[ORAL ARGUMENT NOT SCHEDULED]

NO. 20-5345

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

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

JAMES H. ROANE, ET AL.,
Plaintiffs-Appellants,

v.

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

Appeal from the United States District Court for the District of Columbia, Hon. Tanya S. Chutkan, Nos. 19-mc-145

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

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INTRODUCTION AND SUMMARY

The district court granted Mr. Hall's request for injunctive relief this afternoon based on this Court's clarification of *Barr v. Lee*, 140 S. Ct. 2590 (2020), which fundamentally changed the law upon which the court relied to make its factual finding. The district court explained that correcting its erroneous interpretation of *Lee* "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." A6. The Government presents four arguments in support of its motion to stay or vacate the district court's injunction, each of which lacks merit.

ARGUMENT

First, the district court was correct that the mandate rule did not bar it from reconsidering the evidence before it under the correct legal standard and issuing a preliminary injunction. This Court, in affirming the district court's denial of a permanent injunction, relied on the fact that "[t]he district court 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." D.C. Circuit Op. 25. This

Court therefore rested its holding on the district court's findings of fact regarding irreparable harm, which it reviewed for abuse of discretion.

But as the district court explained, its "conclusion was premised, in part, on its interpretation of *Lee*." A5. The district court continued that it was only because it believed *Lee* required an "improperly elevated" showing that Plaintiffs "completely undermine" the testimony of Dr. Crowns that it found that Plaintiffs had not made the necessary showing for irreparable harm. A6. It also pointed to new evidence from subsequent executions that, given the Court of Appeals' clarification that the district court had misread *Lee*, provided it with additional evidence it did not believe it could consider. A6-7.

The district court is best positioned to weigh the facts based on the applicable law. This Court's opinion clarified the applicable law in a manner that forced the district court to reevaluate the evidence before it, which it has done. In other words, given the intervening change in the law, the district court faced a different application of facts to law than it previously had. *See id.* at 7 ("The Court of Appeals' decision has fundamentally changed the law upon which this court relied in making its factual finding."). This Court likewise is reviewing a different

injunction based on a different analysis by the district court. Such a situation, where "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), is precisely when the mandate rule gives way.

Moreover, the district court's order falls well within its discretion to revisit the propriety of prospective equitable relief in light of new circumstances. Plaintiffs obtained a judgment in their favor on their FDCA claim—a judgment that was affirmed by this Court. Although this Court also affirmed the district court's denial of injunctive relief, the mandate rule does not prevent Plaintiffs from returning to the district court, judgment in hand, to ask the district court to revisit its prospective assessment of the need for an injunction in light of changed circumstances. Those circumstances include not only this Court's explication of the relevant legal standard, but also the government's inability before this Court to point to any harm from a brief delay associated with obtaining a prescription, Op. 9; and the government's assertion that it intends to defy this Court's decision in conducting Plaintiffs' executions, Op. 8. If the government disagrees with this

Court's ruling on the FDCA, it is free to seek certiorari from the Supreme Court. But it may not obviate the need to do so by executing the Plaintiffs in a manner that this Court has held exceeds its statutory authority. Those circumstances establish that the district court was within its discretion to revisit the need for equitable relief.

The mandate rule is limited to issues that were actually or necessarily decided by the Court of Appeals, not those that could have been considered or decided. *See, e.g.*, *Bayala v. United States Dep't of Homeland Sec.*, 246 F. Supp. 3d 16, 22 (D.D.C. 2017). Here, this Court's decision that the district court did not *abuse* its discretion in its prior opinion did not foreclose the district court from reconsidering the exercise of its discretion in light of this Court's clarification of the law and other changed circumstances.

The Government fares no better attacking the district court's finding of irreparable harm. *See* Mot. at 7-10. It miscasts Mr. Hall's primary showing of harm as based on a "bare" statutory violation. *Id.* at 9. But that is not the harm that the district court credited. To the contrary, the court made known its continuing awareness of the risk that an "inmate injected with a high dose of pentobarbital will suffer flash

pulmonary edema while sensate." A6. The court observed that "new evidence" after "each execution" tended to "chip away at [Dr.] Crowns' hypothesis" that the prisoner's visible respiratory distress during an execution might reflect agonal breathing instead of flash edema, which was the district court's stated reason for previously finding that Plaintiffs had failed to "completely undermine" the Government's experts. *Id.* (quoting ECF No. 261 at 38). The district court explained that the recent evidence from William LeCroy's execution and otherwise, considered in tandem with the court's corrected understanding of *Lee*, "undermines the court's basis" for finding no irreparable harm on the FDCA violation. A6-7. And even *before* that evidence, the district court was "concerned at the possibility that inmates will suffer excruciating pain during their executions." ECF No. 261 at 36.

