[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.

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

No. 21-5004

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

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INTRODUCTION AND SUMMARY

Just over 48 hours before the first of two executions scheduled for Thursday and Friday of this week, the district court issued its sixth injunction against the federal lethal-injection protocol, halting both executions on the ground that the condemned inmates' infection with COVID-19 nearly a month ago will likely cause an as-applied Eighth Amendment violation. The court's previous five protocol-based injunctions have all been vacated by either this Court or the Supreme Court, and this unfounded and untimely last-minute injunction should be vacated as well.

The district court's injunction is legally deficient for multiple reasons. First, the Supreme Court held last July that the district court erred in imposing a "last-minute" preliminary injunction on Eighth Amendment grounds based on nothing more than "competing expert testimony" about whether the protocol's dose of pentobarbital would cause an inmate to suffer the effects of pulmonary edema while sensate. *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020). The district court here reprised that very error in entering yesterday's last-minute preliminary injunction on an as-applied Eighth Amendment challenge by Corey Johnson and Dustin Higgs. The dueling expert evidence on novel and heavily contested scientific issues—especially the key question whether COVID-19's effect on the lungs will cause pulmonary edema to occur so much more quickly that Higgs and Johnson, unlike their co-plaintiffs, will clearly still be sensate when it develops—is far too equivocal for the district court to permissibly conclude that executing plaintiffs under the federal protocol is "*sure or very likely* to

cause … needless suffering." *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (citation omitted) (emphasis added). The speculative evidence by presented by plaintiffs—particularly Johnson, who produced no meaningful individualized evidence about the condition of his lungs—therefore falls far short of the "exceedingly high bar" for last-minute injunctive relief. *Lee*, 140 S. Ct. at 2591.

Moreover, even assuming that the district court correctly credited plaintiffs' experts' predictions regarding the coronavirus's effects during a pentobarbital-based execution over the evidence provided by the government's experts, plaintiffs still cannot establish a likelihood of success. Plaintiffs allege that they will feel pain from pulmonary edema beginning shortly after their lethal injection begins. But plaintiffs agreed below that pentobarbital affects the inmate's brain within 30 to 60 seconds. By their own account, then, the sense of suffocation plaintiffs allege they will experience will be felt for less than one minute. The district court erred in concluded that eliminating that brief period (or even the two-and-a-half-minute interval the district court adopted without support) would so "*significantly* reduce a substantial risk of severe pain" that the Constitution demands an alternative method be adopted, given the Supreme Court's instruction that a "minor reduction in risk is insufficient; the difference must be clear and considerable." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1130 (2019) (emphasis added). That is especially true given by comparison to the pain caused by execution methods such as hanging, which have been "uniformly regarded as constitutional for centuries," *Lee*, 140 S. Ct. at 2591, even though they "caused

death slowly," sometimes through "suffocation, which could take several minutes," *Bucklew*, 139 S. Ct. at 1134 (citation omitted).

The district court likewise seriously erred in concluding that the government is violating the Eighth Amendment in declining to switch from the well-vetted, single-drug pentobarbital protocol to a never-used, two-drug regime or the firing squad to eliminate the risk of pain before pentobarbital reaches the inmate's brain. The Supreme Court has instructed that courts may not become "boards of inquiry" regarding execution "best practices" by mandating a "marginally safer alternative" to an existing drug protocol to carry out a lethal injection. *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion). Here, by imputing constitutional significance to the brief period of pain plaintiffs allege will result from their unique medical conditions before pentobarbital anesthetizes them, the district court did just that, "substantially intrud[ing] on the role" of the Executive Branch in carrying out lawful death sentences in a humane manner. *Id.* As the Supreme Court did in *Lee*, this Court should stay or immediately vacate the injunction barring plaintiffs' executions on Eighth Amendment grounds.[1]

[1] Given the time constraints, the government intends to file a similar application for a stay in the Supreme Court absent prompt action by this Court. If the Court chooses to vacate rather than stay the injunction, the government requests that it issue its mandate forthwith.

STATEMENT

1. The Supreme Court And This Court Conclude That Preliminary Injunctive Relief Is Unavailable On Plaintiffs' Facial Eighth Amendment Claim.

