No. 20A-_____

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IN THE SUPREME COURT OF THE UNITED STATES

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IN RE FEDERAL BUREAU OF PRISONS' EXECUTION PROTOCOL CASES

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

DANIEL LEWIS LEE, ET AL.

(CAPITAL CASE)

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APPLICATION FOR A STAY OR VACATUR OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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## PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are William P. Barr, in his official capacity as Attorney General; the United States Department of Justice; Timothy J. Shea, in his official capacity as Acting Administrator of the Drug Enforcement Administration; Stephen M. Hahn, in his official capacity as Commissioner of Food and Drugs at the Food and Drug Administration; Michael Carvajal, in his official capacity as Director of the Federal Bureau of Prisons; Jeffrey E. Krueger, in his official capacity as Regional Director, Federal Bureau of Prisons, North Central Region; Donald W. Washington, in his official capacity as Director of the U.S. Marshals Service; Nicole C. English, in her official capacity as Assistant Director, Health Services Division, Federal Bureau of Prisons; T.J. Watson, in his official capacity as Complex Warden, U.S. Penitentiary Terre Haute; William E. Wilson, M.D., in his official capacity as Clinical Director, U.S. Penitentiary Terre Haute; and John Does I-X, individually and in their official capacities.

The respondents (plaintiffs-appellees below) are Dustin Lee Honken, Daniel Lewis Lee, Wesley Ira Purkey, and Keith Nelson.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (July 13, 2020) (issuing second preliminary injunction)*

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 22, 2019) (denying motion to stay first preliminary injunction)

In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (Nov. 20, 2019) (issuing first preliminary injunction)

United States Court of Appeals (D.C. Cir.):

In re: Federal Bureau of Prisons' Execution Protocol Cases, No. 19-5322 (Apr. 7, 2020) (vacating first preliminary injunction)

In re: Federal Bureau of Prisons' Execution Protocol Cases, No. 19-5322 (Dec. 2, 2019) (denying motion for stay or vacatur of first preliminary injunction)

Supreme Court of the United States:

Bourgeois v. Barr, No. 19-1348 (19A1050) (June 29, 2020) (denying petition for a writ of certiorari and application for a stay regarding first preliminary injunction)

Barr v. Roane, No. 19A615 (Dec. 6, 2019) (denying motion for stay or vacatur of first preliminary injunction)

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* The consolidated case, In re Federal Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145, includes three individual cases relevant here: Lee v. Barr, No. 19-cv-2559 (filed Aug. 28, 2019), which includes respondent Honken as an intervenor; Purkey v. Barr, No. 19-cv-3214 (filed Oct. 25, 2019); and Nelson v. Barr, No. 20-cv-557 (filed Feb. 25, 2020). The consolidated case includes other individual cases, see, e.g., Roane v. Barr, No. 05-cv-2337 (filed Dec. 6, 2005), but the order at issue here does not pertain to those other individual cases.

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Just before 10 a.m. today, July 13, 2020, the United States District Court for the District of Columbia -- acting on a motion that had been pending in its latest iteration since June 19 -- preliminarily enjoined respondents' scheduled executions, the first of which is scheduled for today at 4:00 p.m. Eastern Daylight Time. Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General, on behalf of applicants William P. Barr et al., respectfully applies for an order staying the injunction pending appeal or vacating it effective immediately. See pp. 9, 19, infra (citing orders of this Court providing such relief in the capital and non-capital context); cf.

140 S. Ct. 353 (considering a similar request before the previously scheduled executions of three respondents in December 2019).[1]

This is the third time the Court has encountered this case in recent months. Respondents are federal death-row inmates, each of whom was "convicted in federal court more than 15 years ago for exceptionally heinous murders." 140 S. Ct. at 353 (statement of Alito, J.). They have exhausted all permissible appeals and requests for collateral relief, and they do not challenge the lawfulness of their convictions or capital sentences in this case. This case instead involves respondents' challenge to the federal execution protocol, which sets forth "details for carrying out federal executions," including the substances used to conduct a lethal injection. 955 F.3d 106, 109; see id. at 110.

As relevant here, the Federal Bureau of Prisons (BOP) revised the protocol in July 2019 to address the unavailability of a lethal-injection drug that had been used in prior federal executions. 955 F.3d at 110. "After extensive study," BOP amended the protocol to provide for the use of a massive dose of the sedative pentobarbital -- the same approach that leading death-penalty States have used to execute more than 100 inmates since 2012, and that this Court upheld last year against an Eighth

[1] The government has filed a similar motion to stay or vacate the injunction in the court of appeals. The government has urged the court to rule promptly and will notify this Court immediately if it acts on that request. Given the time constraints caused by the district court's delayed ruling, the government has no choice but to request relief from this Court at the same time.

Amendment challenge brought by a Missouri inmate with a health condition he claimed made the drug particularly risky as applied to him even though it was concededly constitutional in general. Ibid.; see Bucklew v. Precythe, 139 S. Ct. 1112, 1129-1134 (2019).

After adopting the revised protocol, BOP scheduled execution dates in December 2019 and January 2020 for five federal inmates, including respondents Lee, Purkey, and Honken. Those respondents, along with inmate Alfred Bourgeois, moved to enjoin their executions based on various constitutional and statutory challenges to the protocol.[2] In November 2019, the district court enjoined the executions on a single ground -- that the protocol purportedly conflicted with the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 et seq. -- without acting on respondents' other claims. This Court declined to stay or vacate that injunction to allow the executions to proceed as scheduled, but expressed its expectation that the court of appeals would resolve the government's appeal of the injunction with "appropriate dispatch." 140 S. Ct. at 353. Three Justices added that the government "is very likely to prevail when" the FDPA "question is ultimately decided." Ibid. (statement of Alito, J.).

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[2] In descriptions of earlier proceedings in this case, the term "respondents" refers to Lee, Purkey, Honken, and Bourgeois. In descriptions of the current proceedings, the term refers to Lee, Purkey, Honken, and Nelson. Any distinctions are ultimately not material to the legal issues at issue in this filing, because the inmates have all advanced the same arguments as relevant here.

That prediction proved accurate. In April 2020, the court of appeals not only vacated the injunction, but directed entry of judgment for the government on both the FDPA claim and respondents' claim that the protocol had to be issued through notice-and-comment rulemaking. 955 F.3d at 111-113. The court declined to address respondents' remaining claims, but indicated "concern about further delay from multiple rounds of litigation." Id. at 113.

