No. 21-5004

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 ROSEN, ACTING ATTORNEY GENERAL, et al.

Appellants.

On Appeal from the United States District Court
for the District of Columbia

DEFENDANTS-APPELLANTS' OPPOSITION TO PETITION FOR REHEARING EN BANC

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Plaintiffs Corey Johnson and Dustin Higgs are death-row inmates scheduled for execution this evening at 6 p.m. and tomorrow at 6 p.m., respectively. They do not challenge the lawfulness of their sentences or the constitutionality of the government's lethal-injunction protocol generally—a claim that the Supreme Court has already held does not warrant a preliminary injunction. Rather, plaintiffs' only argument here is an as-applied Eighth Amendment challenge turning on their highly individualized claims that their prior infection with the novel COVID-19 virus means that the well-established, single-drug pentobarbital protocol is unconstitutional in their cases alone.

On January 12, a week after concluding its evidentiary hearing, the district court entered a preliminary injunction barring their executions until at least March 16. ADD-46. A panel of this Court vacated that injunction the next day in an unpublished order. ADD-1-2. Writing for the majority, Judge Katsas explained in detail why plaintiffs' claims here failed to establish a likelihood of success on the merits of their Eighth Amendment claim under the demanding standards for demonstrating that a lethal-injection protocol is unconstitutional. ADD-3-7. Judge Pillard dissented.

Plaintiffs now ask the en banc Court to reinstate the eve-of-execution injunction that the panel found unwarranted. Given this Court's request for a response within several hours, the government asks that the en banc Court deny relief for the reasons the government set out in its filings made yesterday at the panel stage.

See Gov't Emergency Motion To Stay Or Vacate and Reply (Jan. 13, 2021). Plaintiffs' request for en banc review should also be denied for the following reasons.

1. This case plainly fails to meet the en banc standard as involving a "question[] of exceptional importance." Fed. R. App. P. 35(a)(2). Plaintiffs' suggestion that the panel's order somehow alters the legal regime such that the government may "evade the strictures of the Eighth Amendment," Pet. 1-2, is meritless. To begin, the majority's concurrence in an unpublished order does not set out, let alone alter, anything regarding this Court's Eighth Amendment precedent. Next, the majority's views plainly require adherence to, not evasion of, the Eighth Amendment's requirements. As Judge Katsas explained, the district court seriously erred in applying the "'exceedingly high bar'" inmates face in establishing that the government has "'superadd[ed]'" pain to a capital sentence by declining to alter its method of execution. ADD-3 (quoting first *Lee*, 140 S. Ct. at 2591, then *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019)).

Further, the panel majority's conclusions regarding the Eighth Amendment's strictures and plaintiffs' burdens thereunder hardly "nullif[ies] a district court's power" to hear evidence and issue preliminary injunctions, Pet. 9-10, or precludes relief "as a matter of law no matter what facts and science might show," Pet. 3. Rather, they simply reflect the significant hurdles facing plaintiffs who must establish a likelihood of actually succeeding on their ultimate claim under the Eighth Amendment in order to secure the extraordinary relief of an injunction on the eve of execution. *See In re*

Federal Bureau of Prisons' Execution Protocol Cases, 980 F.3d 123, 133 (D.C. Cir. 2020) (*Protocol Cases II*) (noting "the Eighth Amendment's high constitutional mountain of proof" and distinguishing its pleading-stage ruling from "the extraordinary step of affirmatively proscribing a party's behavior before adjudicating its rights" by issuing a preliminary injunction).

Rather than involving any sweeping questions of exceptional importance, this case involves highly individualized and fact-specific claims—a paradigmatic example of a case that does not warrant review by the full Court. Plaintiffs' claim turns on allegations that because they have been infected with the novel coronavirus, such infection makes them uniquely likely to suffer unconstitutional pain and suffering during their upcoming executions. This circumstances is unlikely to recur with frequency, if ever.

Nor does the capital context alter the propriety of en banc review in this matter, as demonstrated by the Supreme Court's prompt vacatur of a stay of execution this en banc Court entered earlier this week. *See Rosen v. Montgomery*, No. 20A122 (U.S. Jan. 12, 2021). Indeed, the question there—the scope of the Federal Death Penalty Act's incorporation of state laws governing executions—was at least a purely legal issue capable of repetition. Here, by contrast, the factbound issues the panel carefully review and decided are exceedingly unlikely to recur. The Supreme Court's vacatur demonstrates that this Court's desire to consider its own precedent en banc—even on a highly expedited basis—does not warrant halting an execution, even

briefly. *See* Order, *Montgomery v. Rosen*, No. 21-5001 (D.C. Cir. Jan. 11, 2021) (providing for a truncated briefing schedule to be completed within a few weeks).

2. Nor is en banc review warranted to secure uniformity in this Court's decisions or the decisions of other courts. Plaintiffs suggest that the panel majority's approach conflicts with the Supreme Court's, arguing that it "misread *Lee* to preclude injunctive relief whenever defendants offer competing expert testimony." Pet. 9. But the majority's analysis recognizes that under *Lee*, the existence of competing expert testimony—even testimony that the district court *refused to credit* at the time—indicates the absence of the type of scientific clarity that would be necessary to enjoin the government from using a well-established lethal-injection protocol on an Eighth Amendment method-of-execution claim.