The district court's most recent injunction is its sixth attempt to enjoin use of the federal execution protocol and its second injunction predicated on the theory that the pentobarbital lethal-injection protocol violates the Eighth Amendment. The first five injunctions were vacated by this Court or the Supreme Court, including the one entered on Eighth Amendment grounds arising out of a facial challenge to the protocol. The district court concluded that use of pentobarbital would cause the plaintiffs to suffer unconstitutional levels of pain from pulmonary edema while still sensate. Dkts. 135, 136. A few hours after this Court denied relief, the Supreme Court vacated the district court's injunction. *Lee*, 140 S. Ct. at 2591.

After the district court dismissed plaintiffs' facial Eighth Amendment claim based on *Lee*, Dkts. 193, 205, this Court reversed, holding that the amended complaint satisfied Federal Rule of Civil Procedure 12(b)(6). *In re Federal Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 134 (D.C. Cir. 2020) (*Protocol Cases II*). This Court observed that its determination to "open the courthouse doors to the Plaintiffs" at the pleading stage "is a far distant inquiry from Lee's request that a court take the extraordinary step of affirmatively proscribing a party's behavior before adjudicating its rights." *Id.* And despite remanding for continued litigation on the

facial Eighth Amendment claim, the Court denied several plaintiffs' requests for stays of execution on Eighth Amendment grounds. *See id.* at 135.

2. The District Court Grants Preliminary Injunctive Relief On Plaintiffs' As-Applied Eighth Amendment Claims.

Johnson's and Higgs's executions are scheduled for January 14, 2021, and January 15, 2021, respectively. Dkt. 330. On December 16, 2020, they tested positive for COVID-19. Dkt. 380-4, at 16, 121. They neither developed severe symptoms nor required hospitalization. *See generally*, Dkt. 380-4. Higgs complained of a stuffy nose, intermittent headache, cough, sore throat, and occasional shortness of breath, although his temperature and oxygen saturation were normal. *See, e.g.*, Dkt. 380-4, at 57-75; Dkt. 389, at 86. Johnson's temperature and oxygen saturation were also within normal ranges, and his medical records reveal that he complained only of an intermittent headache and cough. *See, e.g.*, Dkt. 380-4, at 132-49. After ten days, Higgs and Johnson "were medically clear[ed] from isolation." Dkt. 380-4, at 17, 122. Since then, Johnson's medical records indicate that he has not reported any body aches or fatigue, and instead has reported a cough and intermittent sore throat. *See* Dkt. 380-4, at 118-62; Dkt. 389, at 74-77; Dkt. 388-2. Higgs told his provider that he "was short of breath sometimes" but that he was "fine." Dkt. 380-4, at 13. Higgs underwent a chest x-ray on December 30; the radiology report indicated "clear lungs" with only a "right apical reticular nodular density" that was "unchanged" compared to a 2018 x-ray. *Id.* at 107.

Notwithstanding their mild and improving symptoms, Higgs and Johnson each filed amended and supplemental complaints and preliminary injunction motions, alleging that the government's execution protocol violates the Eighth Amendment due to their COVID-19 infections. Dkts. 370, 371, 374, 375. The district court held an evidentiary hearing on plaintiffs' as-applied Eighth Amendment claims on January 4 and 5, 2021. On January 12, 2021, just two days before the executions were scheduled to begin, the district court yet again enjoined the government. The court concluded that both plaintiffs were likely to succeed on their as-applied challenges because "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"—a result that "could be avoided were Defendants to … administer[] a pre-dose analgesic or carry[] out the execution by firing squad." A3.

In reaching this conclusion, the court afforded more weight to the testimony of plaintiffs' experts than to government's, including on such matters as the precise timing of pentobarbital's effects on coronavirus-damages lungs, and the probability that plaintiffs had the relevant type of lung damage. A9-18. With respect to Higgs, the court found plaintiffs' expert's interpretation of Higgs's chest x-rays more persuasive than the interpretations offered by two other doctors—the radiologist who interpreted the x-rays and the government's expert—who agreed those x-rays did not

show any COVID-19-related lung damage. A13-14. As for Johnson, because of "the lack of x-ray evidence," the district court relied solely on "the testimony proffered for Higgs" to "infer … that Johnson has suffered COVID-19 related lung damage." A17-18. The court accorded a separate objective measurement of Johnson's lung function—his pulse oximetry readings—"minimal weight." A18.