Despite the expectation of expedition indicated by both this Court and the court of appeals, respondents did not ask the district court to promptly rule on their remaining challenges to the protocol. Rather, they spent the next two-and-a-half months filing a series of requests for stays and further review of the court of appeals' decision, all of which failed. See No. 19-1348 (June 29, 2020) (denying petition for a writ of certiorari and accompanying stay application).

Following issuance of the court of appeals' mandate, BOP on June 15 rescheduled execution dates for respondents Lee, Purkey, and Honken, on July 13, 15, and 17, respectively. BOP also scheduled respondent Nelson's execution for August 28. Only after that -- on June 19, more than two months after the court of appeals vacated the first injunction -- did respondents move for another preliminary injunction. The government promptly opposed that motion on June 25. But the district court (without objection from respondents) left the motion undecided for the next 18 days,

resolving it only today by granting a second injunction of respondents' executions just six hours before the first rescheduled execution is set to occur. This time, the court's stated basis is that the federal execution protocol violates the Eighth Amendment, App., infra, 9a-18a, notwithstanding the clear import of this Court's holding in Bucklew.

The district court's last-minute, day-of-execution injunction is inappropriate, contrary to binding precedent from this Court, and should be promptly stayed or summarily vacated. This Court has admonished repeatedly that "[l]ast-minutes stays" or injunctions of impending executions "should be the extreme exception, not the norm." Bucklew, 139 S. Ct. at 1134. The injunction in this case flouts that direction. There is no reason the district court had to wait until the day of the first rescheduled execution to issue this injunction. Indeed, as explained further below, the court informed the parties that it was prepared to rule on Friday, but then withheld its decision for three more days while an unrelated injunction of respondent Lee's execution entered by a different district court in a different case brought by different parties raising different legal issues was reviewed and ultimately vacated as "frivolous" yesterday around 5 p.m. Peterson v. Barr, No. 20-2252 (7th Cir. July 12, 2020); see p. __, infra. Even then, the district court here waited roughly another 17 hours to rule, leaving the court of appeals and

this Court just six hours before the first scheduled execution (and barely discussing the irrelevant decision in Peterson, cf. App., infra, 3a). The indisputable effect of the district court's actions is to make it difficult for the United States to obtain timely appellate review of this latest injunction against these executions. This Court should not permit such tactics.

The standard for a stay or vacatur of the injunction is readily satisfied. The injunction entered today, like the district court's first and now-repudiated injunction, is "without merit," 955 F.3d at 112, and has no realistic prospect of withstanding review. If anything, the court's second choice of rationales for enjoining these executions is even less tenable than its first. In short, the court reached a conclusion that is directly at odds with this Court's binding decision in Bucklew last year. The district court attempts to distinguish Bucklew on the ground that it involved execution of an inmate with a distinctive health condition, App., infra, 10a, but if anything that makes this an a fortiori case from Bucklew given that respondents do not have such health sensitivities. The result of the district court's decision, moreover, appears to be that the materially identical execution protocols of Texas, Missouri, Georgia, and other States -- which have collectively been used to execute more than 100 inmates since 2012 without apparent incident, and which have been repeatedly upheld by federal courts of appeals -- are unconstitutional.

Allowing such a meritless injunction destined for appellate vacatur to again delay imminent executions "would serve no meaningful purpose and would frustrate the [federal government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion of Roberts, C.J.).

The equities, moreover, overwhelmingly support a stay or vacatur of the injunction. Respondents stand convicted of crimes of staggering brutality, for which they were sentenced to death more than 15 years ago. The claims that serve as the basis of the injunction do not involve respondents' culpability or the lawfulness of their capital sentences; the claims are, at best, strained objections that the execution protocol could be better. And the "abusive delay" by respondents and the district court powerfully underscores that the injunction should be stayed or vacated. Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (per curiam). Countenancing such deviation from a court's "proper role * * * to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously" would convey the misimpression that last-minute stays or injunctions are "the norm" rather than an "extreme exception." Bucklew, 139 S. Ct. at 1134. Particularly in the first federal execution in 17 years -- one that has already been

delayed once by a legally defective injunction -- this Court should not tolerate such conduct. Cf. ibid.

Finally, failing to stay or vacate the injunction would cause a "profound injury" to the public, which has a "'powerful and legitimate interest in punishing the guilty,'" and to the government, which is fully prepared to implement respondents' lawfully imposed sentences as scheduled. Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted). Right now, in Terre Haute, Indiana, specialized BOP contractors are preparing to administer a dignified and humane lethal injection, grieving family members of respondent Lee's victims have traveled to witness the execution, and many other precautions are in place to ensure a safe and orderly proceeding. D. Ct. Doc. 139-1 ¶¶ 4-12. For the district court to scramble those plans with a meritless injunction on the day of an execution is unwarranted and unfair. Unlike some state executions, moreover, these federal executions cannot be easily rescheduled. If the executions are not conducted this week, contractor availability constraints mean they will likely be delayed by at least another month, id. ¶ 6, which would surely spark more last-minute litigation and could also disrupt the scheduling of other federal executions.

No sound basis supports such an outcome. The "people of" the United States, along with the families of respondents' victims and their communities, "deserve better" than another last-minute

impediment to the implementation of sentences validly imposed for horrific federal crimes committed long ago. Bucklew, 139 S. Ct. at 1134. This Court has vacated similarly unjustified stays or injunctions in prior capital cases. See, e.g., Dunn v. Price, 139 S. Ct. 1312 (2019); Mays v. Zagorski, 139 S. Ct. 360 (2018); Dunn v. McNabb, 138 S. Ct. 369 (2017); Roper v. Nicklasson, 571 U.S. 1107 (2013); Brewer v. Landrigan, 562 U.S. 996 (2010). The law and the equities manifestly warrant the same result here. And given the district court's unreasonable decision to proceed piecemeal, see App., infra, 18 & n.6, this Court should make clear that "[n]o further stays of [respondents'] execution[s] shall be entered by the federal courts except upon order of this Court." Vasquez v. Harris, 503 U.S. 1000, 1000 (1992) (per curiam).

