive over twenty five years ago—have gathered after traveling over a thousand miles to witness the long-delayed implementation of Hall's sentence.[1]

STATEMENT

Yesterday, this Court affirmed the district court's previous denial of injunctive relief under the FDCA. In so doing, the Court rejected Hall's (and his co-plaintiffs') argument that the record below supported a finding of irreparable harm. The Court credited the district court's factual finding that "the evidence in the record does not support Plaintiffs' contention that they are likely to suffer flash pulmonary edema while still conscious." *In re Federal Bureau of Prisons' Execution Protocol Cases (Protocol Cases)*, No. 20-5329, slip op. at 25 (D.C. Cir. Nov. 18, 2020) (Op.). And the Court acknowledged that "Plaintiffs have not identified before the district court or this court any other type of irreparable harm that would likely be suffered due to the unprescribed use of pentobarbital." *Id.* Based on these findings, this Court held that the district court "was correct to deny the entry of a permanent injunction." Op. 24.

The district court granted Hall's request for a stay of execution pending the district court's reconsideration of its findings on irreparable harm. Relying on Judge Pillard's partial dissent, the court explained that its "prior assessment of the evidence

[1] Given the time constraints caused by the district court's delayed ruling—which it admitted was "last minute," A9—the government intends to file a similar application for a stay in the Supreme Court while this Court considers this request. If the Court chooses to vacate rather than stay the injunction, the government requests that it issue its mandate forthwith.

in the record was tainted by [its] erroneous interpretation of *Lee*." A6. Correcting that error, the court explained, "casts the evidence in a different light such that Plaintiffs have established a significant possibility of showing irreparable harm given Defendants' violation of the FDCA." *Id.* The court reasoned further that it had "improperly elevated Plaintiff's burden to show irreparable harm" in "finding that Plaintiffs had failed to 'completely undermine' the testimony of Defendants' expert Dr. Crowns." *Id.* The court noted "new evidence presented after each execution … appears to chip away at Crowns' hypothesis and, given the Court of Appeals' interpretation of *Lee*, undermines the basis for the court's conclusion on Plaintiffs' motion for reconsideration of the irreparable harm finding." A6-7. The district court rejected the government's argument that injunctive relief is foreclosed by this Court's finding that the district court correctly denied a permanent injunction on the FDCA claims. A7. The court stated that "the Circuit's conclusion means only that this court did not abuse its discretion under the circumstances that were then before it." According to the district court, because this Court's decision "fundamentally changed the law upon which [the district court] relied in making its factual finding," reconsideration was required. *Id.*

With respect to the equitable factors, the court concluded that Hall "will be executed with a drag administered in violation of a federal law that ensures its safety and efficacy for the intended purpose" and would suffer irreparable harm in the absence of a stay if he were "unable to pursue his Eighth Amendment claim." A8.

The court also concluded that the balance of equities and public interest weigh in favor of a stay because "the government has not shown that it would be significantly burdened by staying federal executions until it can secure a valid prescription" and because the "public interest is not served by executing individuals" in a manner that "violates federal law." A9.

ARGUMENT

This Court should stay or summarily vacate the district court's extraordinary, last-minute injunction revisiting ground this Court tread just yesterday. That result is required by law-of-the-case principles, the absence of any irreparable harm supporting the injunction, the remaining equitable factors underlying the entry of permanent injunctive relief, and the equities surrounding the district court's decision to once more halt a federal execution just hours before it was set to begin.

1. As an initial matter, Hall's request for injunctive relief is foreclosed by this Court's opinion issued yesterday morning, affirming that the district court "was correct to deny the entry of a permanent injunction [on Hall's FDCA claim]." Op. 24. This Court explained that the district court had previously "specifically found … that 'the evidence in the record does not support Plaintiffs' contention that they are likely to suffer flash pulmonary edema while still conscious.'" *Id.* (quoting Dkt. 261 at 39). This Court also noted that "Plaintiffs have not identified before the district court or this court any other type of irreparable harm that would likely be suffered due to the unprescribed use of pentobarbital." Op. 25.

