ORAL ARGUMENT NOT YET SCHEDULED
No. 21-5004

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES
COREY JOHNSON AND DUSTIN HIGGS,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the District of Columbia, No. 19-mc-145
Before the Honorable Judge Tanya S. Chutkan

OPPOSITION OF PLAINTIFFS-APPELLEES DUSTIN HIGGS AND COREY JOHNSON TO DEFENDANTS-APPELLANTS' MOTION TO STAY OR VACATE THE PRELIMINARY INJUNCTION

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INTRODUCTION

Less than a month after Plaintiffs were informed that they had contracted COVID-19, the district court granted a limited preliminary injunction, enjoining Plaintiffs' executions until March 16, 2021. A31. The district court's ruling was issued after an evidentiary hearing "to assess the credibility of the parties' expert opinions." A3. The court found that based on the evidence, Plaintiffs "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." A3.

It is undisputed that both Mr. Higgs and Mr. Johnson have symptomatic COVID infections. It is undisputed that damage to the aveolar capillary membrane is "seen by radiography in . . . at least 79% of patients who have symptomatic COVID-19 infection[.]" A10. It is also undisputed that pentobarbital is caustic. Because pentobarbital is caustic, the high concentration dose, as called for by the execution protocol, will burn the COVID-19 damaged alveoli-capillary membraned in the lungs within a second or two of injection. A11.

This causes flash pulmonary edema, which the district court described as a "sensation of drowning akin to waterboarding". A3, 11. This will happen before pentobarbital reaches the brain, A10, and long before it reaches its peak effects. Thus, plaintiffs will suffer the sensation of drowning akin to waterboarding "anywhere from thirty seconds to two-and-a-half minutes after injection." A11. The Government now asks this Court to upend the district court's careful factual findings and credibility assessments based on little more than its say-so. This request—which does not come close to meeting the "clear error" standard applicable on this appeal—should be rejected, and the motion should be denied.

STANDARDS OF REVIEW

.A stay pending appeal is available "only under extraordinary circumstances," and the "district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). The Government has not carried its "'heavy burden'" to justify such relief here. *Id.* The Government has not met the four factors for a stay pending appeal: (1) it has not "'made a strong showing that [it] is likely to succeed'"; (2) it will not "'be irreparably injured absent a stay'"; (3) a stay would substantially and irreparably injure Plaintiffs; and (4) a stay is not in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Moreover, the district court's factual findings may be overturned only "upon a finding of clear error." *Mills v. District of Columbia*,

571 F.3d 1304, 1308 (D.C. Cir. 2007); *see Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 928 F.3d 1102, 1112 (D.C. Cir. 2019) ("We review the issuance of a preliminary injunction for abuse of discretion, although we review the court's underlying legal conclusions de novo and factual findings for clear error.").

FACTUAL STATEMENT

On November 20, 2020, Defendants notified Plaintiffs that their executions were scheduled for January 14, 2021 and January 15, 2021, respectively. Dkt. #330. Less than a month before their scheduled executions, both Plaintiffs tested positive for COVID-19. Mr. Higgs tested positive on December 16, and the Bureau of Prisons notified him on December 17. Dkt. #369-2. That same date, counsel for Mr. Higgs informed the district court of Mr. Higgs's COVID-19 diagnosis, and five days later, on December 22, Mr. Higgs filed an amended and supplemental complaint along with a motion for preliminary injunction barring his execution based on this diagnosis. Dkt. #369-1 at 2; Dkt. #369-5. Mr. Johnson filed his supplemental complaint and motion for preliminary injunction on December 23, within five days of learning of his own COVID-19 diagnosis on December 18. Dkt. #372-1, #373-1. These filings were supported by three new declarations from expert witnesses. Dkt. #369-3; #369-4; #372-4.

On December 28, the court ordered Defendants to respond to Plaintiffs' motions for preliminary injunction by December 31, and on January 1, the court

scheduled a two-day evidentiary hearing for January 4 and 5, 2021. Plaintiffs filed a reply to Defendants' opposition on January 3. Dr. Kendall von Crowns testified on January 4, 2021, and Drs. Todd Locher, Michael Stephen, and Gail Van Norman testified on January 5. "Based on the declarations and live testimony," the district court found 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." A16 (emphasis added). This will subject Mr. Higgs "to a sensation akin to waterboarding[.]" *Id.* at 3. The district court also found it "undisputed that Johnson is suffering from symptoms of COVID-19" causing "damage to his alveoli-capillary membrane," and concluded that if Mr. Johnson were to be executed on January 14, pentobarbital would "burn the alveoli-capillary membrane which has already been damaged from COVID-19, triggering flash pulmonary edema, all before the pentobarbital even reaches [Mr. Johnson's] brain and begins to have an anesthetizing effect." A17.