## STATEMENT

### A. LEGAL BACKGROUND

1. It is undisputed here that the "Constitution allows capital punishment," and Congress has authorized the death penalty for the most egregious federal crimes since 1790. Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019). It "necessarily follows that there must be a" lawful "means of carrying" out executions. Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion); see Glossip v. Gross, 135 S. Ct. 2726, 2732-2733 (2015).

In the Nation's early years, hanging was the "standard method of execution" for both States and the federal government. Glossip,

135 S. Ct. at 2731; see 955 F.3d at 108-109 (per curiam). Over time, States replaced hanging with new methods of execution such as electrocution and lethal gas, each of which was considered "more humane" than its predecessors. Baze, 553 U.S. at 62 (plurality opinion). This Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." Id. at 48 (plurality opinion). And "understandably so," since each chosen method was designed to reduce pain for the condemned, rather than "superadd terror, pain, or disgrace to their executions." Bucklew, 139 S. Ct. at 1124.

2. The "progress toward more humane methods of execution" eventually "culminat[ed] in [a] consensus on lethal injection." Baze, 553 U.S. at 62 (plurality opinion). The federal government likewise prescribes lethal injection as its method of execution, see 28 C.F.R. 26.3(a)(4), and BOP executed three federal inmates by lethal injection in 2001 and 2003, see A.R. 1.

Initially, most States and the federal government conducted lethal injections using a combination of three drugs: sodium thiopental, a sedative to induce unconsciousness; pancuronium bromide, a paralytic agent that inhibits movement and stops breathing; and potassium chloride, which stops the heart. Baze, 553 U.S. at 42-44, 53 (plurality opinion). Although the States and the federal government selected that protocol to minimize pain, inmates nevertheless claimed that it constituted cruel and unusual

punishment. See id. at 41. Seven Justices rejected that claim in Baze. Ibid.; see id. at 71 (Stevens, J., concurring in the judgment); id. at 94 (Thomas, J., concurring in the judgment); id. at 107 (Breyer, J., concurring in the judgment). Of particular relevance here, the Court held that States were not required to adopt the inmates' proposed alternative of a single-drug protocol consisting of sodium thiopental or another sedative such as pentobarbital. Id. at 57 (plurality opinion).

3. Although Baze did not require adoption of a single-drug protocol, some States nevertheless made that choice voluntarily. In 2009, Ohio executed an inmate using a massive dose of sodium thiopental. A.R. 93. That drug, however, soon became unavailable "as anti-death-penalty advocates pressured" its "sole American manufacturer" to cease production. Glossip, 135 S. Ct. at 2733.

States then "replaced sodium thiopental with pentobarbital, another barbiturate," which "can 'reliably induce and maintain a comalike state that renders a person insensate to pain.'" Glossip, 135 S. Ct. at 2733 (citation omitted); see, e.g., Zagorski v. Parker, 139 S. Ct. 11, 11-12 (2018) (Sotomayor, J., dissenting from denial of application for a stay and denial of certiorari) (explaining that "pentobarbital * * * is widely conceded to be able to render a person fully insensate."); Beaty v. Brewer, 649 F.3d 1071, 1075 (9th Cir. 2011) (Tallman, J., concurring in the denial of rehearing en banc) (noting that pentobarbital is

"commonly used to euthanize terminally ill patients who seek death with dignity in states such as Oregon and Washington"). Ohio conducted the first execution using a single-drug pentobarbital protocol in 2011. A.R. 870-871. Other States soon followed suit. A.R. 94, 96, 102. In 2012 and 2013, three of the leading death-penalty States -- Texas, Missouri, and Georgia -- each adopted single-drug pentobarbital protocols. A.R. 96, 98, 103. Those States have since used that protocol to carry out more than 100 executions, see ibid., and federal courts of appeals has repeatedly upheld the protocol against Eighth Amendment challenges, see, e.g., Zink v. Lombardi, 783 F.3d 1089, 1097-1107 (8th Cir.) (en banc) (per curiam), cert. denied, 135 S. Ct. 2941 (2015); Ladd v. Livingston, 777 F.3d 286, 289-290 (5th Cir.), cert. denied, 135 S. Ct. 1197 (2015); Ledford v. Commissioner, 856 F.3d 1312, 1316-1317 (11th Cir.), cert. denied, 137 S. Ct. 2156 (2017).

Last Term, this Court in Bucklew considered an Eighth Amendment challenge to Missouri's single-drug pentobarbital protocol by an inmate with an "unusual medical condition" who conceded that the protocol "is constitutional in most applications." 139 S. Ct. at 1118. The Court explained that an inmate "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." Id. at 1125. The Court

concluded that Bucklew had failed to make that showing because his proposed alternative method (hypoxia induced by inhaling nitrogen gas) would not "significantly reduce" any "substantial risk of severe pain" caused by the use of pentobarbital. Id. at 1130. Of particular relevance here, the Court credited expert testimony that pentobarbital would "render Mr. Bucklew fully unconscious and incapable of experiencing pain within 20 to 30 seconds." Id. at 1132. Even assuming nitrogen hypoxia might render the inmate insensate in roughly the same amount of time, the Court concluded that he had failed to show that use of that alternative "would significantly reduce his risk of pain." Id. at 1133.

4. Three months after Bucklew, BOP issued a revised execution protocol adopting the same single-drug pentobarbital protocol approved in that case. A.R. 868-875. BOP's adoption of the revised protocol was the culmination of an "extensive study" that began in 2011 when sodium thiopental became unavailable. 955 F.3d at 110. Among other steps, BOP personnel examined state lethal-injection protocols, visited States to personally observe executions, studied after-action reports (including for "botched" lethal injections), consulted medical experts, reviewed expert reports and testimony in recent litigation, surveyed applicable court decisions, and assessed the quality and reliability of available drugs. See A.R. 1-5.

BOP ultimately "determined that the single-drug pentobarbital protocol is the most suitable method based on its widespread use by the states and its acceptance by many courts." A.R. 871. Indeed, BOP noted that inmates in States that use different lethal-injection protocols frequently identify a single-drug pentobarbital protocol as a humane and lawful alternative. A.R. 4 (citing cases, including Glossip). And "[a]lthough various media outlets have reported complications with lethal injection executions, none of those executions appear to have resulted from the use of single-drug pentobarbital." A.R. 871.