Law-of-the-case principles preclude the district court from departing from this Court's mandate to take the course outlined by the dissenting judge. *See Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 596-97 (D.C. Cir. 2001) ("Under the mandate rule," a "more powerful version of the law-of-the-case doctrine," "'an inferior court has no power or authority to deviate from the mandate issued by an appellate court.'") (quoting *Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948)). Although the district court indicated it now wishes to "reconsider" its factual findings regarding FDCA-related harms, A5-7, A10, it did so based on precisely the same information before this Court when it affirmed the denial of injunctive relief. This Court was aware that it concluded that the district court had read *Lee* too broadly in dismissing the Eighth Amendment claim. And this Court was aware that plaintiffs thought this error rendered the district court's evaluation of the evidence legally erroneous. But a majority of this Court *rejected* that argument, finding no legal error. Only Judge Pillard's partial dissent concluded that the district court should reconsider its earlier finding regarding plaintiffs' inability to carry their burden of demonstrating irreparable harm. Op. 4-5 (Pillard, J., concurring in part and dissenting in part). By relying on that dissent, and disregarding the effect of the majority's opinion, *see* A6, the district court fundamentally misapplied this Court's decision.

The district court suggested it was free to second-guess its earlier factfindings underlying its denial of permanent injunctive relief, reasoning that this Court must have only concluded that the district court had not abused its discretion. *See* A7.

But if the district court's misreading of *Lee* had tainted its FDCA-related findings, that would be a legal error. When this Court affirmed, it necessarily concluded that the district court had committed no such legal error, and the district court was not free to reconsider factual findings that this Court had affirmed based on a non-existent legal error that this Court had rejected. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 529-32 (2007) (agency erred in concluding it lacked the power to regulate greenhouse gas emissions); *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1910 (2020) (agency erred in concluding it lacked the legal power to act).

Nor does the district court's retention of jurisdiction over the case based on pending, unrelated claims provides give it free license to revisit issues disposed of by a higher court. The district court did not even purport to avail itself of one of the narrow instances in which courts may revisit their earlier decisions. *See* Fed. R. Civ. P. 60(b).

2. Even assuming the district court had jurisdiction to revisit its previous decision after this Court affirmed it, the injunction should be summarily vacated as unsupported by an adequate finding of irreparable harm. This Court and the Supreme Court have already made clear that the two forms of irreparable harm on which the court rested its injunction—a stand-alone FDCA violation and plaintiffs' ability to continue litigating an Eighth Amendment claim on which they has not demonstrated a likelihood of ultimately succeeding—are insufficient. Vacatur on this basis alone is required.

On the morning of the first scheduled execution, the Supreme Court vacated an injunction based on plaintiffs' Eighth Amendment challenge to the federal execution protocol, explaining concluded that plaintiffs "ha[d] not established that they are likely to succeed on the merits of their Eighth Amendment claim," which faces "an exceedingly high bar." *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam). The Court accordingly directed "that the plaintiffs' executions may proceed as planned." *Id.* at 2592. This Court later applied *Lee* to a request for an injunction pending appeal from a plaintiff to this litigation, explaining that it had to consider the plaintiff's "showing that he could ultimately prevail on the Eighth Amendment claim," not arguments regarding the "merits of the ruling on the motion to dismiss that claim." Order at 5, (No. 20-5252).

On the morning of the second scheduled execution, the district court entered a preliminary injunction based on its FDCA analysis, which the Supreme Court vacated without any noted dissents. *Barr v. Purkey*, No. 20A10, 2020 WL 4006821 (U.S. July 16, 2020). When the district court entered another, permanent injunction on this basis, this Court vacated that injunction later the same day, explaining that the injunction "fail[ed] to comply with Fed. R. Civ. P. 65(d) in that, inter alia, there are insufficient findings and conclusions that irreparable injury will result from the statutory violation found by the district court." Order, No. 20-5260 (D.C. Cir. Aug. 27, 2020). The district court denied Nelson's renewed motion for an injunction the

next day, concluding that he had not met his burden of demonstrating irreparable harm due to the asserted FDCA violation standing alone. Dkt. 226.

