

No. \_\_\_\_\_

**Capital Case**

**Underwood's Execution is set for December 19, 2024, at 10:00AM.**

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**IN THE SUPREME COURT OF THE UNITED STATES**

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KEVIN UNDERWOOD,

*Petitioner,*

v.

Oklahoma Pardon and Parole Board; Tom Bates, in his official capacity as Director of the Pardon and Parole Board; and Richard Miller, in his official capacity as Chairperson of the Pardon and Parole Board,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
TENTH CIRCUIT COURT OF APPEALS

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**PETITION FOR CERTIORARI**

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## **QUESTION PRESENTED**

Whether the due process clause provides any protection for petitioners in state clemency proceedings that are explicitly required by state law.

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## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Kevin Underwood respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Tenth Circuit.

### **ORDERS BELOW**

The district court denied Underwood's Emergency Motion for a Stay on December 8, 2024. Order, *Underwood v. Oklahoma Pardon and Parole Board*, Case 5:24-cv-01266-G, Doc. 16 (W.D. Okla. Dec. 8, 2024). This order is attached as App. A. The Tenth Circuit temporarily stayed Underwood's clemency proceedings on December 8, 2024, to order briefing and consider the issues. *Underwood v. Oklahoma Pardon and Parole Board*, 24-6259, Doc. 3 (10th Cir. Dec. 8, 2024). This order is attached as App. B. The Tenth Circuit lifted the temporary stay and denied Underwood's Emergency Motion for a Stay on December 11, 2024. *Id.* Doc. 14 (10th Cir. Dec. 11, 2024). This order is attached as App. C.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254 and 2101(f).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Due Process Clause of the United States Constitution, Amendment XIV, states:

All persons born or naturalized in the United States, and subject to the



jurisdiction thereof, are citizens of the United States and of the State where in they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

And Title 18 U.S.C. § 3599(e) states:

Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

## BACKGROUND

This Court has stressed that “capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all.” *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). “Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). “Executive clemency has provided the ‘fail safe’ in our criminal justice system.” *Id.* at 415. “In authorizing federally funded counsel to represent their state clients in clemency proceedings, Congress ensured that no prisoner would be put to death without meaningful access to the ‘fail-safe’ of our justice system.” *Harbison v. Bell*, 556 U.S. 180, 194 (2009).

To ensure that the most fundamental right—the right to life—is not unfairly or arbitrarily extinguished, the State of Oklahoma has provided an additional safeguard by providing robust clemency proceedings. Recognizing this historic remedy, the Oklahoma Constitution “created a Pardon and Parole Board to be composed of five members.” Okla. Const. art. VI, § 10. Board members have a constitutional duty to “make an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote make its recommendations to the Governor of all persons deemed worthy of clemency.” *Id.*

Clemency proceedings in Oklahoma are much more substantial than in other states. Hearings generally last around three hours and routinely include multiple lay and expert witnesses. The clemency petitioner's legal team gets forty minutes to present the case for clemency. The State then has forty minutes to respond. Representatives for the victim, usually the family, have twenty minutes. And the clemency petitioner himself has twenty minutes to speak on his own behalf.

Despite constitutional, statutory, and regulatory requirements governing Oklahoma clemency hearings, in this case the Board built the plane as they were flying it. As detailed below, the Board changed the number of members needed to be at the hearing from five to three, changed the number of days notice for the hearing from ten to two, and ignored the training and skill requirements in state law. These myriad arbitrary actions deprived Underwood of even the minimal due process to which he was entitled.

On October 1, 2024, the Oklahoma Court of Criminal Appeals set Underwood's execution for December 19, 2024. Order, *Underwood v. State*, D-2008-319 (Okla. Crim. App. Oct. 1, 2024). Once an execution date is set, the Pardon and Parole Board must schedule a clemency hearing within "three (3) business days of receiving the notice of the setting of an execution date." Okla. Admin. Code § 515:10-3-1. A day after Underwood's execution date was set, the

Board scheduled Underwood's clemency hearing for December 4, 2024, at 9AM.

