Nos. 24A590, 24-6159

In the Supreme Court of the United States

KEVIN UNDERWOOD,

Applicant,

v.

OKLAHOMA PARDON AND PAROLE BOARD, et al.,

Respondents.

Application from The United States Court of Appeals for the Tenth Circuit (No. 24-6259)

COMBINED BRIEF IN OPPOSITION TO KEVIN UNDERWOOD'S PETITION FOR CERTIORARI AND RESPONSE TO UNDERWOOD'S EMERGENCY APPLICATION FOR STAY OF EXECUTION

*****RULING REQUESTED BY 10 A.M. THURSDAY, DECEMBER 19, 2024*****

Gentner Drummond
Attorney General of Oklahoma
Garry M. Gaskins, II
Solicitor General
Zach West
Director of Special Litigation
Counsel of Record
Kyle Peppler
Assistant Solicitor General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921
Garry.Gaskins@oag.ok.gov
Zach.West@oag.ok.gov
Kyle.Peppler@oag.ok.gov

Counsel for Respondents

CAPITAL CASE
EXECUTION SET: DECEMBER 19, 2024, AT 10:00 A.M. CST
Nos. 24A590 & 24-6159

QUESTION PRESENTED

Whether this Court should issue a last-minute stay of execution to scrutinize the lower courts' determination that the Oklahoma Pardon and Parole Board's unanimous decision to deny clemency to Kevin Underwood did not deprive him of due process.

INTRODUCTION

In 2006, in an act of heinous brutality that shocked the State of Oklahoma, Kevin Underwood savagely murdered 10-year-old Jamie Bolin. He was thereafter convicted and sentenced to death by a jury of his peers. After almost twenty years of unsuccessful appeals and lawsuits, Underwood has sued once again. This time, he attacks the validity of his clemency hearing, after which the Oklahoma Pardon and Parole Board (hereinafter, the "Board") denied him a clemency recommendation by a unanimous 3–0 vote. Both the district court and Tenth Circuit correctly declined to enjoin this hearing, which occurred on December 13, and they declined to enjoin his execution, as well. After inexplicably waiting more than five days after the Tenth Circuit's denial, Underwood has now filed this emergency appeal—less than 48 hours before his execution—insisting that this Court intervene. It should not.

Underwood alleges that his admittedly "minimal" due process rights are being violated because his initial clemency hearing was canceled and then subsequently re-set at a slightly later date due to membership turnover at the Board. As the district court held, however, Underwood's "contentions and the relevant record … do not show that he is substantially likely to succeed on the merits of his due process claim." Underwood's App. at 12a. The Tenth Circuit agreed, holding that having "carefully considered" the injunction factors, "Underwood has not satisfied them." Respondents' App. 3a. Among other things, Underwood is unlikely to show that state law requires the participation of all five Board members when multiple past clemency hearings have happened with fewer members; he is unlikely to show that due process requires

representation by his preferred attorney when he has entirely failed to provide a reason for that attorney's absence on December 13 and he was represented by two attorneys, including the First Assistant Federal Public Defender who is also the Capital Habeas Unit Chief; he cannot show the Board's alleged partiality or violation of the Oklahoma Open Meeting Act violates due process when he did not raise those arguments in his original stay motion below or provide evidence or legal backing other than his own say-so to support them.

In short, Underwood has never come *close* to meeting the immense burden necessary to stay the State's hand. He instead lobs rhetorical bombs and unfounded accusations, packs his stay motion and petition for certiorari full of misleading statements and half-truths, and makes many factual allegations that have no support in the record whatsoever. Moreover, a stay here will harm the State, the public, and, most importantly, the victim's family. As such, Underwood's demand should be swiftly denied, allowing his sentence to be carried out by the State.

PARTIES TO THE PROCEEDING

Applicant is KEVIN UNDERWOOD. Applicant is Plaintiff in the U.S. District Court for the Western District of Oklahoma and Appellant in the U.S. Court of Appeals for the Tenth Circuit.