These decisions require vacatur of the injunction. The district court this afternoon justified its injunction based on two asserted forms of irreparable harm: Hall's "execut[ion] with a drug administered in violation of a federal law that ensures its safety and efficacy for the intended purpose," and his inability "to pursue his Eighth Amendment claim, which the D.C. Circuit has just revived as of yesterday." A8. Notably, the court did not enter any findings regarding plaintiffs' asserted harms related to pulmonary edema. *See* A5-7. On the contrary, the district court candidly stated that it had not yet "reconsidered its finding that Plaintiffs failed to show the necessary 'irreparable harm' to warrant enjoining their executions, despite Defendants' violation of the FDCA." A10.

The asserted harm related to the Eighth Amendment is plainly untenable; as this Court emphasized yesterday, it merely reversed the district court's conclusion that plaintiffs had failed to even state a claim, and thus it remains unclear "[w]hether Plaintiffs will ultimately be able to climb the Eighth Amendment's high constitutional mountain of proof is not the question for today." Op. 17. Reinstatement of this claims is manifestly not the type of showing of success of the ultimate merits required for equitable relief during continuing litigation. And as this Court's order of August 27 demonstrates, a bare FDCA violation does not constitute the type of harm that could support an injunction—a conclusion only reinforced by this Court's decision

yesterday, where it ordered the protocol "set aside" but declined to enjoin executions from proceeding. *See* Op. 22-25. Thus, as demonstrated by *Lee*, *Purkey*, and this Court's orders of August 25th and 27th in this very case, the harms relied upon by the district court to support injunctive relief are inadequate to the task.

3. Even if the district court may, and eventually does, "reconsider" its earlier factual findings regarding harms flowing from the absence of a prescription, A10, the remaining equitable factors would independently preclude the entry of an FDCA-based injunction. Plaintiffs would be unable to secure a permanent injunction under the FDCA even if the district court *had* established irreparable harm from any statutory violation. Courts must also consider the "balance of equities" and "the public interest" in assessing the propriety of permanent injunctive relief, *Winter*, 555 U.S. at 7, including whether the relief requested comports with "'what is necessary, what is fair, and what is workable,'" *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam). As the Supreme Court has explained, even where plaintiffs could succeed on the merits of a statutory claim, and "even if plaintiffs have shown irreparable injury," the "proper consideration" of the balance of injuries and the public interest can "alone require[] denial of the requested injunctive relief." *Winter*, 555 U.S. at 23.

An FDCA-based injunction is inappropriate in light of these factors. As in *Winter*, there is a substantial disconnect between plaintiffs' "ultimate legal claim" and their requested relief. *See* 555 U.S. at 32-33. There, the Court explained that because

the underlying claim was that the government must prepare an environmental impact statement, not cease the military sonar training exercises, the court had "no basis for enjoining such training" where the public had a strong interest in it. *Id.* That was true even though the Court assumed plaintiffs had established irreparable harm. *Id.* at 23. Similarly, plaintiffs' ultimate legal claim here is that the government must obtain a prescription, not that it cannot execute them. And there are powerful interests in carrying out their sentences in a timely fashion. *See, e.g.*, *Calderon v. Thompson*, 523 U.S. 538, 556 (1998); *Baze*, 553 U.S. at 61 (plurality opinion). Even if plaintiffs could ever establish *some* form of irreparable harm due to the government's use of pentobarbital unconstrained by the FDCA's prescription requirement, that harm would not outweigh these significant interests. *See infra* p.11-13.