Relying on the Board's notice, Underwood's legal team made travel arrangements for Underwood's expert psychologist Dr. Kim Spence to travel from Florida to attend the hearing. She is a psychologist and expert in autism spectrum disorder, which is one of Underwood's disabilities. Dr. Spence has met with Underwood on multiple occasions, digested thousands of pages of records, and interviewed three of Underwood's family members. Her testimony alone was anticipated to amount to more than half of Underwood's clemency presentation.

Also relying on the December 4 notice, Hunter Labovitz, Underwood's lead counsel, committed to represent another one of his capital clients at a federal evidentiary hearing scheduled to start December 5, 2024, and run through December 11, 2024. *See* Minute Order, *United States v. Edward Fields*, No. 03-cr-73 (E.D. Okla. Oct. 23, 2024), ECF No. 418 (Oct. 23, 2024); Minute Order, *United States v. Edward Fields*, No. 03-cr-73 (E.D. Okla. Nov. 6, 2024), ECF No. 424. Labovitz specifically requested the federal court to schedule the evidentiary hearing after Underwood's clemency hearing.

Then on December 2, 2024, two days before the scheduled clemency hearing, the Board rescheduled Underwood's hearing for December 9, five days later than originally planned. The Board formally informed counsel of the

cancelation and rescheduling in the same email, and no one consulted with Underwood's counsel on whether the new hearing date was feasible. In the time since the Board had set the December 4 date, two members of the Board had resigned.

The Board told Oklahoma's Attorney General it wanted to wait to hold Underwood's clemency hearing "until the two vacancies are filled and a full Board will be present." Emergency Petition for Writ of Mandamus, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). In response to the Board canceling Underwood's hearing, the Attorney General's Office sought an extraordinary writ of mandamus in the Oklahoma Court of Criminal Appeals arguing that rescheduling the clemency hearing was plainly unlawful. Emergency Petition for Writ of Mandamus at 5-7, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). It argued the Board's abrupt "cancelation of the clemency hearing did not comply with [Oklahoma's] Open Meeting Act." *Id.* at 5-7.

Then, a few days later and after communications between the Board and the AG's Office, both offices changed their positions to align with each other. The Board decided it no longer needed a five-member Board and scheduled Underwood's clemency hearing for December 9, 2024, before a three-member Board. And the Attorney General's Office decided it no longer believed

rescheduling the hearing violated Oklahoma law.

Importantly, rescheduling the hearing gave no benefit to the Board. The Board confirmed the December 9 hearing would be before three members, just as it would have been had the hearing happened on December 4. *Underwood*, Case 5:24-cv-01266-G, App. D at 36. From the Board's perspective, the rescheduling was completely arbitrary. But from Underwood's perspective, it was detrimental. Postponing the hearing for five days with two days' notice ensured that Underwood would be missing half his legal team and potentially his only expert. It also ensured that Underwood would have two fewer opportunities to obtain the three votes required for a clemency recommendation. To obtain a "majority" of the Board, Underwood had to convince three members of the Board, regardless of the total number of members sitting. With a three-member Board, Underwood must convince every member to recommend clemency. Two out of three is not a majority. The Board confirmed this at the hearing before the district court on December 6, 2024.

Two days after the Board rescheduled the hearing and confirmed it was moving forward with only three members, Underwood sued the Board under 42 U.S.C. § 1983. W.D. Okla. Case 5:24-cv-01266-G, Doc. 1. The following day, on December 5, the Governor appointed a new member to the Board. The Board

planned for her to sit at the December 9 hearing, giving the new member a weekend to complete the mandatory 12-hour training required of all Board members and digest the hundreds of pages and hours of video that were submitted by the parties for Underwood's hearing. Okla. Ann. tit 57, § 332.1A(A) ("Each member of the Pardon and Parole Board shall receive at least twelve (12) hours of training for the first year"). Digesting these materials takes time, and the other members had the materials since November 15, 2024.