BOP also consulted with two medical experts, including the expert credited by this Court on the effects of pentobarbital in in Bucklew. A.R. 872. Both concluded that the single-drug pentobarbital protocol "would produce a humane death." A.R. 3. Specifically, the experts explained that an inmate receiving the proposed injection of pentobarbital -- which is 12 to 35 times the maximum tolerable human dosage -- "will lose consciousness within 10-30 seconds," and "will be unaware of any pain or suffering" before death occurs "within minutes." A.R. 525; see Bucklew, 139 S. Ct. at 1132; A.R. 401-524.

B. PRIOR PROCEEDINGS

1. After adopting the revised protocol, BOP scheduled executions of five federal inmates -- including respondents Lee, Purkey, and Honken -- for dates in December 2019 and January 2020.

In August 2019, respondents Lee, Purkey, and Honken (along with Alfred Bourgeois) sought to enjoin their executions on multiple grounds, including that the amended protocol violates the FDPA's "manner" of execution provision, 18 U.S.C. 3596(a); the notice-and-comment requirement and other provisions of the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., 5 U.S.C. 701 et seq.; provisions of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 et seq., and Controlled Substances Act (CSA), 21 U.S.C. 801 et seq.; and the First, Fifth, Sixth, and Eighth Amendments.

On November 20, 2019, the district court concluded that respondents were entitled to a preliminary injunction because they were likely to succeed on their claim that the protocol conflicts with the FDPA's requirement that federal executions be implemented "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). This Court denied the government's motion for a stay or vacatur of the injunction, but expressed its expectation that the court of appeals would resolve the government's appeal of the injunction with "appropriate dispatch." 140 S. Ct. at 353. Justice Alito, joined by Justices Gorsuch and Kavanaugh, stated that the government "has shown that it is very likely to prevail when" the FDPA "question is ultimately decided." Ibid.

2. After expedited briefing and argument, the court of appeals on April 7, 2020, vacated the preliminary injunction and

directed entry of judgment for the government on both the FDPA claim and respondents' claim that the BOP protocol could be issued only after notice-and-comment rulemaking. 955 F.3d at 112-113. The court declined to address respondents' remaining claims in the first instance, but stated that it "share[d] the government's concern about further delay from multiple rounds of litigation." Id. at 113. Judge Katsas added that the injunction should have been vacated on the equities alone, given that respondents' claims were designed "to delay lawful executions indefinitely" -- an objective federal courts "should not assist." Id. at 129.

Following the panel's decision, respondents sought rehearing en banc, but that request was denied on May 15. Respondents then sought a stay of the mandate from the court of appeals in two separate motions, with the ultimate result that the court denied a stay but extended the date of the mandate's issuance by nearly three weeks. See 19A1050 Gov't Opp. 14-15 (describing these proceedings in more detail). On June 5, respondents filed a petition for a writ of certiorari in this Court, No. 19-1348, and on June 10, they filed an accompanying stay application, No. 19A1050. The Court denied both the certiorari petition and stay application over two noted dissents on June 29.

3. Throughout that time, the district court retained jurisdiction to address respondents' remaining claims, including their Eighth Amendment claim. See, e.g., 16 Charles Alan Wright

et al., Federal Practice & Procedure § 3921.2 (3d ed. 2020) (Wright & Miller). Respondents, however, did not seek another preliminary injunction on their remaining claims until June 19, after BOP on June 15 announced their execution dates for July 13, July 15, July 17, and August 28.[3] The government promptly opposed respondents' motion on June 25. But with executions approaching, the district court did not decide the motion for more than two full weeks.

On Friday, July 10 -- the last business day before respondent Lee's scheduled execution -- the court notified the parties by email that it would issue a "ruling related to Lee before 6 PM." App., infra, 37a-38a. But the court did not issue a ruling on Friday, or Saturday, or Sunday. At a telephonic status conference Saturday afternoon, the court stated that a preliminary injunction by a federal court in Indiana involving unrelated claims brought by family members of Lee's murder victims, see Peterson v. Barr, No. 20-cv-350 (S.D. Ind. July 10, 2020), vacated No. 20-2252 (7th Cir. July 12, 2020), required it to "incorporate" changes "at least into the background of [its] opinion," App., infra, 26a. The government urged the court to rule promptly on the motion pending

[3] When appropriate, a court may enjoin an execution before the date has been scheduled. Indeed, in several of the underlying actions in the consolidated case (none of which are involved here), the district court entered preliminary injunctions barring executions before a date had been set. See, e.g., No. 05-cv-2337 Docs. 67, 68, 336. And at a minimum, nothing prevented respondents from seeking a preliminary injunction and briefing it so the court would be able to promptly rule when the government rescheduled the executions, as it clearly intended to do.

before it. Id. at 34a. The court said it would "certainly try and do that," but also stated that "it looks like I'm just going to continue to monitor developments in the case." Ibid.

On Sunday, July 12, the Seventh Circuit summarily vacated the injunction that had been entered by the district court in Indiana, explaining that the claims in that case were "frivolous." Peterson v. Barr, No. 20-2252, slip. op. 4, 6. The government then informed the district court that there were no existing barriers to Lee's execution today at 4 p.m., and that BOP was prepared to implement the sentence at that time. D. Ct. Doc. 134. The government again urged the court to rule as promptly as possible on the remaining claims so that the parties would have some limited time to seek appellate review. Ibid. The court again did not rule.

Finally, just before 10 a.m. today -- more than nine months after respondents first sought a preliminary injunction on their Eighth Amendment claim, three months after the court of appeals vacated the district court's first injunction, 27 days after BOP rescheduled respondents' executions, and just six hours before Lee's rescheduled execution for a crime committed in 1996 -- the district court preliminarily enjoined respondents' executions for the second time. This time, the court held that respondents were likely to succeed on their claim that the federal government's use of pentobarbital -- the same drug used by the leading death-penalty States and upheld by this Court in Bucklew -- violates the Eighth

Amendment. App., infra, 9a-18a. The court concluded that, despite the contrary statements in Bucklew, the use of a single-drug pentobarbital protocol is "very likely to cause [respondents] extreme pain and needless suffering during their executions." Id. at 9a. The court attempted to distinguish Bucklew on the ground that it involved a challenge "unique to [the] medical condition" of the inmate in that case. Id. at 10a. The court added that respondents had offered two valid alternative methods of execution -- adding an extra drug to the lethal dose of pentobarbital, and being shot to death by a firing squad. Id. at 13a-18a.

