United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20-5206 **September Term, 2019**

1:19-mc-00145-TSC

Filed On: July 15, 2020

In re: In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases,

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James H. Roane, Jr., et al.,

Appellees

v.

William P. Barr, Attorney General, et al.,

Appellants

Consolidated with 20-5210

BEFORE: Rogers, Griffith, and Pillard, Circuit Judges

O R D E R

Upon consideration of the emergency motion to immediately stay or vacate preliminary injunction barring three federal executions, the opposition thereto, and the reply, it is

ORDERED that the emergency motion for stay pending appeal of the district court's order enjoining plaintiffs' executions be denied and consideration of the motion to vacate be deferred pending further order of the court.

Plaintiffs are three federal death-row inmates. On June 15, 2020, the Federal Bureau of Prisons (BOP) announced that four inmates would be executed: Daniel Lewis Lee, Wesley Purkey, Dustin Lee Honken, and Keith Dwayne Nelson. See Notice, In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases (In re FBOP), No. 19-mc-145 (D.D.C. June 15, 2020). BOP scheduled three executions for Monday, Wednesday, and Friday of this week, and scheduled Nelson's execution for late August. Id.

Four days later, the inmates moved for a preliminary injunction, arguing that the government's plan for their executions, the 2019 Protocol, violates the Administrative Procedure Act (APA) as arbitrary and capricious for failure to consider important factors, is contrary to law for failure to conform to the Food, Drug and Cosmetics Act (FDCA) and Controlled Substances Act (CSA), violates their right of access to counsel and the courts, and violates the Eighth Amendment's prohibition on cruel and unusual punishments. See Pls. Mot. for a Prelim. Inj., In re FBOP, No. 19-mc-145 (D.D.C. June 19, 2020).

On the morning of July 13, the district court enjoined the government from carrying out the executions based on plaintiffs' likely success on the merits of their Eighth Amendment claim. See In re FBOP, No. 19-mc-145, slip op. at 22 (D.D.C. July 13, 2020). The government sought a stay of the district court's order to permit it to carry out the executions in this court and the Supreme Court. In the evening of July 13, we denied the stay pending appeal, and set an expedited briefing schedule on the government's motion to vacate the preliminary injunction. See Order, In re FBOP, No. 20-5199 (D.C. Cir. July 13, 2020). Early yesterday morning, the Supreme Court granted the government's request to stay the district court's injunction, holding that the inmates had not established a likelihood of success on their Eighth Amendment claim. See Barr v. Lee, No. 20A8, 2020 WL 3964985 (S. Ct. July 14, 2020) (per curiam). The government executed Daniel Lewis Lee later that morning.

Yesterday, the inmates Purkey, Honken, and Nelson filed a motion requesting that the district court rule on the still-pending claims in their preliminary injunction motion. See Mot. for Order, No. 19-mc-145 (D.D.C. July 14, 2020). The district court this morning stayed plaintiffs' executions, holding that they had demonstrated a likelihood of success on the merits of their contrary-to-law FDCA claim, but not their other claims. See In re FBOP, No. 19-mc-145, slip op. at 13 (D.D.C. July 15, 2020). The government again seeks a stay of that order to permit it to carry out the remaining executions.

In determining whether to grant "the exceptional remedy of a [stay] pending appeal," John Doe v. CFPB, 849 F.3d 1129, 1131 (D.C. Cir. 2017), we consider four factors: "(1) whether the [government] has made a strong showing that [it] is likely to succeed on the merits; (2) whether [the government] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties; and (4) where the public interest lies," Nken v. Holder, 556 U.S. 418, 434 (2009) (alteration omitted). The government has not made "a strong showing" that it is "likely to succeed" in demonstrating that the district court abused its discretion in granting the preliminary injunction. Id.

The district court held that plaintiffs were likely to succeed on their claim that the 2019 Protocol violates the FDCA, rendering the Protocol contrary to law under the APA.