Respondents are the OKLAHOMA PARDON AND PAROLE BOARD, TOM BATES, in his official capacity as Director of the Oklahoma Pardon and Parole Board, and RICHARD MILLER, in his official capacity as acting chairperson of the Oklahoma Pardon and Parole Board. Respondents are the Defendants in the U.S. District Court for the Western District of Oklahoma and Respondents in the U.S. Court of Appeals for the Tenth Circuit.

TABLE OF CONTENTS

OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
- **I. Murder and Conviction** 2
- **II. Clemency Process** 3
- **III. Underwood's Latest Lawsuit** 5
- **IV. Administrative Stay** 7
- **V. Clemency Hearing** 10
- **VI. Delayed Application and Petition** 11

REASONS FOR DENYING THE APPLICATION AND PETITION 12
- **I. Underwood's appeal is plainly defective on several fronts** 13
- **II. On the merits, Underwood is highly unlikely to show that his admittedly 'minimal' due process rights have been violated.** 18
  - **A. There is no right to have five Board members vote** 19
  - **B. The Oklahoma Open Meeting Act provides no reason to grant a stay.** 25
  - **C. Underwood has no due process right to his preferred attorney or in-person expert, and he failed to raise 18 U.S.C. § 3599 below.** 34
- **III. The State and victim's family will be grievously harmed by a stay.** 38

CONCLUSION 40

INDEX OF APPENDIX

APPENDIX EXHIBIT 1:
Order, *Underwood v. Oklahoma Pardon and Parole Board, et al.*, 24-6259, Doc. 14 (10th Cir. Dec. 11, 2024). 1a

APPENDIX EXHIBIT 2:
Brief in Support of Emergency Petition for Writ of Mandamus, *State v. Oklahoma Pardon and Parole Board*, No. MA-2024-943 (Okla. Ct. Crim. Appeals Dec. 2, 2024). 4a

APPENDIX EXHIBIT 3:
Oklahoma Governor's Order of Appointment of Susan H. Stava, J.D. to the Oklahoma Pardon and Parole Board. 15a

APPENDIX EXHIBIT 4:
Declaration of Susan H. Stava. 17a

APPENDIX EXHIBIT 5:
Plaintiff Kevin Underwood's Emergency Motion for Stay of Execution and Brief in Support, *Underwood v. Oklahoma Pardon and Parole Board, et al.*, No. 5:24-cv-01266-G, Doc. 3 (W.D. Okla. Dec. 4, 2024). 21a

APPENDIX EXHIBIT 6:
United States Court of Appeals for the Tenth Circuit draft order entering administrative stay and scheduling order. 33a

APPENDIX EXHIBIT 7:
Declaration of Jessica Stegner. 36a

APPENDIX EXHIBIT 8:
Defendants' Notice of Scheduling of New Clemency Hearing Date and Assurance of Compliance, *Underwood v. Oklahoma Pardon and Parole Board, et al.*, 24-6259, Doc. 7 (10th Cir. Dec. 11, 2024). 40a

Exhibit 1: Oklahoma Pardon and Parole Board special meeting notice for December 13, 2024, at 9:00 a.m. filed with Oklahoma Secretary of State. 45a

Exhibit 2: Oklahoma Pardon and Parole Board notice provided to parties for December 13, 2024, at 9:00 a.m. special meeting 48a

APPENDIX EXHIBIT 9:
Underwood's Notice that the Pardon and Parole Board Has Changed the Facts Relied on By the District Court, *Underwood v. Oklahoma Pardon and Parole Board, et al.*, 24-6259, Doc. 8 (10th Cir. Dec. 11, 2024).. 50a

APPENDIX EXHIBIT 10:
Defendants' Response to Underwood's Notice that the Pardon and Parole Board has Changed the Facts Relied on by the District Court, *Underwood v. Oklahoma Pardon and Parole Board, et al.*, 24-6259, Doc. 13 (10th Cir. Dec. 11, 2024). 57a

APPENDIX EXHIBIT 11:
Oklahoma Pardon and Parole Board Policy 101 – Duties and Responsibilities of the Pardon and Parole Board. 64a