In reaching these conclusions, the court credited Dr. Van Norman's "highly credible" testimony that "inmates with lung damage from COVID-19 will experience flash pulmonary edema within a second or two after injection" because "COVID-19 causes severe damage to . . . the aveolar-capillary membrane," and

pentobarbital is caustic such that "a high concentration dose will burn the [already damaged] alveoli-capillary membrane in the lungs within a second or two of injection." *Id.* at 10-11 (quoting Dkt. #389, Hr'g at 192).

The court found further that "[a] person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain," *id.* at 11, because the onset of action of pentobarbital is not synonymous with the point at which it renders a person insensate. *Id.*; *see also* Dkt. #389, Hr'g at 149 ("[T]he inmate is virtually certain to be sensate during parts of the execution that include the stages in which the lungs are flooding with fluid due to prior damage with COVID-19."). As Dr. Van Norman explained, although "some textbooks indicate that pentobarbital onset is anywhere from 30 seconds to two and a half minutes," Dkt. #389, Hr'g at 150, "the clinical effect" that renders a person insensate "occurs later than the onset," *id.* at 151. Given that pentobarbital "takes longer to reach peak effectiveness" than its initial onset, the district court found that Plaintiffs "will suffer the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection." A11.

The district court also credited Dr. Stephen's "particularly persuasive and helpful" testimony 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." A13. This flood of viral particles and inflammatory white blood

cells "places Higgs at high risk for pulmonary edema" because Higgs's heart has to "pump[] very hard to supply blood to the inflamed parts of the lung." *Id.* (citing Dkt. #389, Hr'g at 98. The district court described this condition as "readily apparent" from a comparison of Higgs's x-rays from October 18, 2018, and December 30, 2020, which reveals increased right-lung opacity in the form of interstitial markings that are "more visible as a result of inflammation caused by 'viral pneumonia from COVID-19.'" *Id.* (quoting Dkt. #389, Hr'g at 97); *see also* A15 (noting that "one does not have to be an expert to see" that "the right lung in the 2020 image has more prevalent cloudier streaks when compared to the same lung in 2018").[1]

The district court was "unpersuaded" by the rebuttal testimony offered by Dr. Todd Locher. With respect to Dr. Locher's statement that "there is no evidence in the medical literature suggesting an injection with pentobarbital would somehow

[1] Defendants denied Mr. Johnson's request that an X-ray or CT scan be performed, as the District Court recognized. A17. Nonetheless, the district court found as a factual matter that such examinations were very likely to reveal extensive lung damage in light of Mr. Johnson's undisputed COVID-19 symptoms and the results of Mr. Higgs's chest x-ray. A16-18. As a matter of logic and fundamental fairness, Defendants cannot refuse to provide these tests while at the same time arguing that the lack of such tests counsels in their favor. *See Ernst v. City of Chi.*, No. 08 C 4370, 2018 WL 6725866, at *19 n.45 (N.D. Ill. Dec. 21, 2018) ("The court notes that this evidence would have been under the exclusive control of the Defendant, and the court will not penalize Plaintiffs for data that Defendants failed to provide to their own expert.")

exacerbate symptoms or physiologic abnormalities in patients with COVID-19," *id.* at 14 (quoting Dkt. #381-1 at ¶ 11), the court found that, "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 11. With respect to Dr. Locher's opinion that "any findings on a CT scan would likely be minor in view of a normal chest x-ray," *id.* at 14 (quoting Dkt. #381-1 at ¶ 11), the court questioned his assertion that a relatively more accurate measurement would not reveal useful information beyond that captured in a relatively less accurate measurement. *Id.*

The court found that "Dr. Locher's live testimony cast further doubt on his credibility" because multiple inaccuracies in his sworn declaration made it "unclear how closely [Dr. Locher] had reviewed the relevant medical records." *Id.* These inaccuracies included, for example, "that Higgs was not experiencing any symptoms" on multiple dates in late December despite the fact that BOP medical records "clearly indicate" that he was. A14-15.