4. Finally, the equities surrounding the district court's order to once again halt a federal execution just hours before it was scheduled to commence weigh heavily in favor of immediate vacatur of this afternoon's injunction. The Supreme Court has emphasized in this litigation that "last-minute intervention" of the kind the district court granted here "should be the extreme exception, not the norm." *Lee*, 140 S. Ct. at 2591 (quoting *Bucklew*, 139 S. Ct. at 1134). There is no good reason for such an exception here. Seven other federal inmates have been executed under the protocol being challenged, six of them after the Supreme Court vacated an injunction on the same claim on which the district court based its stay here. *See Purkey,* No. 20A10, 2020 WL 4006821 (U.S. July 16, 2020). And more than 1000 inmates have been

executed by lethal injection over the past four decades—all without any requirement to comply with the FDCA. *See Lee*, 140 S. Ct. at 2591. Neither law nor equity supports a different result now, particularly given this Court's *affirmance* of the denial of injunctive relief and the absence of any new contradictory factual findings by the district court.

Further delay would also undermine the public's "powerful and legitimate interest in punishing the guilty" by carrying out the lawfully imposed capital sentences. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). Hall was convicted more than twenty-five years ago of a crime of staggering brutality: he kidnapped a 16-year-old girl, held her hostage over two days during which time he and others raped her repeatedly, beat her with a shovel, poured gasoline on her, and killed her by burying her alive. *United States v. Hall*, 152 F.3d 381, 389-90 (5th Cir. 1998). He has long since exhausted all permissible appeals and collateral challenges. He has received undeniably extensive review of his claims regarding the federal execution protocol over the past year. Family members of Hall's 16-year-old victim—who have waited a two decades for implementation of this sentence—traveled over a thousand miles to Terre Haute, where they are now waiting to witness the execution. Equity strongly supports the administration of the justice. A district court's desire to consider reversing factual findings the day after they have been affirmed by a higher court does not constitute the type of extreme exception to the Supreme Court's admonition barring last-minute orders barring executions. As the Fifth Circuit recently explained,

"It is time—indeed, long past time—for these proceedings to end." *In re Hall*, No. 19-10345, 2020 WL 6375718, at *7 (Oct. 30, 2020).

CONCLUSION

This Court should stay or immediately vacate the injunction barring plaintiffs' executions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 3165 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Melissa N. Patterson
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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system, except for the following, who will be served by email:

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ADDENDUM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases, LEAD CASE: *Roane, et al. v. Barr* THIS DOCUMENT RELATES TO: *Roane, et al. v. Barr*, 05-cv-2337	Case No. 19-mc-145 (TSC)

MEMORANDUM OPINION

In an order issued early yesterday morning, the U.S. Court of Appeals for the District of Columbia Circuit reversed this court's dismissal of Plaintiff Orlando Hall's Eighth Amendment claim. *In re Federal Bureau of Prisons' Execution Protocol Cases*, No. 20-5329 (D.C. Cir. Nov. 18, 2020). In doing so, the Court of Appeals found that this court had read too broadly *Barr v. Lee* in assessing the irreparable harm facing Plaintiff from being executed with non-prescribed pentobarbital in violation of the Food, Drug, and Cosmetic Act (FDCA).

Plaintiff Hall, whose execution is scheduled for 6 p.m. today, has moved for an order setting aside the 2019 Federal Bureau of Prisons' Execution Protocol and declaring it unlawful for Defendants to carry out further executions without a prescription for pentobarbital. Hall has also moved for a stay of execution to allow the court to reconsider its finding that Plaintiffs in this consolidated litigation failed to make the necessary showing of irreparable harm to warrant a permanent injunction despite Defendants' FDCA violation. Given the complexity of this litigation, including a decision by the Court of Appeals issued on the eve of the scheduled execution which has fundamentally altered this court's prior fact-findings, and the Plaintiff's

likelihood of success on the merits of his challenge to this court's irreparable harm findings, the motion is GRANTED.