APPENDIX EXHIBIT 12:
Order, *Underwood v. Oklahoma Pardon and Parole Board, et al.*, No. 5:24-cv-01266-G, Doc. 5 (W.D. Okla. Dec. 4, 2024).. 68a

APPENDIX EXHIBIT 13:
Oklahoma Pardon and Parole Board agenda for December 2–4, 2024, regular meeting... 70a

APPENDIX EXHIBIT 14:
Oklahoma Pardon and Parole Board special meeting notice confirmation for December 9, 2024, at 9:00 a.m., filed with the Oklahoma Secretary of State. 74a

APPENDIX EXHIBIT 15:
Oklahoma Pardon and Parole Board special meeting agenda for December 9, 2024, at 9:00 a.m. 76a

APPENDIX EXHIBIT 16:
Docket Sheet, *United States v. Fields*, No. 6:10-cv-00115-RAW (E.D. Okla. Dec. 17, 2024). 78a

TABLE OF AUTHORITIES

Cases

Att'y Gen. of Okla. v. Tyson Foods, Inc.,
565 F.3d 769 (10th Cir. 2009) 13

Bay v. Anadarko E&P Onshore LLC,
73 F.4th 1207 (10th Cir. 2023) 16

Bucklew v. Precythe,
587 U.S. 119 (2019) 13, 17, 39

Cavazos v. Smith,
565 U.S. 1, 11 (2011) 17

Dewey v. Redevelopment Agency of City of Reno,
64 P.3d 1070 (Nev. 2003) 27

Does 1-3 v. Mills,
142 S. Ct. 17 (2021) 12

Dominion Video Satellite v. EchoStar Satellite Corp.,
269 F.3d 1149 (10th Cir. 2001) 13

Dunn v. Price,
139 S. Ct. 1312 (2019) 13

Duvall v. Keating,
162 F.3d 1058 (10th Cir. 1998) 5, 7, 16, 21, 33

Elliott v. Martinez,
675 F.3d 1241 (10th Cir. 2012) 34

Gardner v. Garner,
383 F. App'x 722 (10th Cir. 2010) 18, 37

Glossip v. Chandler,
No. CIV-14-0665-F, 2022 WL 1997194, (W.D. Okla. June 6, 2022) 3

Glossip v. Okla. Pardon and Parole Bd.,
Case No. CV-2023-1001 (Okla. County Dist. Ct. Jan. 17, 2024) 23

Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n,
No. 20-2257, 2022 WL 1467650 (6th Cir. May 10, 2022) 35

Grant v. Trammell,
727 F.3d 1006 (10th Cir. 2013) 17, 23, 26

Harris v. State,
2004 OK CR 1, 84 P.3d 731 (OCCA 2004) 35

Hays Cnty. v. Hays Cnty. Water Plan. P'ship,
106 S.W.3d 349 (Tex. App. 2003) 27

Herrera v. Collins,
506 U.S. 390 (1993) 40

Hill v. McDonough,
547 U.S. 573 (2006) 12, 39

Kyle v. Morton High Sch.,
144 F.3d 448 (7th Cir. 1998) 34

Lee v. Hutchinson,
854 F.3d 978 (8th Cir. 2017) 33

Lux v. Rodrigues,
561 U.S. 1306 (2010) 12

McWilliams v. Dunn,
582 U.S. 183, 201 n.2 (2017) 17

Med. Park Tel. Co. v. Okla. Corp. Comm'n,
441 P.3d 113 (Okla. 2019) 22

Nken v. Holder,
556 U.S. 418 (2009) 12

Ohio Adult Parole Authority v. Woodard,
523 U.S. 272 (1998) 19, 33

Ohio Citizens for Responsible Energy, Inc. v. NRC,
479 U.S. 1312 (1986) 12

Olim v. Wakinekona,
461 U.S. 238 (1983) 34

Roman Cath. Diocese of Brooklyn v. Cuomo,
592 U.S. 14 (2020) 12

Ross v. Oklahoma,
487 U.S. 81 (1988) 19

Tandon v. Newsom,
593 U.S. 61 (2021) 12

The Monrosa v. Carbon Black Exp., Inc.,
359 U.S. 180 (1959) 16

Underwood v. Carpenter,
139 S. Ct. 1342 (2019) 3

Underwood v. Duckworth,
No. CIV-12-111-D, 2016 WL 4059162 (W.D. Okla. July 28, 2016) 3