Finally, the district court found that Dr. Antognini's declaration "did not adequately refute Dr. Van Norman's opinions." A12. The court described Dr. Antognini's opinions as "conclusory" because he cited only "two studies in his entire declaration, neither of which involved COVID-19." *Id.* Further, Dr. Antognini's declaration "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." *Id.*

ARGUMENT

I. THE GOVERNMENT IS NOT LIKELY TO SUCCEED ON THE MERITS

A. The district court correctly found an Eighth Amendment violation based on the certainty that Plaintiffs will consciously suffer flash pulmonary edema.

As the district court recognized, Plaintiffs' claims require them to show that the Government's protocol is "sure or very likely to cause serious illness and needless suffering," and give rise to "sufficiently imminent dangers." A8 (quoting *Baze v. Rees*, 553 U.S. 35, 49-50 (2008)). The prisoner must demonstrate a "substantial risk of serious harm" such that prison officials cannot later plead that they were "subjectively blameless." *Baze*, 553 U.S. at 50.

The harm at issue here is the conscious experience of COVID-accelerated flash pulmonary edema, which is "a medical condition in which fluid rapidly accumulates in the lungs causing respiratory distress and sensation of drowning and asphyxiation." *In re Federal Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 131 (D.C. Cir. 2020). The district court credited testimony that, within a second or two of injection, highly caustic and concentrated pentobarbital will burn the already COVID-damaged alveoli-capillary membrane in the lungs,

leading Plaintiffs to experience flash pulmonary edema immediately – and before the pentobarbital even reaches the brain, let alone before the 30 seconds to two-and-a-half minutes before the drug starts to take effect. A3, A11, A16.

Flash pulmonary edema creates "a sensation of drowning akin to waterboarding." A3. Dr. Van Norman explained that "not being able to breathe during drowning or asphyxiation is one of the most powerful, excruciating feelings known to man." Dkt. #24 at 34. That same sensation "is deliberately elicited in the 'enhanced interrogation technique' called waterboarding, which is . . . a form of torture." *Id.*

Citing *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), the Government argues that the Eighth Amendment is indifferent to a "brief" period of excruciating pain, including 30-60 seconds of conscious drowning. Mot. at 15-18. The Government is wrong in two respects. First, the district court found that Plaintiffs would consciously experience flash edema for up to two-and-a-half minutes. It based that finding on Dr. Van Norman's testimony that pentobarbital only *starts* to act on the brain within 30 seconds to two-and-a-half minutes after injection but does not have its peak effect until later. A11. The Government insists that the district court "clearly erred" by accepting Dr. Van Norman's testimony, Mot. at 17, but it does not explain why. The district court credited the testimony of a board-certified specialist whose expertise concerns the effects of anesthetic drugs on the brain.

The Government cannot show that the district court's finding is "without substantial evidentiary support." *Atlas Air*, 928 F.3d at 1112.

Second, the Government misreads *Bucklew*. At no point did *Bucklew* hold that any particular period of excruciating suffering is a non-event for Eighth Amendment purposes, including the 20-30 second period that the Court considered there. The Court ruled only that the prisoner's alternative (nitrogen hypoxia) did not appreciably reduce the duration of suffering, not that the suffering itself was constitutionally inconsequential. *See id.* at 1132.

The Government argues that flash pulmonary edema is no worse than hanging, which has been constitutional for centuries. A17 (citing *Bucklew*, 139 S. Ct. at 1124; *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020)). But *Bucklew* explained that hanging "was not considered cruel because that risk was thought – by comparison to other known methods – to involve no more pain that was reasonably necessary to impose a lawful death sentence. *Bucklew*, 139 S. Ct. at 1127. In *Lee*, the Court implied that hanging does involve more pain than is reasonably necessary, explaining that lethal injection was "thought to be less painful and more humane than traditional methods, like hanging." *Lee*, 140 S. Ct. at 2591. Here, when compared to the proffered alternatives, i.e., addition of an analgesic, the administration of five grams of pentobarbital, which the district court found will cause minutes of "drowning akin to waterboarding[,]" cruelly superadds pain. And

while hanging caused death "sometimes through 'suffocation, which could take several minutes,'" A17, the district court found that it is certain that execution by the lethal injection protocol will subject Plaintiffs to the conscious experience of minutes of flash pulmonary edema.

Nor does it help the Government to rely on the Sixth Circuit's opinion in *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 298 (6th Cir. 2019), for the proposition that the Eighth Amendment is indifferent to flash pulmonary edema because it resembles the effects of botched hangings that the courts have tolerated. For one thing, the district court recognized that this Court's precedent is to the contrary. *See Execution Protocol Cases*, 980 F.3d at 132 (holding that flash pulmonary edema may give rise to an Eighth Amendment claim); A2 n.1. For another, the Government misreads the Sixth Circuit's ruling. The court's casual remark that the sensation of drowning and asphyxiation "looks a lot like the risks of pain associated with hanging" does not establish that flash pulmonary edema is per se constitutional. *See Ohio Execution Protocol*, 946 F.3d at 290.