The court-credited risk of excruciating pain from the prisoner's conscious experience of flash edema amplifies its finding of irreparable harm: "[W]ithout 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." A8. The very purpose for which Defendants have chosen to inject pentobarbital is to ensure a humane

execution with "the least amount of discomfort as possible." AR 1, 3, 525-526, 858, 871-872, 929, 931; Nov. 15, 2019 Deposition of Rick M. Winter at 281:19-21 (ECF No. 45 Ex 1). That purpose justifies adherence to a statute that ensures that the drug is "safe and effective for its intended use," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), as the district court itself has recognized:

> Where the government argues that a lethal injection drug is legally and constitutionally permissible because it will ensure a "humane" death, it cannot then disclaim a responsibility to comply with federal statutes enacted to ensure that the drugs operate humanely. ECF Doc. 213 at 8.

The FDCA's prescription requirement ensures the presence of clinical judgment in determining whether and how a prescription-only drug will be administered. *United States v. Smith*, 573 F.3d 639, 652-53 (8th Cir. 2009); *United States v. Nazir*, 211 F. Supp. 2d 1372, 1375 (S.D. Fla. 2002). The FDCA's prescription requirement "provides safeguards against improper use of lethal-injection chemicals by assuring that medical practitioners are adequately involved in the use of those chemicals." *Ringo v. Lombardi*, 706 F. Supp. 2d 952, 958 (W.D. Mo. 2010). "[I]gnoring those safeguards, as Plaintiffs allege Defendants intend to do, places Plaintiffs at risk." *Id.*

The Government's third and fourth arguments are likewise unavailing. The Government claims that Plaintiffs would be unable to secure a permanent injunction under the FDCA even if they do establish irreparable harm, because an FDCA-based injunction is inappropriate in light of the "balance of equities" and "the public interest". Mot. at 10. The Government's argument finds no support. The Plaintiffs' interest in avoiding illegal executions that expose them to risks of grievous bodily pain and suffering outweighs the Government's claimed interest in carrying out death sentences in a "timely fashion".

It is indisputable that the public has an important interest "in the humane and constitutional application of [a] lethal injection statute." *Nooner v. Norris*, 2006 WL 8445125, at *4 (E.D. Ark. June 26, 2006). This is especially true here, given Plaintiffs' interest in avoiding "elevated risks of severe and gratuitous pain from administration of pentobarbital absent the requisite statutory safeguards . . . outweighs the government's interest in proceeding with the executions as scheduled without obtaining the required prescriptions." (Pillard, J. concurring in part and dissenting in part, at 6-7.) Indeed, the district court emphasized that it "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." A9.

Although Defendants argue that "last-minute" stays of execution should be treated as an exception, as the district court explained, the timing in this instance could not be avoided, given that this Court issued its decision and mandate only yesterday and the district court promptly issued its order this morning. A10. In so doing, the Court also emphasized that it "would not issue a stay were it not convinced that the Plaintiff has presented claims that had a substantial possibility of succeeding." (*Id.*) In light of these circumstances, including Defendants' intentions to proceed with executions in clear and proven violation of law, as well as the court's strong expressed belief that Plaintiffs will succeed on their claim, the equities squarely favor enjoining Plaintiff Hall's execution.

These factors also far outweigh any need for finality in this case. For seventeen years, Defendants did not execute or seek to execute any death-sentenced prisoners, including Plaintiff Hall. Once Defendants announced their intent to do so, Plaintiffs swiftly moved for injunctive relief. A relatively short stay to allow Plaintiff Hall to fully and fairly

litigate the merits of his claims will not substantially injure either the public or Defendants where, as here, Defendants' newfound urgency emerged only after nearly two decades of inaction. *See Oscorio-Martinez*, 893 F.3d at 179 ("[T]he fact that the Government has not—until now—sought to remove SIJ applicants, much less designees, undermines any urgency surrounding Petitioners' removal.").

Finally, Defendants' argument that "more than 1000 inmates have been executed by lethal injection" in violation of the FDCA (Br. 11-12) is no answer at all. This Court has ruled definitely that Defendants' use of pentobarbital to carry out executions without obtaining a valid medical prescription is unlawful. The Government's blatant disregard for that ruling and the statutory requirements to which it must comply should not be countenanced. *See League of Women Voters*, 838 F.3d at 12 ("There is generally no public interest in the perpetuation of unlawful agency action."); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (noting the substantial "public interest in having governmental agencies abide by the federal laws that govern their existence and operations").

CONCLUSION

For the foregoing reasons, the Court should deny the emergency motion to stay or immediately vacate the District Court's injunction barring the execution of Mr. Hall.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and D.C. Circuit Rule 32(c), because it contains 2137 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(f), according to the count of Microsoft Word.

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

November 19, 2020

/s/ Amy Lentz
Amy Lentz

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 using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Amy Lentz
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