The government counters that the logic of FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000), prevents reading the FDCA to authorize the FDA to regulate drugs used for executions. The government claims that the FDA could not declare pentobarbital "safe and effective for its intended use" in an execution because "the potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit." Id. at 133-34 (internal quotation marks and citations omitted). But the FDA cannot ban the use of prescription drugs for lethal injections, the government reasons, because the Federal Death Penalty Act (FDPA) expressly authorizes execution by lethal injection. "If [lethal-injection drugs] cannot be used safely for any therapeutic purpose, and yet [they] cannot be banned, [they] simply do not fit" under the FDA's jurisdiction. Brown & Williamson, 529 U.S. at 143.

Given our decision in Cook v. FDA, 733 F.3d 1 (D.C. Cir. 2013), the government has not met its high burden of showing that Brown & Williamson applies here. The FDA's statement in the Cook litigation that thiopental is a "drug" within the meaning of the FDCA even when it is intended for use in an execution, see Defs.' Mem. in Support of Mot. to Dismiss 19, ECF No. 13-1, Beaty v. FDA, 853 F. Supp. 2d 30 (D.D.C. Apr. 20, 2012), aff'd in relevant part sub nom. Cook v. FDA, 733 F.3d 1 (D.C. Cir. 2013), was central to the court's affirmance of the district court's permanent injunction. Without it, there was no need for the court to decide any of the FDCA issues that it did decide, or even to affirm the district court's permanent injunction against the FDA. The government's argument conflicts with the necessary premise of a published precedential decision of our court. We also note that the Supreme Court has expressly declined to resolve this "thorny" jurisdictional question. Heckler v. Chaney, 470 U.S. 821, 828 (1985); see also id. (stating that "we need not and do not address" whether the FDCA applies to drugs used to carry out executions). Finally, the government contends that plaintiffs cannot argue that the Protocol is unlawful because only the FDA may enforce the FDCA. But plaintiffs do not seek preliminary injunction on an enforcement claim, they claim that the Protocol is contrary to law under the APA. See Am. Compl. ¶¶ 186-191, In re FBOP, No. 19-mc-145 (D.D.C. June 1, 2020) (citing 5 U.S.C. § 706(2)). In light of our precedent, and because the government must make a "strong showing" that it is "likely to succeed on the merits," Nken v. Holder, 556 U.S. at 434, we cannot say the government has carried its burden regarding the plaintiffs' FDCA claim.

The other three stay factors also favor plaintiffs. The government will be inconvenienced but not irreparably injured, and a stay would "substantially injure the other parties interested in the proceeding," Nken, 556 U.S. at 434, by subjecting them to executions under a Protocol that may be unlawful. The government faces undeniable organizational complexities in orchestrating an execution. But the late-stage ruling is not the fault of plaintiffs who, as the government emphasizes, brought these preliminary injunction

claims nine months ago. See Gov't Mot. 5-6, No. 20-5206 (D.C. Cir. July 15, 2020). We recognize that "the State and the victims of crime have an important interest in the timely enforcement of a sentence." Bucklew v. Precythe, 139 S. Ct. 1112, 1133 (2019). That interest is served, not impaired, by allowing more than a few hours for judicial review of claims upon which even the most deeply scarred human life hangs. The plaintiffs should not be executed before "the merits of their [APA] claim [are] adjudicated." Barr v. Roane, 140 S.Ct. at 353 (statement of Alito, J., respecting denial of stay or vacatur). Rather, "in light of what is at stake, it would be preferable for the District Court's decision to be reviewed on the merits by the Court of Appeals for the District of Columbia Circuit before the executions are carried out." Id.

Recognizing the government's interest in the timely execution of these sentences, it is

FURTHER ORDERED, on the court's own motion, that this appeal be expedited. It is

FURTHER ORDERED that the following briefing schedule, or such other schedule as the parties may agree upon and that is workable for the court, will apply:

Appellants' Brief and Appendix	July 20, 2020
Appellees'/Cross-Appellants' Brief	July 27, 2020
Appellants' Reply/Cross-Appellees' Brief	August 3, 2020
Cross-Appellants' Reply Brief	August 10, 2020

An expedited date for oral argument will be set shortly.

All issues and arguments must be raised by appellants in the opening brief. The court ordinarily will not consider issues and arguments raised for the first time in the reply brief.

To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedure 43 (2019); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

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Parties must hand deliver the paper copies of their briefs to the Clerk's office on the date due. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Scott H. Atchue
Deputy Clerk