Underwood v. Oklahoma,
565 U.S. 1121 (2012) 3

Underwood v. State,
2011 OK CR 12, 252 P.3d 221 3

Statutes

18 U.S.C. § 3599(e) 5

18 U.S.C. § 3771(a)(7) 38

28 U.S.C. § 1254 1

28 U.S.C. § 1651 1

42 U.S.C. § 1983 5

OKLA. STAT. tit. 21, § 142A-2(F) 37, 38

OKLA. STAT. tit. 57, § 332.15(C) 20

OKLA. STAT. tit. 57, § 332.1B(B) 6

OKLA. STAT. tit. 57, § 332.2(A) 29, 30

OKLA. STAT. tit. 74, § 18b(A)(1) 24

OKLA. STAT. tit. 74, § 18c(B) 24

Other Authorities

Emma Murphy, *Oklahoma Judicial Nominating Commission launches search for state's next Supreme Court justice*,
OKLA. CITY FREE PRESS (Nov. 29, 2024) 22

Okla. Admin. Code 515:10-5-2 10

Press Release, *State officials announce plans to resume execution by lethal injection*,
Dep't of Corr. (Feb. 13, 2020) 39

Vera & Andone*, Oklahoma governor grants clemency to Julius Jones, halting his execution*, CNN (Nov. 19, 2021) 5

Constitutional Provisions

OKLA. CONST. art. II, § 34 38

OKLA. CONST. art. VI, § 10 23

OKLA. CONST. art. VII, § 2 21

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Tenth Circuit, dated December 11, 2024, denying an injunction is attached at Respondents' App. 2a–3a. The order of the Tenth Circuit, dated December 8, 2024, issuing an administrative stay, is attached at Underwood's App. 14a–15a. The order of the U.S. District Court for the Western District of Oklahoma, also dated December 8, 2024, denying Underwood's Emergency Motion for Stay of Execution is attached at Underwood's App. 1a–13a. The docket number in the U.S. District Court for the Western District of Oklahoma is No. CIV-24-1266-G, and the docket number in the U.S. Court of Appeals for the Tenth Circuit is 24-6259.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254 and 1651.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall … deprive any person of life, liberty, or property, without due process of law ….

U.S. CONST. amend. XIV, § 1.

The Oklahoma Constitution provides in pertinent part:

> There is hereby created a Pardon and Parole Board to be composed of five members; three to be appointed by the Governor; one by the Chief Justice of the Supreme Court; one by the Presiding Judge of the Criminal Court of Appeals or its successor. … It shall be the duty of the Board 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.
>
> The Governor shall have the power to grant, after conviction and after favorable recommendation by a majority vote of the Pardon and Parole Board, commutations, pardons and paroles for all offenses, except cases of impeachment, upon such conditions and with such restrictions and limitations as the Governor may deem proper, subject to such regulations as may be prescribed by law. …

OKLA. CONST. art. 6, § 10.

STATEMENT OF THE CASE

I. MURDER AND CONVICTION

In April 2006, as part of a sadistic sexual and cannibalistic plan, Underwood savagely murdered 10-year-old Jamie Rose Bolin in Purcell, Oklahoma. After luring her into his apartment, as she walked home from school, he repeatedly struck her

over the head and smothered her, and then he raped her as she lay unconscious or dead. Afterward, he partially severed her head and stuffed her mutilated body in a plastic tub in his closet. *See Underwood v. State*, 2011 OK CR 12, ¶¶ 2, 4, 252 P.3d 221, 230–31. A jury found Underwood guilty of first-degree murder and sentenced him to death. *Underwood*, 2011 OK CR 12, ¶¶ 2, 4, 252 P.3d at 229–30. Oklahoma's Court of Criminal Appeals ("OCCA") affirmed, *id.* at 258, and he exhausted all challenges in March 2019. *Underwood v. Carpenter*, 139 S. Ct. 1342 (2019).