The court further concluded that plaintiffs had "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." A21-26. Accordingly, after finding in favor of plaintiffs on the remaining injunction factors, the district court entered an injunction effective until March 16, 2021, to give plaintiffs time to further recover from their COVID-19 infections before execution. A29-31.[2]

ARGUMENT

Under the familiar standards for equitable relief pending appeal, *see Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation omitted), this Court should afford the government immediate relief given (1) the overwhelming likelihood that the district court's Eighth Amendment analysis will not withstand appellate review, and (2) the

[2] Another impediment to Higgs' execution currently exists. Higgs's sentencing court concluded it lacked authority to designate a new state's law to govern the manner of execution under 18 U.S.C. § 3596(a) in light of Maryland's post-sentencing abolishment of capital punishment; the government has a request pending in the Supreme Court for relief. *See United States v. Higgs*, No. 20-927 (S. Ct.).

profound public interest in implementing plaintiffs' lawfully imposed sentences, scheduled to begin tomorrow, without further delay.

I. Plaintiffs Cannot Succeed On The Merits Of Their As-Applied Eighth Amendment Challenges.

The Supreme Court has offered extensive guidance on the "exceedingly high bar" that a method-of-execution Eighth Amendment challenges face, reiterating that it very recently rejected such an as-applied challenge by a "prisoner with a unique medical condition that could only have increased any baseline risk of pain associated with pentobarbital as a general matter." *Lee*, 140 S. Ct. at 2591 (citing *Bucklew*, 139 S. Ct. 1112)).

Importantly, the question in plaintiffs' facial challenge—whether a massive dose of pentobarbital will generally render inmates unresponsive but not insensate, leaving them capable of experiencing pain while only appearing unconscious—is not at issue here, and for good reason: *Lee* already vacated a preliminary injunction entered on that basis, and the district court subsequently made factual findings refuting that claim. *See* A8 (distinguishing that issue from plaintiffs' as-applied, COVID-19-related claim); Dkt. 261, at 39 (finding that "the evidence in the record does not support Plaintiffs' contention that they are likely to suffer flash pulmonary edema while still conscious").

Rather, the court rested its injunction solely on plaintiffs' allegations that COVID-19 so hastens the effects of pentobarbital on the lungs that these inmates—

unlike their co-plaintiffs—will experience a period of pulmonary edema before pentobarbital reaches their brains. *See* A10-11. Plaintiffs cannot succeed in establishing that the well-established pentobarbital lethal-injection regime will likely be deemed cruel and unusual as-applied to them based on these contested allegations.

A. The Eighth Amendment Imposes A High Bar On Method-Of-Execution Challenges.

1. A death-row inmate bringing an Eighth Amendment challenge must show that the challenged method poses "an objectively intolerable risk of harm." *Glossip*, 576 U.S. at 877 (quotation marks omitted). The Eighth Amendment does not "demand the avoidance of all risk of pain in carrying out executions" or "guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people." *Bucklew*, 139 S. Ct. at 1124-25 (quotation marks omitted). Rather, the Constitution prohibits the "'superadd[ition]' of 'terror, pain, or disgrace'" to a capital sentence. *Id.* at 1124 (citation omitted).

Even if an inmate does show an intolerable risk of severe harm, the Eighth Amendment analysis is "a necessarily comparative exercise," *Bucklew*, 139 S. Ct. at 1126, so an inmate must also "plead and prove a known and available alternative," *Glossip*, 576 U.S. at 880, that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain" relative to the challenged method, *id.* at 877. Further, a plaintiff must demonstrate that the government has refused to adopt the proposed alternative "without a legitimate penological reason." *Bucklew*, 139 S. Ct.

at 1125. These standards govern both facial Eighth Amendment challenges and as-applied claims that a unique medical condition increases the pain an inmate may experience during a particular execution protocol. *See Bucklew*, 139 S. Ct. at 1122-29.

2. These standards' application to the single-drug, pentobarbital lethal-injection protocol does not come on a blank slate. "Courts across the country have held that the use of pentobarbital in executions does not violate the Eighth Amendment." *Glossip,* 576 U.S. at 871. Just last summer, in this very case, the Supreme Court observed that the single-dose pentobarbital protocol challenged here "has become a mainstay of state executions," explaining that pentobarbital "[h]as been used to carry out over 100 executions, without incident," "[h]as been repeatedly invoked by prisoners as a *less* painful and risky alternative to the lethal injection protocols of other jurisdictions," and "[w]as upheld by [the Supreme] Court last year, 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." *Lee*, 140 S. Ct. at 2591.