B. The District Court properly found that Plaintiffs are sure or very likely to experience needless suffering during their executions

1. The District Court applied the proper standard.

Defendants argue that the district court improperly applied a preponderance of the evidence standard and "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." Mot. at 11-12, 13. To the contrary: the district court's opinion explicitly acknowledges that "[i]n order to succeed . . . 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' . . . ." (quoting *Baze*, 553 U.S. at 49-50) (emphasis added).

In line with this standard, the court made explicit factual findings that Plaintiffs are sure or very likely to experience needless suffering. With respect to Mr. Higgs, the court found 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." A16. With respect to Mr. Johnson, the court similarly held that "Johnson has demonstrated a substantial risk of serious harm." A18. For both Plaintiffs, the Court found that the duration of suffering would be more than just a brief moment of pain: Plaintiffs "*will suffer* the effects of flash pulmonary edema anywhere from thirty seconds to two-and-a-half minutes after injection." A16 (emphasis added). Moreover, the court found that "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." A28. Thus, the district court properly applied the

standard from *Baze*, *Glossip*, and *Bucklew*, and it made factual findings that are not clearly erroneous.

2. Defendants do not meaningfully contest Plaintiffs' evidence that they are sure or very likely to experience needless suffering during execution as a result of their COVID-19 infections.

Defendants claim that the mere fact that they have proffered "competing expert opinions" means that a district court "*could not* have found" that plaintiffs were likely to succeed on the merits. This argument is meritless for two reasons.

First, Defendants do not contest the underlying facts that entitle Plaintiffs to relief. None of Defendants' medical experts dispute Plaintiffs' diagnoses or symptoms, nor do they credibly undermine the proposition that Mr. Johnson and Mr. Higgs are consequently at greater risk of flash pulmonary edema 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." A8. Importantly, Defendants' experts *do not dispute* that COVID-19 causes lung damage in a large majority of symptomatic patients. Indeed, studies that Dr. Locher cites in his declaration conclude that between 44.5% and 94.8% of *asymptomatic* COVID-19 patients had lung damage visible on a CT scan. *See* Dkt. #389, H'rg at 78; Dkt. #380-1 at ¶ 11 (Locher Decl.). Moreover, Dr. Locher does not dispute the research cited by Dr. Van Norman indicating that at least 79% of

symptomatic COVID-19 patients had lung damage. Dkt. #374-1 at 4.Taking only these uncontested facts, Mr. Johnson and Mr. Higgs face at least a 4 in 5 chance of experiencing significant lung damage as a result of their COVID-19 infections – hardly the "speculative" leap that Defendants describe. Mot. at 2, 13. With respect to Mr. Higgs, the district court found that a chest x-ray confirmed "extensive damage caused by COVID-19." A13. Further, lung damage persists after COVID-19 symptoms have subsided for at least several weeks and up to 90 days, another point that Defendants do not dispute. *See* A10, A31 n.13.

Defendants offer no substantive rebuttal to Plaintiffs' evidence that their COVID-19 infections will cause them to experience painful flash pulmonary edema quickly during their executions, and that they will experience flash pulmonary edema before pentobarbital reaches the brain. As the district court explained, "[i]t 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.'" *Id.* The court explained that Dr. Van Norman testified that "[b]ecause pentobarbital is caustic, a high concentration dose will burn the alveoli-capillary membrane in the lungs within a second or two of injection. A person with COVID-19 related lung damage will experience flash pulmonary edema before the pentobarbital reaches the brain." A11. None of Defendants' three experts offer a

competing explanation to refute the physiological mechanism that Dr. Van Norman describes.

Defendants contend that Plaintiffs' "expert opined for the first time, without citing any objective evidence for her opinion, that pulmonary edema will occur virtually instantaneously." Mot. at 12 (internal quotation marks and citation omitted). But Dr. Van Norman has consistently opined that flash pulmonary edema "develops within moments, even prior to peak barbiturate levels in the brain." Dkt. #249-1 at 4. Her testimony at the evidentiary hearing was consistent: it is her "expert opinion[] that [Plaintiffs] will experience pulmonary edema much earlier in the execution process" based on their lung damage from COVID-19. Dkt. #389, Hr'g at 181, and this would occur "within a second or two of the start of the injection," *id.* at 192.