Over the years, Underwood has sought to challenge his conviction and execution in many ways, without success. *See, e.g.*, 2011 OK CR 12, 252 P.3d 221 (direct appeal); *Underwood v. Oklahoma*, 565 U.S. 1121 (2012) (cert. denied); *Underwood v. State*, No. PCD-2008-0604 (Okla. Crim. App. Jan. 17, 2012) (post-conviction application); *Underwood v. Royal*, 894 F.3d 1154 (10th Cir. 2018) (affirming habeas denial in *Underwood v. Duckworth*, No. CIV-12-111-D, 2016 WL 4059162 (W.D. Okla. July 28, 2016)); *Underwood v. Carpenter*, 139 S. Ct. 1342 (2019) (cert. denied); *Glossip v. Chandler*, No. CIV-14-0665-F, 2022 WL 1997194, at *2 (W.D. Okla. June 6, 2022) (method-of-execution challenge denied); *Underwood v. Harpe*, No. PR-122536 (Okla. Oct. 21, 2024) (non-delegation claim denied).

II. Clemency Process

On October 1, 2024, the OCCA scheduled Underwood's execution for December 19, 2024. Underwood's App. 4a, 21a. The very next day, on October 2, the Board scheduled Underwood's clemency hearing for December 4, as part of a general Board meeting. *Id.* Both parties submitted clemency packets on November 15. Pet. at 8.

Underwood's packet included a video recording that was thirty minutes in length and included testimony from his expert psychologist Dr. Kim Spence regarding her belief that the murder was a result of Underwood's diagnosis of Autism Spectrum Disorder and allegedly abusive childhood. On November 29, however, it became known that the Board had lost two members. Underwood's App. 35a. One member had resigned effective November 6, and another resigned on November 29, effective immediately. *Id.* at 28a, 35a. That same day, the Board posted on its website that the December 4 clemency hearing was canceled; also canceled was the Board's entire general meeting, which had other items on the agenda. Respondents' App. 6a.

The next Monday, December 2, the Attorney General sought a writ of mandamus from the OCCA seeking to compel the Board to hold a clemency hearing before the December 19 execution. *Id.* at 1. Several hours later, the Board jointly notified the Attorney General and Underwood's counsel that a special meeting solely for the clemency hearing would be held on December 9. Underwood's App. 22a. Important here, numerous clemency hearings for death row inmates have occurred at special meetings, including those for Richard Rojem (2024); Richard Glossip (2023); Benjamin Cole (2022); James Coddington (2022); John Grant (2021); Bigler Stouffer (2021); Donald Grant (2021); and Gilbert Postelle (2021).[1]

On December 5, Governor Kevin Stitt appointed Susan Stava, who has extensive experience in social work, to serve on the Board. *See* Respondents' App. 16a. Upon appointment, she received the clemency materials for Underwood, she was

[1] *Available at* https://oklahoma.gov/ppb/about/board-meetings.html.

briefed on administrative procedures, and by December 6 she "had time to read the submitted written materials, view the submitted videos, and familiarize myself with the relevant law, policies, and procedures as it relates to clemency consideration." Respondents' App. 19a. Her study continued through the weekend, and she anticipated being "fully prepared to impartially consider Mr. Underwood's request for clemency on Monday, December 9." *Id.* The hearing eventually took place on December 13, giving Stava even more opportunity to prepare.