ARGUMENT

Under Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals, or may summarily vacate the order. See, e.g., Department of Homeland Security v. New York, 140 S. Ct. 599 (2020) (granting stay pending appeal); Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3 (2019) (same); Dunn v. Price, 139 S. Ct. 1312 (2019) (vacating stay of execution); Mays v. Zagorski, 139 S. Ct. 360 (2018) (same); Dunn v. McNabb, 138 S. Ct. 369 (2017) (vacating injunction barring execution); Brewer v. Landrigan, 562 U.S. 996 (2010) (same); see also Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017) (per curiam) (staying a preliminary injunction in part, even though the injunction would become moot before the Court could

review its merits). In considering whether to stay an injunction pending appeal, the three questions are, first, "whether four Justices would vote to grant certiorari" if the court below ultimately rules against the applicant; second, "whether the Court would then set the order aside"; and third, the "balance" of "the so-called 'stay equities.'" San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (citation omitted). Here, all those factors counsel in favor of a stay or vacatur of the injunction given the overwhelming likelihood that the injunction will not withstand appellate review and the profound public interest in implementing respondents' lawfully imposed sentences without further delay.

## I. THE DISTRICT COURT'S INJUNCTION IS UNLIKELY TO WITHSTAND APPELLATE REVIEW

Like the district court's first injunction, the injunction entered by the court today is "without merit" and exceedingly unlikely to withstand appellate review. 955 F.3d at 112; see 140 S. Ct. at 353 (statement of Alito, J.). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008). In the capital context, as in others, a plaintiff must first "establish that he is likely to succeed on the merits." Glossip v. Gross, 135 S. Ct. 2726, 2736 (2015) (quoting Winter, 555 U.S. at 7) (emphasis added). Respondents did not come close to making that

showing here. If anything, the district court's second-choice rationale for enjoining the executions is even less substantial than the rationale given for its first and now-vacated injunction. Indeed, the court's reasoning here is foreclosed by a binding decision of this Court. Allowing such a legally baseless injunction to again delay lawful executions "would serve no meaningful purpose and would frustrate the [federal government's] legitimate interest in carrying out a sentence of death in a timely manner." Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion).

A. The Injunction Rests On Legal Error

First and foremost, the injunction is very unlikely to withstand review because respondents failed to "establish that [they are] likely to succeed on the merits." Glossip, 135 S. Ct. at 2736 (citation omitted). Indeed, the injunction rests on a merits holding that conflicts with a binding decision of this Court. Few rulings are more likely to be vacated on appeal.

1. Because "it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" Glossip, 135 S. Ct. at 2732–2733 (2015) (citation omitted; brackets in original). The Eighth Amendment forbids "long disused (unusual) forms of punishment that intensif[y] the sentence of death with a (cruel) 'superadd[ition]' of 'terror, pain, or disgrace.'" Bucklew, 139 S. Ct. at 1124 (citation omitted). The Eighth Amendment does not,

however, "'demand the avoidance of all risk of pain in carrying out executions.'" Id. at 1125 (citation omitted). Indeed, this Court has emphasized that the Eighth Amendment "does not guarantee a prisoner a painless death -- something that, of course, isn't guaranteed to many people." Id. at 1124. Rather, the Constitution prohibits only the "superadd[ition] of terror, pain, or disgrace" to a capital sentence. Ibid. (citation omitted).

Accordingly, to prevail on an Eighth Amendment challenge, an inmate must first establish that the execution method "is 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" Glossip, 135 S. Ct. at 2737 (citation omitted). "[T]here must be a substantial risk of serious harm" -- that is, "an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." Ibid. (internal quotation marks and citation omitted). The fact that "an execution may result in pain, either by accident or as an inescapable consequence of death," is insufficient to state an Eighth Amendment claim. Baze, 553 U.S. at 50 (plurality opinion).

Next, an inmate must "plead and prove a known and available alternative" to the method established to cause a substantial risk of severe harm. Glossip, 135 S. Ct. at 2739. The proposed alternative must be "'feasible, readily implemented, and [must] in fact significantly reduce a substantial risk of severe pain.'"

Id. at 2737 (citation omitted). A plaintiff cannot prevail by merely '"showing a slightly or marginally safer alternative."' Ibid. (citation omitted). This Court has made clear that a "minor reduction in risk is insufficient" to meet this standard -- rather, "the difference must be clear and considerable." Bucklew, 139 S. Ct. at 1130. Otherwise, courts would become "boards of inquiry charged with determining 'best practices' for executions, with each ruling 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.

Finally, an inmate must demonstrate that the government has refused to adopt the proposed alternative "without a legitimate penological reason." Bucklew, 139 S. Ct. at 1125. This Court has recognized that there are "many legitimate reasons why [the government] might choose, consistent with the Eighth Amendment, not to adopt a prisoner's preferred method of execution." Ibid. The "Constitution affords a measure of deference to [the government's] choice." Ibid. (citation omitted).

2. Respondents failed to demonstrate a likelihood they can satisfy any of these independent requirements, let alone all three. The district court's contrary conclusion turns on a profound misunderstanding of this Court's Eighth Amendment jurisprudence; it would produce the implausible results that huge numbers of recent state executions have violated the Constitution and that

inmates themselves have routinely asked for cruel and unusual punishment; and it would convert courts into precisely the kinds of boards of inquiry refereeing battles of the experts this Court has repeatedly made clear they are not.

a. The district court egregiously erred in concluding that the federal government's use of the frequently used single-drug pentobarbital protocol will cause needless pain and suffering. See App., infra, 9a-13a. "Courts across the country have held that the use of pentobarbital in executions does not violate the Eighth Amendment," Glossip, 135 S. Ct. at 2733, and "it is difficult to regard a practice as 'objectively intolerable' when it is in fact widely tolerated," Baze, 553 U.S. at 53 (plurality opinion); see pp. 11-13, supra (recounting the many States that use pentobarbital and the many decisions upholding its use). As noted, moreover, this Court in Bucklew credited expert testimony that a massive dose of pentobarbital will "render" a person "fully unconscious and incapable of experiencing pain within 20 to 30 seconds." Bucklew, 139 S. Ct. at 1132.