"Against this backdrop," the Supreme Court explained, the plaintiffs could not establish a likelihood of success on their Eighth Amendment claim by proffering contested evidence that "pentobarbital causes prisoners to experience 'flash pulmonary edema,'" potentially "temporarily produc[ing] the sensation of drowning or asphyxiation." *Lee*, 140 S. Ct. at 2591. Accordingly, the Court held that plaintiffs

failed to make "the showing required to justify last-minute intervention" to stop a lawful execution. *Id.*

Since *Lee*, this Court has held that plaintiffs' allegations suffice at the pleading stage, while emphasizing the difference between permitting continued litigation and "tak[ing] the extraordinary step of affirmatively proscribing a party's behavior before adjudicating its rights" by issuing a preliminary injunction. *Protocol Cases II*, 980 F.3d at 134; *see id.* at 135 (declining to enjoin executions during litigation on the remanded facial claim). And this Court explained that "if all that Plaintiffs can produce at summary judgment is a scientific controvers[y] between credible experts battling between marginally safer alternative[s], [plaintiffs'] claim is likely to fail on the merits." *Id.* (quotations omitted). The Court observed that the Supreme Court's precedents "collectively mark out the difficult task ahead for Plaintiffs on the merits" of an Eighth Amendment claim. *Id.*

B. The District Court Applied The Incorrect Standard In Weighing The Parties' Competing Expert Testimony.

The district court rested its decision to enjoin plaintiffs' executions on its conclusions that plaintiffs' experts had testified more persuasively than the government's regarding the possible effects of pentobarbital on someone diagnosed with coronavirus. *See* A10-18. But the court failed to determine whether inmates have carried their burden of providing evidence that the challenged method "is *sure or very likely* to result in needless suffering." *Glossip*, 576 U.S. at 881 (emphasis added).

As the Court has warned, "challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts," and in assessing an Eighth Amendment challenge, "federal courts should not 'embroil [themselves] in ongoing scientific controversies beyond their expertise.'" *Glossip*, 576 U.S. at 882 (quoting *Baze*, 553 at 51 (plurality opinion)). Hence, a court must conclude not merely that it is more likely than not that the inmates' evidence establishes "a substantial risk of severe pain," it must find that it is "sure or very likely" in a way that avoids the need for judicial pronouncements regarding matters still in scientific debate. *Id.* at 881-82. Indeed, *Lee* vacated a preliminary injunction despite the district court's conclusion that "Plaintiffs have the better of the scientific evidence" and reliance on an expert's opinion that their alleged suffering was a "virtual medical certainty." Dkt. 135, at 11-12; *see Lee*, 140 S. Ct. at 2591.

Here, despite agreeing that coronavirus was not yet well-understood, the parties' experts disagreed about whether Higgs and Johnson will develop pulmonary edema so much faster because of COVID-19 that they—unlike other plaintiffs—will remain sensate long enough to experience lung-related pain Plaintiffs' expert asserted that pulmonary edema would occur sooner in individuals infected with COVID-19, Dkt. 374-1, at 1, but never identified with specificity (*i.e.*, seconds or minutes) how much sooner it would occur. Dkt. 389, at 177. At the evidentiary hearing, plaintiffs' expert opined for the first time, without citing any objective evidence for her opinion, that pulmonary edema will occur "virtually instantaneous[ly]," Dkt. 389, at 161, within

one or two seconds of injection, *id.* at 192, for inmates with COVID-19. The government's expert asserted that plaintiffs' expert's opinion was "speculative," explaining that there is "no evidence that asymptomatic or mildly symptomatic Covid-19 patients have increased propensity for pulmonary edema when administered lethal doses of pentobarbital," and opining that Higgs and Johnson "are not at increased risk of developing pulmonary edema … prior to … unconsciousness." Dkt. 380-2, at 2, 3.