Multiple Oklahoma clemency hearings have been held with fewer than five Board members, including those for death row inmates. *See Duvall v. Keating*, 162 F.3d 1058, 1060 (10th Cir. 1998) ("[T]he Board deadlocked on whether to recommend clemency by a two-two vote, with one member of the five-person Board abstaining due to a conflict of interest."). Indeed, in 2021 the Board recommended clemency for Julius Jones by a 3-1 vote, with one member absent, and Governor Stitt eventually granted clemency. *See* Vera & Andone*, Oklahoma governor grants clemency to Julius Jones, halting his execution*, CNN (Nov. 19, 2021).[2]

III. UNDERWOOD'S LATEST LAWSUIT

On December 4, 2024, Underwood sued the Board under 42 U.S.C. § 1983. In his Complaint, Underwood named three claims: (1) a violation of due process under the Fourteenth Amendment, which Underwood tied to the Board having fewer than five members, as well as alleged Open Meeting Act violations; (2) a violation of 18 U.S.C. § 3599(e), which provides inmates an attorney for clemency proceedings; (3) a

[2] *Available at* https://www.cnn.com/2021/11/18/us/julius-jones-oklahoma-execution-decision/index.html.

violation of Fourteenth Amendment due process because of the alleged decrease in his clemency odds from having fewer Board members vote on his case. Underwood's App. 25a, 27a, 31a–33a

Simultaneously, Underwood filed an "Emergency Motion for Stay of Execution." Respondents' App. 22a–32a. There, he initially asked for a stay of his clemency hearing, *id.* at 22a, but thereafter focused solely on a stay of execution. Underwood devoted less than two pages of this entire emergency motion to the merits of a stay—and he argued based only on due process claims. *Id.* at 24a–25a. Section 3599, in particular, was not mentioned a single time in Underwood's original stay motion before the district court. As for due process, Underwood sought a stay based on three arguments: (1) only three Board members would sit for his clemency hearing; (2) the Board lacked one of two members with "training or experience in mental health services, substance abuse services or social work," OKLA. STAT. tit. 57, § 332.1B(B),[3] and (3) the new date prevented his preferred attorney from presenting and his expert from presenting in person. *Id.* at 24a–25a. Like Section 3599, Underwood's skimpy emergency motion never once mentioned the Oklahoma Open Meeting Act. On an extremely expedited schedule, the Board responded to the motion, the court held a hearing, and the parties filed supplemental briefs on the Open Meeting Act, at the court's request.

[3] Before the district court, Underwood conceded that the appointment of Ms. Stava, who has a background in social work, mooted this claim. Underwood's App. 7a, n.2.

On Sunday, December 8, at just after 9 a.m.,[4] the district court denied Underwood's motion. The court found that Underwood's "contentions and the relevant record ... do not show that he is substantially likely to succeed on the merits of his due process claim." Underwood's App. 12a. Regarding the Open Meeting Act, the court found that the Board complied with state law in setting the December 9 special meeting. *Id.* at 10a–11a. Moreover, the court relied on Tenth Circuit precedent to find that a clemency hearing before a Board comprised of four members would not "fail[] to comply with 'procedures explicitly set forth by state law.'" *Id.* at 9a (citing *Duvall*, 162 F.3d at 1061). Lastly, the Court rejected Underwood's argument that the December 9 scheduling was "wholly arbitrary and capricious in nature," *id.* at 11a (citation omitted). The court also noted that Underwood's "conclusory briefing allegations of a lack of impartiality on the part of the Board are unfounded in the record." *Id.* at 11a. Thus, the Board's "proceedings are in compliance with its own rules and do not reflect action that could be characterized as wholly arbitrary or capricious." *Id.* at 11a–12a (citations omitted).

IV. ADMINISTRATIVE STAY

Later that Sunday, December 8, around 3:15 p.m., counsel for Respondents were informed that Underwood had filed a notice of appeal. Approximately four hours later, counsel for Underwood emailed his stay motion and two attachments to counsel for Respondents and the Clerk of Court for the Tenth Circuit. Just after midnight, on Monday, December 9, the Clerk circulated the Tenth Circuit's scheduling order and

[4] All references here are to Central Time.

administrative stay of the clemency hearing, which was scheduled to occur fewer than nine hours later. Respondents' App. 34a–35a. Given the stay, Respondents immediately began the process of cancelling the December 9 hearing. This process included notifying, in the middle of the night, Jamie's family members who had made plans and sacrifices to attend the clemency hearing. *See* Respondents' App. 38a.