I. BACKGROUND[1]

A. The Court's Prior Rulings

On August 20, 2020, this court entered partial final judgment in favor of Defendants as to Plaintiffs' Eighth Amendment claim in Count II of their Amended Complaint. Based on the Supreme Court's reasoning in *Barr v. Lee*, the court found that "[s]o long as pentobarbital is widely used . . . no amount of new evidence will suffice to prove that the pain pentobarbital causes reaches unconstitutional levels." (ECF No. 193 at 4 (discussing *Barr v. Lee*, 140 S. Ct. 2590 (2020) (per curiam)).) This conclusion was premised, in part, on the Supreme Court's observation that Plaintiffs' Eighth Amendment claim faced "an exceedingly high bar" given that single-dose pentobarbital "has become a mainstay of state executions . . . [h]as been used to carry out over 100 executions, without incident . . . [and h]as been 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; *see also id.* (citing *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019)) ("This Court has yet to hold that a State's method of execution qualifies as cruel and unusual.").

In its Opinion, the court further concluded that even if it "found in favor of Plaintiffs on all alleged facts," including evidence that an inmate would be virtually certain to suffer the effects of flash pulmonary edema, "there would be no Eighth Amendment violation because the

[1] This being the most recent of several opinions in this litigation, the court presumes familiarity with the facts and procedural posture of the case. A more detailed recitation of the facts may be found in the Court of Appeals' most recent opinion in this case. *Execution Protocol Cases*, No. 20-5329, Slip Op. at 5–11.

evidence of pain would not satisfy *Lee*'s high bar for an objectively intolerable risk of pain." (ECF No. 193 at 3, 5.)

On September 20, 2020, the court granted summary judgment in favor of Plaintiffs' FDCA claim. It found that that "the pentobarbital the government intends to use in executions is subject to the FDCA and fails to meet the premarketing, labeling, and prescription requirements therein," and that because "the government's use, under the 2019 Protocol, of pentobarbital . . . has not been prescribed and does not meet other statutory requirements of the FDCA," the intended executions "constitute[] agency action that is contrary to law in violation of the APA [Administrative Procedure Act]." (ECF No. 261 at 33; *see also* ECF No. 213.)

The court, however, denied Plaintiffs' request for injunctive relief, finding that although there was a "possibility that inmates will suffer excruciating pain during their executions, Plaintiffs have not established that flash pulmonary edema is 'certain' or even 'likely' to occur before an inmate is rendered insensate." (ECF No. 261 at 36.)

This conclusion was influenced by the court's overbroad reading of *Lee*. Emphasizing that it could not "weigh the evidence before it in a vacuum," the court concluded that Plaintiffs were not entitled to injunctive relief "[g]iven the Supreme Court's decision" in *Lee* and "the competing evidence in this case." (*Id.* at 39–40.) The court reaffirmed this reading in considering Plaintiffs' motion for reconsideration, explaining that it was "constrained" by the Supreme Court's findings in *Lee* and other cases and that "Plaintiff would need to supply evidence that casts doubt on the more than "100 executions carried out using pentobarbital." (ECF No. 305 at 7.)

B. The Court of Appeals' November 18, 2020 Decision

In reversing this court's dismissal of Plaintiffs' Eighth Amendment claim, the Court of Appeals disagreed with this court's assessment that "no amount of new evidence will suffice to prove that the pain pentobarbital causes reaches unconstitutional levels." *Execution Protocol Cases*, No. 20-5329, slip op. at 18–19 (citing ECF No. 193 at 4). The Court clarified that "all the Supreme Court said in *Lee* was that, under the demanding preliminary-injunction standard and before any conclusive factual findings could be made in the case, 'competing expert testimony' over whether pulmonary edema occurs before or after the inmate is rendered insensate would not by itself support a 'last-minute' stay of execution." *Id.* at 19 (citing *Lee*, 140 S. Ct. at 2591).

Finally, the Court of Appeals affirmed this court's conclusion that "the FDCA applies when already-covered drugs like pentobarbital are used for lethal injections" and that the Protocol as administered is "'not in accordance with law' to the extent it allows the dispensation and administration of pentobarbital without a prescription." *Id.* at 24 (quoting 5 U.S.C. § 706(2)). The Court then directed that the Protocol be "set aside" in that respect. *Id.* It affirmed this court's denial of a stay given this court's finding that "the evidence in the record does not support Plaintiffs' contention that they are likely to suffer flash pulmonary edema while still conscious." *Id.* at 25 (quoting ECF No. 261 at 39).