The district court relied on respondents' contention that there is a possibility that a large dose of pentobarbital -- or any barbiturate -- could lead to pulmonary edema in the course of causing death. See App., infra, 11a-12a. But "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort

of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." Baze, 553 U.S. at 50 (plurality opinion). Indeed, the Sixth Circuit recently recognized that the risk of pulmonary edema during an Ohio lethal injection was not the type of "constitutionally cognizable," "severe" pain that could support an Eighth Amendment claim. In re Ohio Execution Protocol Litigation, 946 F.3d 287, 290 (2019) (explaining that an inmate's claim of pain related to pulmonary edema "pales in comparison to the pain associated with hanging," which has "been considered constitutional for as long as the United States have been united"). The district court's dismissal of the Sixth Circuit's conclusion on the basis that Ohio's "three-drug protocol employ[s] midazolam," App., infra, 11a, is difficult to fathom. The Sixth Circuit was analyzing the medical issue of pulmonary edema, and did not confine its reasoning to the particular drug compound that produces that effect. In any event, midazalom has long been identified, including by Members of this Court, as more likely to cause pain than pentobarbital. See Zagorski v. Parker, 139 S. Ct. 11, 11–12 (2018) (Sotomayor, J., dissenting from denial of certiorari and denial of a stay).

To the extent the district court relied on differences in the records in the Sixth Circuit and here regarding evidence of pain connected with pulmonary edema, App., infra, 11a–12a, it misapplied the relevant Eighth Amendment standard. This Court has

made clear that an inmate must establish that a challenged execution method "is 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" Glossip, 135 S. Ct. at 2737 (citation omitted). The district court fell well short of that high bar in tentatively concluding that, although it "is difficult to weigh competing scientific evidence at this relatively early stage," the record here supported respondents' claim "that the 2019 Protocol poses a substantial risk of serious pain." App., infra, 12a-13a.

Indeed, no matter how much longer the district court pondered the evidence, respondents could never clear this bar, since there is no scientific consensus regarding pentobarbital-related risks of pain that could establish the requisite likelihood of unnecessary pain. Relying on a single expert's testimony, the district court concluded that pentobarbital is likely to cause respondents to suffer flash pulmonary edema and severe pain. App., infra, 12a–13a. But the government submitted detailed expert declarations from the same expert witness this Court has credited in Bucklew. 139 S. Ct. at 1132. He disputed each of respondents' expert's claims in detail, see D. Ct. Docs. 111-4, 122-2, explaining his conclusion that pentobarbital at the dose administered will render the inmate insensate within seconds, see ibid. Whatever else might be concluded from this battle of experts, it is plain that there is not the type of scientific

consensus that an overdose of pentobarbital causes the type of substantial and unnecessary pain beyond the "inescapable consequence of death" that "establish[es] the sort of 'objectively intolerable risk of harm'" that the Constitution prohibits. Baze, 553 U.S. at 50 (plurality opinion). That is particularly true in light of the undisputed fact in the record that barbiturates like pentobarbital and thiopental were used for decades as anesthesia, without apparent reports of terrible pain while patients were "unresponsive" but still "sensate," as the district court feared. App., infra, 12a; see D. Ct. Doc. 122-2, at 3 & n.2 (expert declaration noting that "[t]hese barbiturates [pentobarbital and thiopental] * * * were used for decades (from the 1930s until about 1990) for induction of anesthesia worldwide -- millions upon millions of patients").

In any event, the inquiry under this Court's precedent is not whether "pentobarbital is likely to render inmates insensate or dead before they experience the symptoms of pulmonary edema." App., infra, 12a. Rather, the question is whether a chosen execution method poses "an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." Glossip, 135 S. Ct. at 2737. Here, the record demonstrates the government's extensive efforts to choose a well-tested lethal-injection protocol minimizing pain. At the most basic level, the

claim that the federal government and the leading death-penalty States have, in attempt to make executions more humane, selected an execution method that "cruelly superadds pain to the death sentence" is untenable. Bucklew, 139 S. Ct. at 1125.

b. Even if respondents could establish a substantial risk of severe pain under the protocol, they still could not prevail. That is because they failed to "plead and prove a known and available alternative," Glossip, 135 S. Ct. at 2739, that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain," id. at 2737 (citation omitted). The district court accepted respondents' proposal of a two-drug protocol, which relies on a combination of "a clinical dose of an opioid or other [pain-reliever]" prior to injecting pentobarbital. D. Ct. No. 102, at 24; see App., infra, 13a–15a. But this suggestion has "no track record of successful use," which defeats the district court's conclusion that it was an alternative readily available to BOP. Bucklew, 139 S. Ct. at 1130.

The district court's conclusion that a firing squad is a constitutionally superior method to pentobarbital-based lethal injection is equally unsupported. While this Court has long upheld the use of firing squad, see, e.g., Wilkerson v. Utah, 99 U.S. 130, 131–32 (1878), it has also noted that firing squad is a "more primitive" method of execution, Glossip, 135 S. Ct. at 2739; see D. Ct. Doc 111-4, at 8 (noting risks associated with firing squad).

The Constitution does not mandate the federal government to use an execution form that has "given way to more humane methods, culminating in today's consensus on lethal injection." Baze, 553 U.S. at 62 (plurality opinion).

c. Finally, even presuming respondents could satisfy the first two steps of the Eighth Amendment analysis, this Court in Bucklew made clear that to prevail, they "must show * * * that the State has refused to adopt [their proposed alternative] without a legitimate penological reason." 139 S. Ct. at 1125. Here, the government deliberately moved away from multiple-drug protocols to avoid the complications inherent in obtaining multiple lethal injection drugs and in navigating expiration dates of multiple drugs, A.R. 871, 930-931, as well as to "reduce the risk of errors during administration and eliminate the need to orchestrate the pace and sequence of administering multiple drugs," A.R. 931. Those are legitimate reasons for not expanding the number of drugs used. In addition, given that no State actually adds an opioid to a pentobarbital protocol, BOP has legitimate reasons to declining to adopt an approach that "ha[s] never been used to carry out an execution and ha[s] no track record of successful use." Bucklew, 139 S. Ct. at 1130 (citation omitted).