The Tenth Circuit ordered the Board to respond to Underwood's motion for a stay by 4:00 p.m. on December 9, and Underwood was initially granted an optional reply, due by 9:00 a.m. the following morning, Tuesday, December 10. Respondents' App. 34a. Later, the Tenth Circuit extended Underwood's reply deadline to 4:00 p.m. on Tuesday, December 10. Underwood's App. 14a. The Tenth Circuit's administrative stay restricted the remaining available days on which the Board could schedule a special meeting for Underwood's clemency hearing—an Oklahoma constitutional predicate to the effectuation of Underwood's death sentence, scheduled for December 19, 2024.

December 13, a Friday, was the last available day within the week of December 8 to schedule Underwood's clemency hearing and conform to statutory notice requirements of forty-eight hours for special meetings. The Tenth Circuit had not issued a ruling by the morning of Wednesday, December 11. Accordingly, in order to preserve the last available day of the week of December 8 for a special meeting, the Board issued notice before 9:00 a.m. on Wednesday, December 11, for the scheduling of Underwood's clemency hearing for Friday, December 13 at 9:00 a.m. Respondents' App. 46a–47a. The Board also notified the necessary parties prior to 9:00 a.m. on

Wednesday, December 11. *Id.* at 49a. Finally, the Board notified the Tenth Circuit of its actions, explained that it had no intention of contravening the Tenth Circuit's administrative stay, and indicated that only three Board members would be available for December 13 (as opposed to the four members that would have been present for December 9, had Underwood not moved for a stay). *See id.* 42a. This prompted Underwood to file his own notice accusing the Board of "changing the facts" of the case on appeal; but, strikingly, in that notice he made no attempt to inform the Tenth Circuit of any alleged unavailability of his preferred counsel or his expert for the December 13 meeting. *See* Respondents' App. 51a–54a. The Board quickly responded to Underwood's notice, refuting various points he had attempted to make. *See* Respondents' App. 58a–61a.

Just after 9:00 p.m. on Wednesday, December 11, the Tenth Circuit lifted the administrative stay and denied Underwood's motion. Respondents' App. 2a–3a. It expressly took into account the Board's and Underwood's respective notices and the Board's response. That is to say, among other things, the Tenth Circuit knew before issuing its denial that the December 13 clemency hearing would include a three-member quorum rather than a four-member quorum. The Tenth Circuit interpreted Underwood's motion for stay as Underwood effectively moving for an injunction pending appeal. *Id.* at 3a. Having "carefully considered" the injunction factors, the Tenth Circuit "conclude[d] Mr. Underwood has not satisfied them." *Id.* It therefore

lifted its administrative stay and denied Underwood's relief sought. *Id.*[5] Underwood did not immediately appeal this decision.

V. CLEMENCY HEARING

As noticed, the Board held Underwood's clemency hearing at a special meeting on December 13, 2024, before Judge Richard A. Miller, acting chairman, Robert Reavis II, and Stava. The hearing, like all others, proceeded pursuant to a specific schedule. *See* Okla. Admin. Code 515:10-5-2. After the meeting was called to order, Underwood's attorneys were given forty minutes to present their case. *See* Pet. at 4. Underwood opted not to reserve time for rebuttal. The State then had forty minutes to present its case, after which family members of Jamie provided victim impact evidence. Jamie's father was not physically present but appeared via Zoom. Finally, Underwood was given twenty minutes to speak via Zoom; he spoke for approximately two of those minutes. The Board then voted 3-0 to deny a recommendation of clemency. The hearing concluded just after 11:00 a.m. on December 13, lasting more than two hours.

Federal public defenders Emma Rolls and Brendan VanWinkle were present on behalf of Underwood at the hearing. Mr. VanWinkle explained that Underwood's preferred attorney was not present—but did not explain why—and then proceeded to present evidence and argument on behalf of Underwood. Ms. Rolls then read a lengthy prepared statement from Dr. Spence which expressed Dr. Spence's regret at not personally presenting the information—again without any explanation for the absence. (Apparently, Underwood's counsel only provided her one days' notice of the

---

[5] The order notes that Judge Rossman dissented and would have granted Underwood's motion, *id.*, a point Underwood inexplicably ignores before this Court.