Plaintiff then filed the present motion, asking the court to: 1) issue an order setting aside the 2019 Protocol and declaring it unlawful for Defendants to carry out further executions without a prescription, and 2) stay his execution to allow the court to reconsider its findings that Plaintiffs failed to make the necessary 'irreparable harm' showing to warrant enjoining their executions.

As to the first request, the Court of Appeals has already directed this court to enter an order setting aside the Protocol to the extent it permits the dispensing and administration of pentobarbital without a prescription, and the court will therefore issue an order accordingly. Given the extraordinary circumstances here, the request for a stay of execution will be granted.

II. LEGAL STANDARD

In considering whether to grant the "extraordinary remedy" afforded by injunctive relief, courts 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). "[L]ike other stay applicants, inmates seeking time to challenge the manner in which the [the government] plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). In addition, "the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest," two factors that "merge" where, as here, the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

A. Significant Possibility of Success on the Merits

In denying Plaintiff's earlier request for permanent injunctive relief, the court found that the evidence in the record was insufficient to show that flash pulmonary edema was "likely, let alone 'certain' or 'imminent.'" (ECF No. 261 at 40 (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).) As the court explained, this conclusion was premised, in part, on its interpretation of *Lee*. (*Id.* at 39–40.) And in ruling on Plaintiffs' motion for reconsideration, the court found that in order to demonstrate irreparable harm, Plaintiffs would need to "supply

evidence that casts doubt on the more than 100 executions carried out using pentobarbital." (*See* ECF No. 305.)[2]

These conclusions were thrown into doubt given the D.C. Circuit's clarification of *Lee*. And as Judge Pillard pointed out in her dissent, this court's prior assessment of the evidence in the record was tainted by the court's erroneous interpretation of *Lee*. *See Execution Protocol Cases*, No. 20-5320, slip op. at 31 (Pillard, J., dissenting) ("Only after the Supreme Court vacated a preliminary injunction on Plaintiffs' Eighth Amendment claim did the district court find that Plaintiffs had failed to show irreparable harm.").

Indeed, correcting this court's error casts the evidence in a different light such that Plaintiffs have established a significant possibility of showing irreparable harm given Defendants' violation of the FDCA. This court found initially that the question of whether an inmate injected with a high dose of pentobarbital will suffer flash pulmonary edema while sensate was one upon which reasonable minds could differ. But that conclusion was premised on a finding that Plaintiffs had failed to "completely undermine" the testimony of Defendants' expert Dr. Crowns. (*See* ECF No. 261 at 38.) This improperly elevated Plaintiff's burden to show irreparable harm. And new evidence presented after each execution (*See, e.g.*, ECF No. 282-4, Van Norman Supp. Decl.), appears to chip away at Crowns' hypothesis and, given the Court of Appeals' interpretation of *Lee,* undermines the basis for the court's conclusion on

[2] The court also explained that it was not clear whether the prescription requirement was linked to the harm of flash pulmonary edema. (ECF No. 261 at 36.) The Court of Appeals could have adopted this reasoning and avoided consideration of the court's factual finding regarding irreparable harm altogether. Instead, it relied on this court's factual findings, which suggests, at least at this juncture, that the Plaintiffs can make a showing of irreparable harm in the absence of the prescription requirement.

Plaintiffs' motion for reconsideration of the irreparable harm finding. Accordingly, this factor weights in favor of issuing a stay.