Indeed, the parties' experts disagreed even regarding subsidiary scientific issues. They disputed whether there was any evidence to support plaintiffs' contentions that they have incurred COVID-19 lung damage at all.[3] They disputed whether Higgs' chest x-ray was "clear," as the radiologist with whom BOP contracted had deemed it, Dkt. 380-4, at 107, or in fact showed coronavirus-related damage.[4] And they disputed whether Johnson could establish any such damage, despite his mild symptoms and the lack of objective clinical indicators (including images) that he personally had suffered significant lung damage.[5]

In light of the competing expert opinions, the court did not find—and could not have found—that the scientific evidence was so clear that plaintiffs had

[3] *Compare, e.g.*, Dkt. 374-1, at 1; Dkt. 374-7, at 4, *with, e.g.*, Dkt. 380-2, at 1; Dkt. 380-1, ¶ 12; *id.* ¶ 13.

[4] *Compare* Dkt. 380-4, at 107, *and* Dkt. 389, at 59, 87, *with id.* at 95.

[5] *Compare* Dkt. 380-1 ¶ 12, *with* Dkt. No. 374-3, at 3.

established with the requisite certainty that they would suffer the excruciating pain on which their as-applied claim turns. Rather, the court appears to have applied something much closer to "the preponderance-of-the-evidence standard generally applicable in civil actions," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983), simply finding plaintiffs' experts more "persuasive," A11, A13. Such findings that one party's showing edged out the other's in a battle of experts is simply not that the type of scientific consensus regarding the possible implications of plaintiffs' COVID-19 infections that "establish[es] the sort of 'objectively intolerable risk of harm'" that the Constitution prohibits. *Baze*, 553 U.S. at 50 (plurality opinion).

C. Plaintiffs Cannot Establish That The Widely Used Pentobarbital Protocol Creates An Unconstitutional Risk Of Pain As Applied To Them.

Even had the district court made sustainable findings that plaintiffs' earlier coronavirus infections would prompt a period of pulmonary edema before they are anesthetized, plaintiffs' as-applied challenge is likely to fail. As *Bucklew* recently reiterated, the Eighth Amendment "does not demand the avoidance of all risk of pain in carrying out executions." 139 S. Ct. at 1125 (citing *Baze* and *Glossip*). There, Bucklew alleged that Missouri's single-drug pentobarbital protocol would cause him severe pain due to his unique medical condition. *Id.* at 1120. An expert testified that Bucklew's extensive vascular tumors would cause him to experience a "sense of suffocation" before pentobarbital rendered him insensate, thereby experiencing "prolonged feelings of suffocation and excruciating pain." *Id.* at 1131.

The Supreme Court nevertheless upheld the use of the single-drug pentobarbital protocol in those circumstances, explaining that the key inquiry "when it comes to determining whether a punishment is unconstitutionally cruel because of the pain involved" in either a facial and as-applied challenge is "whether the punishment 'superadds' pain well beyond what's needed to effectuate a death sentence," a query that requires the inmate to "prove an alternative method of execution" that would "*significantly* reduce[] a substantial risk of pain." *Id.* at 1126-30 (emphasis added). The Court emphasized that a "minor reduction in risk is insufficient; the difference must be clear and considerable." *Id.* at 1130. That constitutionally significant reduction in alleged suffering may not "rest on speculation unsupported … by the evidence" in the record. *Id.*

Here, as in *Bucklew*, plaintiffs' as-applied Eighth Amendment claim rests—at best—on a brief period of alleged pain before pentobarbital renders them unconscious. Even assuming the district court was correct to credit plaintiffs' expert's conclusion that pentobarbital will reach their lungs and cause pulmonary edema within 1-2 seconds, plaintiffs *agreed* below that the evidence before the district court showed that pentobarbital will *also* begin affecting the brain within 30-60 seconds.[6]

[6] *See* Dkt. 383, at 12-13 (plaintiffs' reply in support of an injunction, citing the opinion of their expert, Dr. Stevens, Dkt. 344-1, at 2 ¶ 8 ("Pentobarbital has an onset of action time of 30 seconds to 1 minute")); Dkt. 352-1, at 6 ¶ 17 & Ex. B (government expert Dr. Antognini opining that pentobarbital's onset time at a lethal dose is 20-30 seconds); *Bucklew*, 138 S. Ct. at 1132-33 (crediting testimony that

Plaintiffs' expert later testified without support that this interval could be up to two-and-a-half minutes, which the district court clearly erred in seizing on. A11 (citing Dkt. 389, at 150). But even if sustainable, plaintiffs' as-applied claim would hinge on 150 additional seconds of coronavirus-related lung pain that they assert that they will experience above and beyond the other plaintiffs in this case.