Two days after Underwood filed his complaint, the district court held a hearing to consider Underwood's motion to stay his execution and clemency proceedings. During the hearing, the district court ordered supplemental briefing on whether the Board's last-minute actions violated Oklahoma's Open Meetings Act. Supplemental briefing was complete the following day. A day later, December 8, the district court denied Underwood's request for a stay. The court did not enter a judgment or final order. That same day, Underwood appealed to the Tenth Circuit. The Tenth Circuit temporarily stayed the clemency proceedings so it could order briefing and consider the issue.

Briefing at the Tenth Circuit was complete on December 10. On the following day, December 11, the Board scheduled another clemency hearing to take place on December 13. It notified the Tenth Circuit of the hearing and clarified that the hearing would go forward only if the Tenth Circuit lifted its

temporary stay of Underwood's clemency proceedings. At 8:00PM that same night, the Tenth Circuit denied Underwood's motion and lifted the temporary stay. App. C.

Underwood's counsel informed their expert of the new hearing date the following morning. Given she had one day's notice, the expert could not attend the clemency hearing. Originally, she planned to attend the hearing in person, but after the last-minute rescheduling, she could not attend the hearing in person or via Zoom. She wrote out her testimony, which was read at Underwood's hearing. Underwood's lead counsel could not attend the hearing either. Ultimately, a three-member Board did not recommend clemency.

### **REASONS FOR GRANTING CERTIORARI**

Due process protections are minimal in clemency proceedings, but they are not non-existent. Under Tenth Circuit precedent, the Board cannot conduct clemency proceedings that violate Board policies or state law. *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir.1998). There, the court reasoned that the due process clause of the federal constitution protects Underwood's interest in a fair proceeding, and it ensures that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin." *Id.* (citing *Ohio Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring)). Before the lower



courts, Underwood argued the Board’s abrupt canceling and rescheduling of Underwood’s hearing violated “the procedures explicitly set for by state law,” and rendered the proceedings “wholly arbitrary, capricious or based upon whim, for example, flipping a coin.” *Id.*

Oklahomans ingrained clemency proceedings in their state constitution as an additional fail safe in its criminal justice system. And with 18 U.S.C. § 3599(e), “Congress ensured that no prisoner would be put to death without meaningful access to the ‘fail-safe’ of our justice system.” *Harbison v. Bell*, 556 U.S. 180, 194 (2009). Underwood is not asking for special treatment. Rather, he merely seeks the same process provided to every other clemency petitioner before him. This Court should decide once and for all whether these guarantees create liberty or property interests protected by due process clause of the Fourteenth Amendment.

**I. A splintered opinion by this Court held that clemency petitioners have a due process interest in clemency proceedings.**

Below, the Board questioned whether the Fourteenth Amendment is at all relevant to the issues raised by Underwood. Board’s Response at 8, *Underwood*, Case 5:24-cv-01266-G, Doc. 16. But in *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), this Court reasoned that death row prisoners are entitled to some minimal due process protections in clemency proceedings.

In *Woodard*, four of the eight justices who found no due process violation under the circumstances presented there also found that judicial review of clemency proceedings is appropriate. Specifically, Justice O'Connor disagreed with the Chief Justice's contention that a death row inmate has no life or liberty interests in clemency proceedings cognizable under the due process clause. *Id.* at 289 (O'Connor, J., concurring in part and concurring in judgment). Three other justices joined her opinion. When combined with Justice Stevens' opinion, *id.* at 290 (Stevens, J., concurring in part and dissenting in part), five members of the Court found that "some level of judicial review is appropriate over the executive act of clemency." David A. Olson, *Second-Guessing the Quality of Mercy: Due Process in State Executive Clemency Proceedings, Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244 (1988), 22 Harv. J.L. & Pub. Pol'y 1009, 1017 (1999); see also *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998).