Defendants' arguments to the contrary are unpersuasive. First, they argue that *Dunn v. McNabb*, 138 S. Ct. 369 (2017) forecloses this court's ability to issue a stay to reconsider its findings on irreparable harm. (ECF No. 319 at 1.) Not quite. In *Dunn*, the Supreme Court vacated a stay issued by a district court where the plaintiff had failed to establish a "significant possibility of success on the merits." 138 S. Ct. 369. Plaintiff in this case has made that showing. Citing the mandate rule, Defendants also argue that Plaintiff's request for injunctive relief is foreclosed by the D.C. Circuit's finding that this court "was correct to deny the entry of a permanent injunction" on the FDCA claims. (ECF No. 319 at 2.) But as Plaintiff correctly points out, the Circuit's conclusion means only that this court did not abuse its discretion *under the circumstances* that were then before it, not that a permanent injunction was unavailable as a matter of law. Even after a mandate issues, a court may revisit an issue when "there has been a substantial change in the evidence or where an intervening decision has changed the law." *Yankee Atomic Elec. Co. v. United States*, 679 F.3d 1354, 1360 (Fed. Cir. 2012); *accord Barrow v. Falck*, 11 F.3d 729, 731 (7th Cir. 1993) ("An appellate mandate does not turn a district judge into a robot, mechanically carrying out orders that become inappropriate in light of subsequent factual discoveries or changes in the law.").

The Court of Appeals' decision has fundamentally changed the law upon which this court relied in making its factual finding. Thus, the court is not foreclosed from reconsidering whether to grant a permanent injunction, especially after finding that Plaintiff has a substantial possibility of success on the merits.

B. Irreparable Harm

In order to prevail on a request for a stay, as with a request for a 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); *see also Nken*, 556 U.S. at 434 (noting the substantial overlap between the factors governing a stay and the factors governing a preliminary injunction). Here, without injunctive relief, Plaintiff will be executed with a drug administered in violation of a federal law that ensures its safety and efficacy for the intended purpose. Furthermore, he will be unable to pursue his Eighth Amendment claim, which the D.C. Circuit has just revived as of yesterday. This harm is manifestly irreparable.

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 (RC), 2018 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).

C. Balance of Equities

The need for closure in this case—particularly for the victim's family—is weighty. *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 seven 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 federal executions until it can secure a valid prescription. Accordingly, the court sees no reason why this execution *must* proceed today.

Thus, the balance of the equities favors a stay.

D. Public Interest

The court is deeply concerned that the government intends to proceed with a method of execution that this court and the Court of Appeals have found violates federal law. 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 a stay. The court 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 here. The Court of Appeals issued a decision altering the court's understanding of the law of this case just after 3 a.m. yesterday. The Court of Appeals' mandate was not filed until 3 p.m., another twelve hours later. The court received Plaintiff's motion at around 10 p.m. last night and the motion was fully briefed around 10:45 a.m. this morning. The court would not issue a stay were it not convinced that the Plaintiff has presented claims that had a substantial possibility of succeeding. Indeed, the court denied another request for a stay of execution brought by Orlando Hall earlier this week. (*See Hall v. Barr*, No. 20-cv-3184 (D.D.C.).)

III. CONCLUSION

For the foregoing reasons, Plaintiffs motion for a stay of execution will be GRANTED until such time that the court has reconsidered its finding that Plaintiffs failed to show the necessary "irreparable harm" to warrant enjoining their executions, despite Defendants' violation of the FDCA. Plaintiff's request for an order declaring that the Federal Execution Protocol must be set aside to the extent it permits the use of pentobarbital not subject to a prescription is also GRANTED. The court will issue an accompanying order.

Date: November 19, 2020

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,	
LEAD CASE: *Roane, et al. v. Barr*	Case No. 19-mc-145 (TSC)
THIS DOCUMENT RELATES TO:	
Roane, et al. v. Barr, 05-cv-2337	

ORDER

In accordance with the Court of Appeals' November 18 ruling, *In re Bureau of Prisons' Execution Protocol Cases*, No. 20-5329 (D.C. Cir. Nov. 18, 2020) and 5 U.S.C. § 706(2), it is hereby ORDERED that the Federal Bureau of Prison's 2019 Execution Protocol be set aside to the extent it allows the dispensation and administration of pentobarbital without a prescription.

Plaintiff's motion for a temporary stay of execution is hereby GRANTED for the reasons set forth in the accompanying Memorandum Opinion. It is further ORDERED that Defendants (along with their respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them) are enjoined from executing Plaintiffs until further order of this court.

Date: November 19, 2020

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