Eliminating the possibility of that brief period simply does not amount constitute the type of "clear and considerable" reduction in suffering that the Eighth Amendment obliges the government to undertake. *Bucklew*, 139 S. Ct. at 1130. As the Supreme Court emphasized in rejecting a similar as-applied challenge, the Court has "time and time again" rejected the proposition that "executions must always be carried out painlessly because they can be carried out painlessly most of the time." *Id.* at 1127. And in constitutionalizing the type of "slight[] or marginal[]" improvement in safety urged here, *id.* at 1130, the district court assumed precisely the role the Supreme Court has warned against, acting as a "board[] of inquiry" dictating "'best practices' for executions," using an Eighth Amendment methodology under which "each ruling [will be] supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51 (plurality opinion); *accord Bucklew*, 139 S. Ct. at 1125.

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pentobarbital would render the inmate "fully unconscious and incapable of experiencing pain within 20 to 30 seconds").

Resting an Eighth Amendment violation on the seconds or minutes before the massive dose of pentobarbital reaches the brain is moreover difficult to square with the Supreme Court "instructive" comparisons with what the Eighth Amendment "was understood to permit," such as hanging, which is "no guarantee of a quick and painless death." *Bucklew*, 139 S. Ct. at 1124. As the Supreme Court reiterated earlier in this litigation, hanging has been "uniformly regarded as constitutional for centuries," *Lee*, 140 S. Ct. at 2591, even though it "caused death slowly," sometimes through "suffocation, which could take several minutes," *Bucklew*, 139 S. Ct. at 1134 (citation omitted); *see also In re Ohio Execution Protocol Litigation*, 946 F.3d 287, 290 (6th Cir. 2019) (holding that the risk of pain due to pulmonary edema during lethal injection was not the type of "constitutionally cognizable," "severe" pain that could support an Eighth Amendment claim under *Bucklew*). Given the Supreme Court's observations about the significant—but not unconstitutional—possibility of minutes of pain attending other constitutional methods of execution, the district court erred in finding an Eighth Amendment violation based on a comparable or shorter period.

D. Plaintiffs Cannot Establish A Feasible Alternative That The Government Lacks A Legitimate Reason Not To Employ.

Even if plaintiffs were able to show that pentobarbital creates a constitutionally cognizable risk of severe pain relative to one of their proposed alternatives, they are unlikely to succeed in establishing an alternative method to significantly reduce that alleged pain that is "feasible and readily implemented," and "that the [government]

has refused to adopt [this method] without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125, 1130.

1. First, the district court concluded that the combination of pentobarbital with an opioid such as fentanyl is a viable alternative method of execution. No State, however, adds an opioid to an execution protocol using pentobarbital. This Court has concluded that plaintiffs can satisfy their burden to identify an alternative at the pleading stage by pointing to the possibility of this two-drug protocol, observing that various jurisdictions have previously used or still use "[t]he combination of drugs as part of lethal injection protocols." *Protocol Cases II*, 980 F.3d at 133. But this Court had no occasion to then decide whether plaintiffs can ultimately succeed in establishing that the novel drug protocol they press—fentanyl added to the existing pentobarbital dose—"would be as effective and humane as the [government's] existing" drug protocol. *Bucklew*, 139 S. Ct. at 1130 (citing *Baze*, 553 U.S. at 57).

Nor could the Court make such a determination about the likelihood of success on the ultimate merits absent evidence offered by the plaintiff to support such a conclusion with respect to the *specific combination* of drugs they propose; it may not rely on the use elsewhere of multi-drug protocols in general. Where the particular drug protocol an inmate proposes in lieu of the existing drug protocol has not been adopted by any other jurisdiction, and "petitioners proffered no study showing that it is an equally effective manner of imposing a death sentence," the proposed alternative "is not so well established that [a government's] failure to adopt it constitutes a

violation of the Eighth Amendment." *Baze*, 553 U.S. at 57 (plurality opinion); *see also Bucklew*, 139 S. Ct. at 1130. Here, plaintiffs have "proffered no study showing" in support of their proposed fentanyl-pentobarbital combination, *Bucklew*, 139 S. Ct. at 1130, making the district court's conclusion that plaintiffs would ultimately be able to establish that the government was obliged to implement this novel regime difficult to fathom. That is particularly true given the years of litigation over other multi-drug execution protocols, and previous allegations that drug combinations designed to alleviate suffering in fact masked it. Moreover, plaintiffs are unlikely to succeed given their additional burden of showing "that the [government] has refused to adopt [their proposed alternative] without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125. Although governments are free to implement novel execution methods to increase the humanity of capital sentences, a government may legitimately decline to adopt an untested method unsupported by scientific evidence assuring the government of its efficacy and reliability. *See id.* at 1130; *see also* AR871, 930-31 (documenting decision to avoid complications and increased risk of error inherent in multi-drug protocols).