Based on the Court's holding in *Woodard*, the Tenth Circuit recognized in *Duvall* "the minimal application of the Due Process Clause" ensures "a death row prisoner that he or she will receive the clemency procedures set forth by state law." *Duvall*, 162 F.3d at 1061. The Tenth Circuit court has continued to follow that principle, as have other circuits. *Gardner v. Garner*, 383 F. App'x 722, 726 (10th Cir. 2010) ("We must focus solely on the Board's compliance with

its own rules and its avoidance of wholly arbitrary or capricious action.”); *Tamayo v. Perry*, 553 Fed.Appx. 395, 402 (5th Cir. 2014) (“We conclude that he has failed to show a substantial likelihood that he could demonstrate the Board violated its policies.”); *Mann v. Palmer*, 713 F.3d 1306, 1316 (11th Cir. 2013) (holding due process claim would be futile because “Florida law did not obligate the Governor to grant Mann a second clemency hearing before he signed Mann’s current death warrant”).

This is unsurprising considering due process cases outside the context of a clemency hearing. For instance, when a state creates good time credits for its prisoners, “the prisoner’s interest has real substance and is sufficiently embraced within Fourteenth Amendment ‘liberty’ to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to ensure that the state-created right is not arbitrarily abrogated.” *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Similarly, the Supreme Court has explained that “the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances.” *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 429 (1982). “The hallmark of property,” the Court stressed, “is an individual entitlement grounded in state law, which cannot be removed except ‘for cause.’” *Id.* at 430. Another example

from the Tenth Circuit includes its holding that there is a due process interest in a state-created cause of action. *M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1310 (10th Cir. 2018).

**II. The Board violated state and federal law by rescheduling Underwood’s clemency hearing at the last minute.**

The Board bulldozed simple and explicit requirements in state and federal law to hold Underwood’s clemency hearing regardless of the impact on his ability to be heard at the hearing. Individually—and especially cumulatively—these violations amount to a denial of due process. *See Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 345 (5th Cir. 1999) (examining petitioner’s objections to parole board’s procedures “either individually or cumulatively under the facts of this case”). Avoiding another clemency hearing is a minimal interest for the Board, but a fair hearing that abides by state and federal law is life or death for Underwood.

**A. The Board violated federal law providing counsel for people seeking clemency.**

Federal law guarantees Underwood the assistance of counsel during the clemency process. 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180, 183-85 (2009); *Hain v. Mullin*, 436 F.3d 1168, 1172-75 (10th Cir. 2006) (en banc). The Board’s abrupt postponing and rescheduling of Underwood’s clemency hearing amounted to a denial of a fair hearing and the meaningful assistance of counsel

during the clemency process. The last-minute change ensured Underwood's lead counsel and his only expert could not attend the hearing.

Moreover, not only did Underwood have to move forward without one of his lawyers, but his hearing was done with his far less experienced lawyer and another lawyer who had never been on Underwood's case. The originally scheduled clemency hearing was meticulously planned and involved both of Underwood's lawyers and his expert witness. The Board argued Underwood is not entitled to counsel of his choosing, but that is not what Underwood requested. Instead, Underwood merely asked that the Board's last-minute cancelation of his hearing not prevent his lawyer and expert, who spent months preparing for the hearing, from presenting at the hearing. In the end, Underwood had to go forward missing the two most important members of his legal team.

### **B. The Board violated the Oklahoma Constitution.**

Underwood has a protected due process interest ensuring he "will receive the clemency procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin." *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir.1998) (citing *Ohio Parole Authority v. Woodard*, 523 U.S. 272, 289 (O'Connor, J., concurring)). Because the five-

member board is explicitly set out in Oklahoma's Constitution, Underwood has a due process interest in having a five-member board vote on his clemency petition. More than a statute, the Oklahoma Constitution guarantees Underwood a five-member board. Okla. Const. art. VI, § 10. In other words, Oklahoma's clemency procedures, which are "explicitly set forth by state law," require a five-member board and an impartial investigation. *Duwall*, 162 F.3d at 1061; Okla. Const. art. VI, § 10. That explicit guarantee creates a due process interest for Underwood. *Id.*

The number of board members is not meaningless. To recommend clemency, the petitioner must receive a majority of the board members. Obtaining three votes of five is easier than obtaining three of three. Underwood must get a majority of the Board's votes, and the Board always defines a majority as obtaining three votes. With five members, Underwood would need three votes or 60%. With three members, Underwood needed 100% of the vote. So the Board's last-minute shuffling of members arbitrarily changed the burden of proof.