Defendants fault Dr. Van Norman for failing to cite published research on the effect of lethal doses of pentobarbital in COVID-19 patients – research that would plainly be unethical. *See* Dkt. #389, H'rg at 153. While the Supreme Court has set a "high bar" for Eighth Amendment method of execution challenges, *Lee*, 140 S. Ct. at 2591, *Lee* cannot mean that Plaintiffs must conduct randomized controlled trials of lethal drugs in order to establish constitutional injury. In reaching her opinion, Dr. Van Norman relied instead on "scientific evidence that pentobarbital administration increases propensity for pulmonary edema and that

pentobarbital potentiates the effects of other toxins in the lungs in doing so." Dkt. #389, Hrg. 153. Defendants did not meaningfully contest this scientific evidence, and the district court reasonably concluded that Mr. Johnson and Mr. Higgs will suffer painful flash pulmonary edema if they are executed with lung damage from COVID-19.

Second, Defendants fundamentally misread *Lee*, and the preliminary injunction standard, as barring relief whenever the Government offers *any* expert testimony at odds with the expert testimony offered by Plaintiffs. In *Lee*, however, the district court had not heard live testimony or evaluated the relative credibility of experts. In the order granting a preliminary injunction, the district court noted that it was "difficult to weigh competing scientific evidence at this relatively early stage." *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, 471 F. Supp. 3d 209, 219 (D.D.C. 2020), *vacated sub nom. Barr v. Lee*, 140 S. Ct. 2590. Defendants' overbroad reading of *Lee* – suggesting that *any* competing expert testimony is sufficient to defeat a preliminary injunction, even after an evidentiary hearing – is starkly at odds with ordinary civil practice. *See* Alan Wright & Arthur R. Miller, 11A Fed. Prac. & Proc. Civ. § 2949 (3d ed. 1998) (when a motion for a preliminary injunction "depends on resolving a factual conflict by assessing the 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."). Indeed, such a broad reading would effectively nullify the district court's power to hold a hearing to resolve factual disputes in a preliminary injunction posture as the court properly did here.

C. Plaintiffs have pled known and available alternatives that would substantially reduce the risk of harm

The Government next argues that the district court wrongly credited two alternative methods of execution: the administration of a pre-execution analgesic such as fentanyl or morphine, and the use of the firing squad. Mot. at 18-20. Missing from the Government's motion is an acknowledgment of Plaintiffs' modest burden. "[A]n inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring). The Court in *Bucklew* perceived "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128-29.

Both of the court-endorsed alternatives are sufficient to sustain Plaintiffs' claim: the district court correctly held that both are feasible, readily implemented, and would significantly reduce the risk of serious pain. A23-A24 (citing *Bucklew* and *Glossip v. Gross*, 576 U.S. 863 (2015)). The first such method – a pre-execution opioid – has already been upheld by this Court as an alternative that

would "readily" avoid the conscious experience of flash pulmonary edema by simply "administering a widely available analgesic first." *In re Federal Bureau of Prisons' Execution Protocol Cases*, 980 F.3d at 133.

The Government nevertheless insists that the Court upheld the opioid alternative only at the pleading stage, and did not decide whether a plaintiff "can ultimately succeed" by establishing that the proposed alternative "would be as effective and humane as the [government's] existing" drug protocol. Mot. at 19 (quoting *Bucklew*, 139 S. Ct. at 1130). But the district court itself made such a finding on the record before it. The court assessed the magnitude of harm presented by the 2019 Protocol as applied to prisoners with COVID-damaged lungs, and it concluded that the addition of a pre-execution analgesic "is likely to be as effective as it is easily and quickly administered." A23 (citing *Bucklew*, 139 S. Ct. at 1129). The district court reached that finding by relying on the analysis of pharmacologist Dr. Craig Stevens, *id.* at 21, who explained that morphine and fentanyl are commercially available and would effectively provide anesthesia to prevent the pain and suffering from the lethal dose of pentobarbital." Dkt. #25 at ¶¶ 14-16. Those finding are not clearly erroneous.

Equally off-base is the Government's argument that no state has ever used the method. Nebraska recently carried out an execution using fentanyl in order to reduce the risk of pain rather than to bring about death. A22; *see also* Dkt. #135 at

15 (district court observing that "*the parties agree* that Nebraska recently used a pre-dose of fentanyl for the precise purpose of reducing the risk of serious pain during an execution.") (emphasis added). Even though Nebraska's multiple-drug protocol is not identical to the Government's, in both instances the executioner is able to administer fentanyl to reduce the risk of pain from another drug. Such use of an opioid, then, is neither "novel" nor "untested" as the Government urges. Even to this date, the Government has presented no evidence to contradict Dr. Stevens' analysis.