2. The district court's conclusion that a firing squad is a constitutionally superior method to pentobarbital-based lethal injection is equally baseless. A23-26. Every other court to have considered the issue has rejected firing squad as an alternative method that renders lethal injection unconstitutional. *See, e.g., Gray v. McAuliffe*, No. 16-cv982, 2017 WL 102970, at *19 (E.D. Va. Jan. 10, 2017); *McGehee v.*

Hutchinson, No. 17-cv-179, 2020 WL 2841589, at *37 (E.D. Ark. May 31, 2020). Despite being a constitutional means of execution, death by firing squad can involve "shattering of bone and damage to the spinal cord," and even for successfully implemented executions, "for the 8-10 seconds of consciousness after bullet entry, the injury would be severely painful." Dkt. 111-4, at 8. The difference between such a method and the seconds of lung-related pain that could occur even assuming plaintiffs' evidence regarding pulmonary edema is credited is not constitutionally cognizable. To the contrary, the permissibility of that method underscores why plaintiffs' as-applied claim fails. And regardless, the Constitution does not mandate the federal government to turn back the clock to a more primitive execution form. *See Baze*, 553 U.S. at 62 (plurality opinion).

II. The Balance Of Equities Strongly Favors Staying Or Vacating The Preliminary Injunction.

The remaining equitable factors weigh heavily against any further delay of plaintiffs' sentences due to this litigation.

First, any cognizable "irreparable harm" that plaintiffs will suffer "in the absence of preliminary relief," *Glossip*, 576 U.S. at 876 (citation omitted), does not support "tak[ing] the extraordinary step of affirmatively proscribing a party's behavior before adjudicating its rights," *Protocol Cases II*, 980 F.3d at 134. To be sure, death is irreparable, but that cannot be the irreparable harm supporting an injunction, because plaintiffs' death sentences are not at issue here. *See Hill v. McDonough*, 547 U.S. 573,

580 (2006). And as discussed above, plaintiffs' as-applied Eighth Amendment claims turn on contested allegations regarding the brief period before pentobarbital renders them unconsciousness.

On the other side of the ledger, the injuries to the government and the public are clear and certain: the government will be unable to "carry[] out a sentence of death in a timely manner" *Baze*, 553 U.S. at 61 (plurality opinion), despite the Supreme Court's repeated emphasis on the public's "powerful and legitimate interest in punishing the guilty," *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). While the district court suggested that the 17-year period without a federal execution demonstrates that the government has a minimal interest in carrying out plaintiffs' sentences, A29, the years it took the government to carefully develop a humane and workable new protocol "does not diminish the importance of carrying out" his lawful punishment as scheduled. *In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 128 (D.C. Cir. 2020) (Katsas, J., concurring).

The public interest also plainly lies with permitting this execution to proceed as scheduled. Higgs and Johnson each committed multiple murders decades ago. *See United States v. Higgs*, 353 F.3d 281, 290 (4th Cir. 2003); *United States v. Tipton*, 90 F.3d 861, 868-70 (4th Cir. 1996). Plaintiffs have exhausted all permissible appeals and collateral challenges. Over a dozen family members of plaintiffs' victims plan to begin their travel to Terre Haute today. Under these circumstances, the need for "finality acquires an added moral dimension." *Calderon*, 523 U.S. at 556.

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 5176 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 January 13, 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 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*	)	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

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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. Irreparable Harm

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.

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	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, (ECF No. 394), the motions for a preliminary injunction filed by Plaintiffs Dustin Higgs and Cory Johnson, (ECF Nos. 371, 375), are hereby GRANTED. 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.

It is hereby 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 Dustin Higgs and Cory Johnson until March 16, 2021.

Date: January 12, 2021

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