The Board is not akin to a court. Courts consider legal arguments and reach rational decisions regardless of the number of members. They are guided by reason. But with a clemency board, mercy and sympathy are the criteria, not reason. And the Oklahoma Constitution guarantees Underwood five

members, so he has five chances to ask for mercy and amass three votes for a clemency recommendation. With any member missing, that is one less opportunity for Underwood to reach three votes. Simply put, convincing three of five is far easier than convincing three of three. And the Governor recently showed how quickly he can appoint Board members. He appointed a new fourth member in less than a week. So, ensuring a five-member Board is not an insurmountable task, and requiring a five-member Board placed a minimal burden on the state. This is unlike a situation where a member has to recuse due to conflict; here the Governor simply chose to deny Underwood a clemency hearing before a full five-member Board.

Moreover, Underwood is entitled to an impartial Board. In response to the Board canceling Underwood's hearing, the Attorney General's Office sought an extraordinary writ of mandamus arguing that rescheduling the clemency hearing was plainly unlawful. *Emergency Petition for Writ of Mandamus at 2, Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). Just two days later, the Office changed its tune, and it was happy to move forward absent two Board members and half of Underwood's legal team. Indeed, not only did the Attorney General's Office agree its lawsuit was moot, but it then started representing the Board in the present litigation.

The Board, which is supposed to be an impartial decisionmaker in Underwood's clemency proceeding, was represented and influenced by one of the parties to that clemency proceeding. Initially, the Board told the Attorney General it wanted to wait to hold Underwood's clemency hearing "until the two vacancies are filled and a full Board will be present." Emergency Petition for Writ of Mandamus at 2, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). The Board wanted to provide Underwood with a full, five-member Board. *Id.* But a few days later, both offices then agreed on a December 9 hearing without consulting with Underwood's legal team. Taking score, the Attorney General changed his position on the lawfulness of rescheduling the hearing to align himself with the Board's position. And the Board changed its position on whether to move forward with three Board members to align itself with the Attorney General's position. It is also important to note that the Board has its own general counsel and that the Attorney General's representation here is an anomaly. The Board and Attorney General were in cahoots with the common goal of conducting Underwood's clemency hearing as quickly as possible regardless of blatant violations of state and federal law.

The Board's close alignment with one of the parties is worse when considering the Board's history. The Board went from five members to three



members inside of a week. One of the resigning members is currently under investigation for bribery by the Oklahoma State Bureau of Investigation. Nolan Clay, *Former Pardon and Parole Board member under criminal investigation; clemency hearing delayed*, The Oklahoman (Dec. 2, 2024). Other former members are accused of colluding with district attorneys to ensure that clemency would be denied. Second Amended Complaint at 7-8, *Glossip v. Oklahoma Pardon and Parole Board*, Case No. CV-2023-1001 (Okla. County Dist. Ct. December 20, 2023). And a grand jury found that the Board “lacks transparency,” as is required by the Oklahoma Open Meetings Act. Oklahoma County Grand Jury Final Report at 38-39, Case No. GJ-2021-1 (May 12, 2022).

The information about the Board’s impartiality revealed more evidence of the Board’s arbitrary decision making, and it provided the foundation for another claim. Oklahoma law requires that people seeking clemency “shall be given impartial review as required in Section 10 of Article VI of the Oklahoma Constitution.” Okla. Stat. tit. 57, § 332.22(H). Members of the Board “shall uphold and promote the independence, impartiality, fairness, and integrity of the Board, and should avoid impropriety, or the appearance of impropriety.” *Id.* at 332.12(B). And Oklahoma ethics laws prohibit state officers from trying to influence the results of a state hearing while that official is in their official capacity as a state officer. Rule 2.9. The Board’s policies also mandate that

members avoid the perception of unethical behavior. Policy 104, <https://oklahoma.gov/ppb/about/policy-procedures.html>. The Board's and Attorney General's latest flipflops to align their positions at the expense of Underwood's right to a fair and meaningful clemency hearing violate Oklahoma law and due process protections for an impartial decisionmaker.