The Government fares no better arguing against the firing squad, which it perceives as more "primitive" than drowning the prisoner to death. Mot. at 21. Based on the evidence before it, the district court found that the firing squad would "significantly reduce the risk of severe pain" in comparison to the 2019 Protocol when applied to Plaintiffs. A24. The Government argues that the prisoner would suffer severe pain for only "8-10 seconds" after being shot by a firing squad, but the district court found that Plaintiffs would consciously suffer the excruciating experience of drowning for as long as two-and-a-half minutes or more. A11.

II. THE BALANCE OF EQUITIES FAVORS LEAVING THE PRELIMINARY INJUNCTION INTACT

Plaintiffs have established irreparable harm based on the evidence duly credited by the district court. "Without injunctive relief," the court observed, "Plaintiffs would be subjected to an excruciating death in a manner that is likely

unconstitutional." A27-A28. The Government disagrees with the district court's findings but without asserting, let alone establishing, clear error. Mot. at 21-22. There is no question that a prospective violation of a constitutional right amounts to an irreparable injury for purposes of equitable relief. *See Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

The Government also mischaracterize the injunction when claiming irreparable harm of its own. It complains that the district court has "affirmatively proscrib[ed] a party's behavior before adjudicating its rights," and the Government "will be unable to carry out a sentence of death in a timely manner." Mot. at 21-22. These contentions are overstated. The Government is free to execute Mr. Johnson and Mr. Higgs as scheduled if it first administers a pain-preventing opioid before the pentobarbital or enlists a firing squad from among the Government's abundant resources. A21-A26. Alternatively, the Government may seek to execute Plaintiffs with the as-written 2019 Protocol after March 16, 2021 – at which point Plaintiffs' lungs are likely to have been restored to their pre-COVID state, and when the Court will require Plaintiffs to offer "*demonstrated* evidence of continued lung damage from COVID-19" in order for a new injunction to issue. A31 & n.13 (emphasis in original). At no point, however, does the Government explain its

purportedly compelling interest to execute Plaintiffs now. *See* A29 ("[T]he court sees no reason why this execution *must* proceed this week.").

The public interest lies in ensuring that agencies act in accordance with the Constitution and federal law. *See League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). In the capital punishment context, "the public's interest in seeing justice done lies not only in carrying out the sentence imposed years ago but also in the lawful process leading to possible execution." *Montgomery v. Barr*, No. 20-3261, 2020 WL 6799140, at *11 (D.D.C. Nov. 19, 2020). When the government decides to take a life, the public interest demands that it do so in a considered and deliberate manner. The seriousness of a person's offenses does not alter that analysis. Here, the Government has no legitimate interest in carrying out Plaintiffs' executions before they have recovered from COVID-19 and while lung damage from their infection will subject them to unnecessary suffering in violation of the Eighth Amendment.

The Government contends that even a brief stay is unwarranted because some of the victims' relatives plan to travel to Terre Haute today. Mot. 22. But the circumstances at hand are a direct result of the Government's failure to protect the prisoners in its care, less than a month before their scheduled executions, against a serious and often deadly disease. Indeed, Mr. Higgs first alerted the district court to the aggravating effects a COVID-19 infection would have on the 2019 Protocol in

September, before his and Mr. Johnson's execution dates were even set. *See* Dkt. #229-1, 330. In response, the Government belittled Mr. Higgs's concerns about contracting COVID-19 and "assured the [district] court," A2, as recently as November, that adequate procedures were in place to "prevent the further introduction and spread of COVID-19 within its facilities," Dkt. #306-1 at 10 n.3. That has proved false. *See, e.g.*, *Smith v. Barr*, 2021 WL 71168, at *2 (S.D. Ind. Jan. 7, 2021) (noting that 657 prisoners and 70 staff members tested positive for COVID-19 between December 8, 2020, and January 7, 2021). In light of the Government's own contributing conduct as well as its previous "suspen[sion] [of] federal executions for over seventeen years," "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." A29.

CONCLUSION

The motion should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5152 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Shawn Nolan
SHAWN NOLAN

January 13, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 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 using the appellate CM/ECF system. With the exceptions noted below, counsel for parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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