The federal government also has a legitimate interest in using a method it regards as "preserving the dignity of the procedure." Baze, 553 U.S. at 57 (plurality opinion). Given the "consensus"

among the States that lethal injection is more dignified and humane than the firing squad, BOP was entitled to reach the same conclusion. Baze, 553 U.S. at 62 (plurality opinion).

B. The Equities Do Not Support Entry Of The Injunction

Even apart from the merits, the injunction is likely to be vacated on appeal because the additional required considerations -- likelihood of irreparable harm, the public interest, and the balance of equities -- all weigh heavily against further injunctive relief. Glossip, 135 S. Ct. at 2736; cf. Winter, 555 U.S. at 26; 955 F.3d at 126-129 (Katsas, J., concurring) (concluding that the first injunction in this case should have been vacated on equitable considerations even apart from the merits).

1. First, any cognizable "irreparable harm" that respondents will suffer "in the absence of preliminary relief" is minimal, at best. Glossip, 135 S. Ct. at 2736 (citation omitted). To be sure, death is an irreparable harm, but that cannot be the irreparable harm supporting the injunction, because all agree that respondents "do not challenge the federal government's authority to execute them." 955 F.3d at 145 (Tatel, J., dissenting). Indeed, respondents could not raise such a challenge in this APA suit. See Hill v. McDonough, 547 U.S. 573, 580 (2006) (permitting challenge to execution method outside habeas only where there was no "challenge to the fact of the sentence itself").

2. Second, "the proper determination of where the public interest lies" is not "a close question." Winter, 555 U.S. at 26. This Court has repeatedly emphasized the public's "powerful and legitimate interest in punishing the guilty," Calderon v. Thompson, 523 U.S. 538, 556 (1998) (citation omitted), by "carrying out a sentence of death in a timely manner," Baze, 553 U.S. at 61 (plurality opinion). "Those interests have been frustrated in this case." Bucklew, 139 S. Ct. at 1133. Respondents were each convicted and sentenced to death more than 15 years ago, and each has exhausted all permissible opportunities for further review. Their executions have already been postponed for six months based on an injunction that proved (predictably) to be "without merit." 955 F.3d at 112; see 140 S. Ct. at 353 (statement of Alito, J.). Particularly given the unwarranted delay that resulted from its first error, the district court should been "sensitive to the [government's] strong interest in enforcing its criminal judgments without undue interference from the federal courts." Hill, 547 U.S. at 584. Its disregard of that interest makes it highly likely that its injunction will again be vacated on appeal.

3. Finally, "the balance of equities" weighs "strongly in favor of the" government and therefore against the injunction. Winter, 555 U.S. at 26. Respondents committed "heinous" murders of children and others with a brutality staggering even in the realm of capital offenses. 140 S. Ct. at 353 (statement of Alito,

J.). Lee threw a family in a bayou to support white supremacists. 955 F.3d at 127 (Katsas, J., concurring). Purkey and Nelson kidnapped, raped, and murdered girls, in once case dismembering the body with a chainsaw. Ibid. Honken murdered four people, including six- and ten-year-old girls, "execution-style, by shooting each in the head." Ibid. Despite that shockingly inequitable conduct, "they continue to litigate with a vengeance" to try to control the precise details of their deaths -- an opportunity they denied to the victims of their crimes. Id. at 128; cf. Bucklew, 139 S. Ct. at 1124; Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Thomas, J., concurring). In addition to the dispositive legal flaws in the injunction, it is manifestly not supported by equity.

## II. THE INJUNCTION SHOULD BE STAYED OR VACATED

The "balance" of the "'stay equities'" strongly favors a stay or vacatur of the injunction for many of the same reasons that it should have barred entry of the injunction in the first place. Mt. Soledad, 548 U.S. at 1302 (Kennedy, J., in chambers) (citation omitted). In addition, two factors strongly support a stay or vacatur of the injunction: the "'dilatory'" conduct of respondents and the district court that produced the "[l]ast-minute" injunction, Bucklew, 139 S. Ct. at 1134 (citation omitted), and the "severe prejudice" to the government of delaying these

executions for a second time, In re Blodgett, 502 U.S. 236, 239 (1992) (per curiam).

A. This Court is familiar with the gamesmanship and delay that can sometimes accompany death-penalty litigation, and the Court has repeatedly denounced those practices and their effects. See Bucklew, 139 S. Ct. at 1134; id. at 1144 (Breyer, J., dissenting); see also, e.g., Hill, 547 U.S. at 584-585. Just last Term, the Court stated clearly that "[l]ast-minute" impediments to scheduled executions "should be the extreme exception," and that "'the last-minute nature of an application' that 'could have been brought' earlier, or" a litigant's "'attempt at manipulation,'" could justify allowing an execution to proceed. Bucklew, 139 S. Ct. at 1134 (citation omitted).

Those considerations counsel strongly in favor of staying or vacating the "[l]ast-minute" injunction issued here. Bucklew, 139 S. Ct. at 1134. The asserted defects in the execution protocol that form the basis of the injunction were evident to respondents when the protocol was issued nearly a year ago. Indeed, respondents sought a preliminary injunction based on the Eighth Amendment in September 2019, raising the same arguments and relying on the same expert declarations as they do now. See D. Ct. Doc. 13-1; see also 955 F.3d at 111 (noting that respondents raised Eighth Amendment claims). The district court issued its first injunction based on the FDPA in November 2019; this Court declined

to grant emergency relief to the government in December 2019 but expressed an expectation of "dispatch" in resolving the appeal, 140 S. Ct. at 353; the court of appeals vacated the injunction in April 2020 and expressed concern about "further delay," 955 F.3d at 113; and both the court of appeals and this Court denied numerous motions for stays and further review. Throughout those many months, the district court retained jurisdiction over respondents' remaining Eighth Amendment claim. Wright & Miller § 3921.2. Yet respondents chose not to seek another injunction until June 19 -- more than nine months after they filed their first preliminary-injunction motion, more than two months after the first injunction was vacated, and less than a month before their rescheduled executions were set to begin. That is hardly "dispatch." 140 S. Ct. at 353.

Respondents' dilatory tactics were, unfortunately, enabled and exacerbated by the district court. Courts handling capital cases have a responsibility "to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously." Bucklew, 139 S. Ct. at 1134. The district court here fell well short of that responsibility. With the government's opposition to the motion on file and respondents' execution dates approaching for the second time, the court declined to rule on respondents' second preliminary-injunction motion for 18 days, until just six hours before the scheduled execution.