**C. The Board violated Oklahoma's Open Meetings Act by failing to provide Underwood with ten days' notice.**

As the Attorney General's Office originally argued, the Board must provide Underwood with at least ten days' notice "[i]f any change is to be made of the date, time or place." Okla. Ann. tit 25, § 311(A)(8); Emergency Petition for Writ of Mandamus at 6, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). The AG argued the Open Meetings Act guaranteed Underwood ten days' notice. *Id.* at 6. Underwood agrees. But the Board gave Underwood only two days' notice that his December 4 hearing was canceled and only seven days' notice that it was rescheduled for December 9. The Board then gave Underwood two days' notice that the hearing was rescheduled for December 13.

The Open Meetings Act reads,

All meetings of public bodies, as defined hereinafter, shall be held at specified times and places which are convenient to the public and shall be open to the public, except as hereinafter specifically provided. All meetings of such public bodies, except for executive sessions of the State

Banking Board and Oklahoma Savings and Loan Board, shall be preceded by advance public notice specifying the time and place of each such meeting to be convened as well as the subject matter or matters to be considered at such meeting, as hereinafter provided.

Okla. Stat. tit 25, § 303. The Act continues,

If any change is to be made of the date, time or place of regularly scheduled meetings of public bodies, then notice in writing shall be given to the Secretary of State or county clerk or municipal clerk, as required herein, not less than ten (10) days prior to the implementation of any such change.

*Id.* at § 311(A)(B). The Board's two days' notice for the cancelation and its seven days' notice for the rescheduling violate the Open Meetings Act because both are less than the statutorily required ten days. The same is true for the Board's scheduling of the December 13 hearing.

Since flipping positions, the Attorney General's Office argued that canceling and rescheduling a meeting does not amount to a "change" of the "date, time, or place." App. C at 2. When reading statutes, "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical use." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). "The ordinary-meaning rule is the most fundamental semantic rule of interpretation." *Id.* The ordinary meaning of a "change" to a scheduled meeting includes its cancelation. Even if "canceling" a meeting somehow does not change its date, time, or place, as

the Office argues, rescheduling the hearing from December 4 to December 9 certainly changed the date and time.

The Board claims that unexpected resignations caused the clemency hearing to be canceled. This argument is arbitrary because the Board planned to move forward with three members for the December 9 hearing anyway. App. D at 36. If three members were good enough for a December 9 hearing, it is hard to understand why the Board would cancel the December 4 hearing due to there being only three members. And the Board highlighted the difficulties with the unexpected resignations. But based on the Attorney General's information and belief, "the Board was aware as of November 6, 2024 (the last day of the Board's regular November meeting) that [former-] Chairman Konieczny would not participate in the December meeting (to include Underwood's clemency hearing). Thus, the Board has planned for weeks to hold Underwood's hearing with less than the full complement of members." Emergency Petition for Writ of Mandamus at 5-7, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024).

The district court claimed the Board's rescheduling of Underwood's hearing was allowed because it amounted to a special meeting. A special meeting is "any meeting of a public body other than a regularly scheduled meeting or emergency meeting." Okla. Stat. tit 25, § 304(4). Special meetings

require two days' notice. *Id.* at § 311(A)(12). But clemency hearings are not special meetings because that would be an unnatural way of reading the statute. And clemency hearings are too important and too solemn a meeting to change at the last minute. When all state law is considered, it is clear that rescheduling clemency hearings is not a special meeting. But even if a clemency hearing can be considered a special meeting, that only excuses the Board's rescheduling of Underwood's hearing, not the last-minute cancelation of it.

