

[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

**REPLY IN SUPPORT OF EMERGENCY MOTION TO STAY OR
IMMEDIATELY VACATE AN INJUNCTION BARRING FEDERAL
EXECUTIONS**

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHAEL R. SHERWIN
Acting United States Attorney

SOPAN JOSHI
*Senior Counsel to the Assistant
Attorney General*

MELISSA N. PATTERSON
AMANDA L. MUNDELL
*Attorneys, Appellate Staff
Civil Division, Room 7230
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1201
melissa.patterson@usdoj.gov*

In defense of the district court's latest last-minute order barring federal executions, Hall mischaracterizes the district court's order regarding its prior factual findings, ignores the contours of this Court's disposition of his appeal, continues to rely on the asserted existence of a statutory violation as an adequate basis for this afternoon's injunction, and disregards an independent basis underlying the denial of injunctive relief. None of these contentions provides any reason for this Court to depart from its binding decision issued yesterday or its prior orders in this litigation—to say nothing of the Supreme Court's previous conclusion that plaintiffs in this litigation are not entitled to an injunction to continue litigating this very FDCA claim and its guidance regarding the need to reserve orders like this afternoon's for extreme exceptions.

1. Perhaps because of this Court's previous refusal to permit an injunction based on an *absence* of findings regarding irreparable harm, Hall suggests that the district court today actually *entered* a revised “finding of irreparable harm.” Opp. 5; *see also* Opp. 3 (asserting that “[t]he district court is best positioned to weigh the facts based on the applicable law”). That is incorrect. As the district court made clear, it now harbors “doubt” about those findings, which now “appear[]” differently to the court, and wished for more time to “reconsider[]” its earlier factfinding. A6, A10. These statements plainly do not constitute the entry of new findings that could possibly warrant the extraordinary remedy of an injunction. As on August 27th, this Court should vacate the injunction on this basis alone.

2. Hall defends the district court's last-minute injunction on the ground that the court's error in dismissing plaintiffs' Eighth Amendment claim tainted its factual findings regarding irreparable harm on his FDCA claim. But he fails to grapple with the reality that the district court's conclusion was based on a theory advanced by Judge Pillard's partial dissent and rejected by the majority: in affirming the denial of injunctive relief, a majority of the panel necessarily held that the district court's legal error *did not* taint the district court's factual findings. And Hall's suggestion that this Court did not make that legal determination, and instead concluded only that the district court did not abuse its discretion (a phrase this Court used only in the background section of its opinion) in denying an injunction, ignores this Court's actual analysis. The district court's entry of a last-minute injunction merely because it belatedly agreed with the panel dissent improperly disregards this Court's mandate. Hall's suggestion (Opp. 4) that the mandate rule does not apply because "an intervening decision has changed the law" is incorrect. The only intervening change he identifies is this Court's affirmance of the denial of injunctive relief on his FDCA claim. That is not a change in law, and so does not permit the district court to "revisit its prospective assessment of the need for an injunction," given that this Court already determined that an injunction is unwarranted

3. Hall's continued insistence (Opp. 5) that the FDCA's purpose means that a violation thereof alone justifies injunctive relief directly contravenes this Court's rejection of that proposition yesterday. *See* Op. 24; *see also* Plaintiffs' Opening Br. at

16-17. Hall's reliance on the interest in "avoiding illegal executions" is unavailing for the same reason; this Court has made clear, twice, that a statutory violation alone cannot support injunctive relief in this context.

4. Moreover, in emphasizing the statute's purposes and his asserted risk of harm, Hall, like the district court this afternoon, disregards an independent basis for the district court's original, affirmed denial of injunctive relief: that plaintiffs' asserted harm is untethered to the alleged statutory violation—BOP's use of pentobarbital without obtaining the prescription allegedly required by the FDCA. Dkt. 261, at 36. As the district court previously recognized, pentobarbital's propensity to cause (or not cause) pain does not vary based on the presence (or absence) of a prescription. *See id.* Thus, if "BOP finds a doctor to write a prescription, Plaintiffs will still be executed using pentobarbital," and neither the prescription requirement nor an injunction enforcing it will alter any risk of pain during their executions. *Id.* This conclusion only underscores the impropriety of the district court's order of now issuing the injunction it earlier refused.

CONCLUSION

This Court should stay or immediately vacate the district court's order enjoining Hall's execution (including redundantly "staying" it, A11, which is also essentially injunctive relief, *see Nken v. Holder*, 556 U.S. 418, 428, 432 (2009) (explaining the attributes of injunctions)).

Respectfully submitted,

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

MICHAEL R. SHERWIN
Acting United States Attorney

SOPAN JOSHI
*Senior Counsel to the Assistant
Attorney General*

/s/ Melissa N. Patterson
MELISSA N. PATTERSON
AMANDA L. MUNDELL
*Attorneys, Appellate Staff
Civil Division, Room 7230
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-1201
melissa.patterson@usdoj.gov*

November 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply satisfies the type-volume limitation in Rule 27(d)(2)(A) because it contains 755 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

MELISSA N. PATTERSON

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:

Scott Matthew Wilson Braden
Public Defender
1111 Richardson Road
Tallahassee, FL 32301-0000
Email: scott_braden@fd.org

Matthew J. Herrington
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Email: mherrington@steptoe.com

Matthew Christopher Lawry
Federal Public Defender
601 Walnut Street
Suit 545 West-Curtis Building
Philadelphia, PA 19106
Email: Matthew_Lawry@fd.org

Joshua Christopher Toll
King & Spalding LLP
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006-4706
Email: jtoll@kslaw.com

/s/ Melissa N. Patterson
Melissa N. Patterson