Plaintiffs also assert that the panel majority applied *Lee* "in a manner that directly conflicts with this Court's earlier interpretation of *Lee* in" *Protocol Cases II*. Pet. 2. But that argument conflates the showing necessary under *Lee* to obtain preliminary (and last-minute) injunctive relief and the showing required to *plead* a claim under Rule 12(b)(6). Only the latter was at issue in *Protocol Cases II*. As this Court made plain, it was not considering "[w]hether Plaintiffs will ultimately be able to climb the Eighth Amendment's high constitutional mountain of proof." *Protocol Cases II*, 980 F.3d at 133. But in order to obtain a preliminary injunction, plaintiffs must establish a likelihood of meet that extremely high standard. Accordingly, this Court denied

injunctive relief to two inmates with imminent execution dates on the Eighth Amendment claim it had just remanded. *Id.* at 135.

3. In any event, even as to just this case, plaintiffs cannot demonstrate any error in the panel's decision. Plaintiffs' emphasis on the currently undisputed aspects of the case, Pet. 11-12, is misplaced. As Judge Katsas recognized, their as-applied Eighth Amendment challenge turns on three highly disputed factual questions: (1) whether "COVID-19 has severely damaged the plaintiffs' lungs;" (2) whether "this damage would make them experience a flash pulmonary edema sooner;" and (3) whether "they will experience this before they become insensate." ADD-4.

At every step, plaintiffs fail to refute the panel majority's cogent explanation why the district court's factual findings did not support the extraordinary relief it granted. With respect to the likelihood that plaintiffs have severe, coronavirus-related lung damage, plaintiffs argue that the panel majority improperly credited the government's expert's opinion that Higgs and Johnson experienced only mild COVID symptoms. Pet. 12. Yet, as Judge Katsas explained, Higgs and Johnson themselves downplayed their symptoms, telling their providers at points that "Nothin's new. I'm fine" and "I'm okay, I'm good." ADD-5. Plaintiffs lean heavily on their expert's interpretation of Higgs's chest x-ray, but that interpretation was

disputed by the government's expert and the reviewing radiologist.[1] In resolving that dispute, "[t]he district court credited [plaintiffs' expert's] testimony, based principally on *its own* independent interpretation of the x-rays." *Id.*

Next, plaintiffs assert that the panel majority "misread[] the record" evidence and discounted plaintiffs' expert's determinations regarding the likelihood that plaintiffs' COVID infections will cause them to suffer flash pulmonary edema more quickly. Pet. 13-14. But as Judge Katsas explained, plaintiffs cannot seriously dispute that their expert in fact provided "no evidence" for her "inference" that "COVID-positive patients" are "particularly 'susceptible to rapid and massive barbiturate damage,'" ADD-6 (Katsas, J., concurring), when the expert admitted on cross-examination that there are no scientific studies regarding the effects of massive doses (or even clinical doses) of pentobarbital in COVID-positive patients, *see* Dkt. 389, at 153.

Lastly, plaintiffs take issue with the panel's assessment of the record evidence supporting the district court's determination that plaintiffs will experience pain from pulmonary edema before becoming insensate. Pet. 14-16. Judge Katsas rightly described that finding as based on nothing more than pure "conjecture" and based on

[1] Judge Katsas identified a third expert, the government's expert Dr. Crowns, as concurring in the radiologist's assessment. ADD-5. Dr. Crowns relied on the radiologist's report (and other objective indicia from Higgs's medical records) when opining on Higgs's heart health and whether Higgs currently suffered from any pulmonary edema, *see* Dkt. 387, at 22, but he did not separately opine on the x-ray images.

little more than the same "thinly supported" expert view the Supreme Court declined to accord dispositive weight in *Lee*. ADD-6, 7. Indeed, contrary to plaintiffs' view (Pet. 15), *Lee* had before it the district court's conclusion—based on Van Norman's "virtually instantaneous" opinion—that pain from the pentobarbital procedure was a virtual certainty. But because there was competing testimony on this score, and given the high bar to invalidating a well-established method of execution as unconstitutionally cruel and unusual, the Supreme Court held that injunctive relief was unavailable. 140 S. Ct. at 2591-92.

* * *

These lawful capital sentences were imposed two decades ago for brutal crimes. The panel has correctly determined that plaintiffs have not made the showing that they are the "extreme exception" that warrants "last-minute intervention" to halt their executions. *Lee*, 140 S. Ct. at 2591. If plaintiffs wish to seek Supreme Court review, they may do so, but this Court should conclude its review with "'with appropriate dispatch'" by declining to order an en banc proceeding. Order, No. 19-5322 (D.C. Cir. May 15, 2020) (statement by Tatel, J.) (quoting *Barr v. Roane*, 140 S. Ct. 353 (2019)). This Court should promptly deny plaintiffs' petition.

CONCLUSION

The petition for en banc review should be denied.

Respectfully submitted,

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January 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this response satisfies the type-volume limitation contained in this Court's order of January 14, 2021, because it contains 1651 words. This response 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 14, 2020, I electronically filed the foregoing response 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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