The most natural reading of the Open Meetings Act would not consider the rescheduling of a clemency hearing to be a special meeting. To start, the text of the Open Meetings act must be construed as a whole. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167, 174 (2012). The Act includes many provisions, and it should be read to give effect to all of them. *Id.* Moreover, the statute should be read to make its provisions "compatible, not contradictory." *Id.* at 180. If the Board can reschedule any meeting as a special meeting, then the Act's requirement of ten days' notice for changes to meetings becomes superfluous and easily avoidable by the Board.

The special meeting rule makes no mention of any sort of cancelation or alteration. It reads, "[s]pecial meetings of public bodies shall not be held without public notice being given at least forty-eight (48) hours prior to said

meetings.” Okla. Stat. tit 25, § 311(A)(12). On the other hand, the other provision requires “not less than ten (10) days prior to the implementation of any such change.” Okla. Stat. tit 25, § 311(A)(8). So when considering the rescheduling of Underwood’s hearing, is it more natural to think of the rescheduling as a new special meeting? No. The most natural and compatible reading of the statute is to consider the rescheduling to be a “change” of the “date, time, or place.” *Id.* The Board’s argument that the rescheduling is a special meeting is superfluous and makes the two relevant provisions, Sections 311(A)(8) and 311(A)(12), incompatible.

The Board’s own rules require clemency hearings be scheduled within “three (3) business days of receiving the notice of the setting of an execution date.” Okla. Admin. Code § 515:10-3-1. And the “clemency hearing will be scheduled on or before the twenty-first calendar day preceding the scheduled execution date, unless otherwise directed by the Chairperson.” *Id.* Even if the rescheduling of a clemency hearing is a special meeting, notice is still required to cancel the already scheduled hearing. The special meeting statute only mentions scheduling future meetings. It says nothing about canceling or changing meetings. So the Board must still give ten days’ notice when it cancels a hearing. The Board violated the Open Meetings Act by providing Underwood with only two days’ notice when cancelling his hearing.

**D. The Board's last-minute rescheduling of the hearing was arbitrary and capricious.**

The “touchstone of due process is protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). A public body, like the Pardon and Parole Board, acts arbitrarily when it makes decisions “without consideration of or regard for facts, circumstances, fixed rules, or procedures.” Black’s Law Dictionary, “arbitrary,” Online (2014). A body acts capriciously when it is “guided by unpredictable or impulsive behavior; likely to change one’s mind suddenly to behave in unexpected ways.” Black’s Law Dictionary, “capricious,” Online (2014). Under Oklahoma law, the Board cannot make arbitrary and capricious decisions.

On December 2, the Attorney General’s Office argued that the Pardon and Parole Board’s abrupt rescheduling of Underwood’s clemency hearing violated the Oklahoma Open Meetings Act. Emergency Petition for Writ of Mandamus at 5-7, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). The AG argued the Open Meetings Act guaranteed Underwood ten days’ notice. *Id.* at 6. Then, four days later, the AG’s Office changed positions and argued the last-minute rescheduling did not violate the Open Meetings Act. *Id.* at Doc. 14.

Similarly, when the Board canceled Underwood’s hearing, the Board told the AG’s Office that it wanted to wait to hold Underwood’s clemency hearing “until the two vacancies are filled and a full Board will be present.” Emergency Petition for Writ of Mandamus at 2, *Drummond v. Pardon and Parole Board*, No. MA-2024-943 (Okla. Crim. App. Dec. 2, 2024). But this position also changed within a week. The Board rescheduled Underwood’s clemency hearing for December 9, 2024, despite it lacking a full board, despite Underwood lacking his full legal team, and despite the Board’s failure to abide by Oklahoma’s Open Meetings Act.

Words are supposed to mean something. This is especially true when the words are written in legal proceedings by the State’s top law enforcement officer. These last-minute flipflops revealed the arbitrariness behind the AG’s Open Meetings Act arguments and the Board’s rescheduling of Underwood’s clemency hearing.

## **CONCLUSION**

The Court should grant certiorari to consider whether the due process clause of the Fourteenth Amended provides any protection for clemency petitioners in state clemency proceedings.



Respectfully Submitted,

s/ EMMA V. ROLLS

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