The district court offered "no good reason for this abusive delay." Gomez v. United States Dist. Court, 503 U.S. 653, 654 (1992) (per curiam). On Friday, July 10 -- the last business day before the first of the rescheduled executions -- the court notified the parties that it would issue a "ruling related to Lee before 6 PM." App., infra, 37a-38a. The court, however, did not issue that ruling. The court stated the next day that it had declined to rule "given a number of changing factors that need to be incorporated * * * at least into the background of my opinion." Id. at 26a. The court mentioned specifically the entry of a preliminary injunction by a federal court in Indiana in an entirely unrelated suit by prospective witnesses to Lee's execution. Ibid.; see Peterson v. Barr, No. 20-cv-350 (S.D. Ind. July 10, 2020), vacated No. 20-2252 (7th Cir. July 12, 2020). The government urged the court to rule promptly nevertheless, App., infra, 34a, but the court ultimately issued its own injunction only after the Peterson injunction was vacated by the Seventh Circuit -- and even then, waited another 17 hours to do so, eating up more than two-thirds of the remaining time until Lee's execution.

The district court's explanation is difficult to comprehend. In Peterson, family members of Lee's victims claimed that BOP had violated the APA by inadequately considering their ability to attend his execution during the COVID-19 pandemic. That assertion is not only "frivolous," Peterson v. Barr, No. 20-2252 (7th Cir.

July 12, 2020), slip. op. 4, 6, but almost entirely unrelated to any question in this case. Indeed, the legal analysis in the court's ultimate preliminary-injunction opinion does not turn in any way on the issues addressed in Peterson, and the background section of the opinion includes only a few sentences describing Peterson, which presumably did not require more than 48 hours to compose. App., infra, 3a; cf. id. at 26a. In any event, there is of course no rule prohibiting two different district courts from enjoining the same execution at the same time, or requiring one court to abstain once another court has issued an injunction. If anything, this Court's direction to proceed "expeditiously" in resolving method-of-execution claims suggests that courts should move ahead. Bucklew, 139 S. Ct. at 1134.

The district court thus appears to have made the conscious decision to withhold its ruling until the last business day before the execution, then to further hold it for the two days immediately preceding the scheduled execution while the Peterson injunction was in place, and finally to release its own injunction only after the Peterson injunction was vacated. If that was the district court's calculus, its approach is deeply troubling. At a minimum, the court committed a serious error in judgment that deprived the government, the court of appeals, and this Court of more than 48 critical hours to address the injunction before the first scheduled execution. The actions "to interpose unjustified delay" by

respondents and the court weigh overwhelmingly in favor of staying or vacating the injunction. Bucklew, 139 S. Ct. at 1134.

B. Failing to stay or vacate the injunction, moreover, would cause "severe prejudice" to the government, which is fully prepared to implement the sentences imposed many years ago in respondents' cases, beginning with respondent Lee's sentence today at 4 p.m. Blodgett, 502 U.S. at 239. "To unsettle these expectations" in the final hours before the executions -- particularly after a lengthy delay arising from a meritless injunction -- would be "to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the [government] and the victims of crime alike." Calderon, 523 U.S. at 556 (citation omitted).

More practically, the last-minute injunction is intensely disruptive to BOP's preparations for the executions, which have now entered their final stages, including picking up grieving family members of the victims and other witnesses at the airport and preparing to transport them to the execution facility, conducting final rehearsals with contractors and execution-team personnel, and increasing security and other precautions in and around the execution facility. See D. Ct. Doc. 139-1 ¶¶ 4-12. There is no valid basis for disrupting this extensive process, which is ultimately designed to ensure a humane and dignified execution, based on a meritless injunction that could have been

issued much sooner and has no reasonable prospect of withstanding appellate review.

In addition, it is critical that these executions -- unlike some state executions -- cannot be rescheduled with relative ease, for example on dates next week. As BOP has explained in a declaration, the contractors assisting in the executions this week would likely need "at least one month's notice in order to be able to reschedule." D. Ct. Doc. 139-1 ¶ 6. Thus, while it is possible for BOP to conduct respondent Lee's execution later today or possibly tomorrow if absolutely necessary to facilitate this Court's consideration of the application, the government cannot postpone the executions any further than that without requiring a much more significant delay of one or more of them.

C. Finally, given the district court's unreasonable decision to proceed piecemeal, see App., infra, 18 & n.6, this Court should make clear that "[n]o further stays of [respondents'] execution[s] shall be entered by the federal courts except upon order of this Court," Vasquez v. Harris, 503 U.S. 1000, 1000 (1992) (per curiam).

* * * * *

"Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable." Baze, 553 U.S. at 61 (plurality opinion). But the people of the United States,

acting through Congress, have authorized the death penalty for serious federal offenses since President Washington signed the Crimes Act of 1790. See Bucklew, 139 S. Ct. at 1122. Respondents here were prosecuted by the Department of Justice across different presidential administrations for undisputedly heinous crimes. They were found guilty of the charged offenses and worthy of the ultimate punishment by juries of their peers. They have fully exercised their rights to appeal and seek collateral relief up and down the federal judicial system for roughly two decades, including repeatedly over the past month. After searching review by many appellate judges, their convictions and sentences have been upheld as lawful. BOP is prepared to execute them using a lethal-injection protocol chosen precisely for its humanity and its constitutionality under this Court's most recent precedent. See id. at 1118-1119. Three of their executions have already been delayed for six months by an injunction that was subsequently vacated in a thorough appellate decision that this Court declined to review. The district court's second injunction -- requested after extensive delay and entered at the eleventh hour on a second-choice set of rationales that lack merit and have nothing to do with respondents' criminal culpability -- does not come close to tipping the equities toward respondents or justifying further delay. As the district court in respondent Lee's case explained on Friday, "no more delay is warranted." United States v. Lee,

No. 97-cr-24 (E.D. Ark. July 10, 2020), slip op. 9. "At some point, the execution must come." Id. at 10. That point has been reached in this case. The delayed and meritless injunction entered by the district court should be stayed or vacated, and the lawful executions should be allowed to proceed.

## CONCLUSION

The district court's injunction should be stayed or summarily vacated effective immediately.

Respectfully submitted.

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Acting Solicitor General

JULY 2020