December 13 hearing. Pet. at 9.) Dr. Spence's written testimony, presented by Ms. Rolls, lasted approximately twenty-two minutes—taking up over half of Underwood's forty minutes to present. This testimony supplemented videotaped testimony of Dr. Spence that was previously provided to the Board. Underwood's App. 11a.

VI. Delayed Application and Petition

Again, the clemency hearing ended on Friday, December 13, around noon, and about six days before Underwood's execution. Four days later, on December 17, at 12:26 p.m., counsel for Underwood informed Respondents that he had just filed the present motion for stay and petition for certiorari. These filings come over five full days after the Tenth Circuit issued its order removing the temporary stay and denying Underwood's motion for relief, and fewer than forty-eight hours before the execution. And it is not as if Underwood's attorneys are incapable of filing more promptly. In this very case, they filed an emergency appeal and motion with the Tenth Circuit within a mere 12 hours of the district court issuing its denial—on a Sunday to boot. Underwood's application should be denied for this inexcusable delay alone.

REASONS FOR DENYING THE APPLICATION AND PETITION[6]

Even outside of the execution context, an injunction (or stay) pending appeal is only appropriate in narrow circumstances: when an applicant faces irreparable harm, is likely to succeed on the merits of his claim, and the public interest would not be harmed. *See Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam) (citing *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 16 (2020)); *see also Does 1-3 v. Mills*, 142 S. Ct. 17, at *18 (2021) (Barrett, J., concurring). Put differently, this Court may issue a stay only when the legal rights are "indisputably clear" and when injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citation omitted).

Similarly, an inmate seeking a stay of execution has the burden to: (1) make a "strong showing" that he is likely to succeed on the merits of his claim, (2) show he is likely to suffer irreparable injury, (3) show that the threatened injury outweighs the State's injury from the stay, and (4) show that the stay is not adverse to the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Hill v. McDonough*, 547 U.S. 573, 584 (2006). The decision whether to grant a stay "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. As a result, for executions "[l]ast-minute stays should be the extreme exception, not the norm." *Bucklew v. Precythe*, 587 U.S.

[6] Due to the intense time considerations here, Respondents have combined their response to Underwood's application for an emergency stay and petition for certiorari into one brief. Should this Court stay the execution, Respondents reserve the right to request further briefing to respond more fully to Underwood's petition.

119, 150 (2019); *see also Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019). For executions, that is, a stay is truly "an extraordinary and drastic remedy," *Warner v. Gross*, 776 F.3d 721, 727 (10th Cir. 2015) (citation and internal marks omitted).

Also applicable here, appellate courts are supposed to review the district court's denial of a stay for an abuse of discretion, examining the court's legal conclusions de novo and its factual findings for clear error. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 775–76 (10th Cir. 2009). The "narrow" abuse of discretion standard is satisfied only if the court's decision was "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Id.* at 776 (citation omitted). "[T]he movant's right to relief must be clear and unequivocal." *Dominion Video Satellite v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1154 (10th Cir. 2001).

This Court should deny Underwood's incredibly flimsy motion for a stay, as well as his petition for certiorari. To the extent Underwood's claims were properly before the Tenth Circuit at all—which Defendants do not concede—they are highly likely to fail, not succeed. Neither the district court nor the Tenth Circuit abused their discretion, and Underwood barely even tries to argue otherwise. Moreover, Underwood has not shown that the equities lie in his favor, as a continued execution stay will harm the State and the victim's family, as well as the public, and his impending execution was fully earned and cannot justify relief.

I. UNDERWOOD'S APPEAL IS PLAINLY DEFECTIVE ON SEVERAL FRONTS.

Before addressing the merits, it is worth pointing out that Underwood's application for a stay and petition for certiorari are defective on several grounds.

First, Underwood has no proceeding pending, in any court, in which he is challenging his conviction or sentence. Rather, he wants to postpone his lawful execution for an unwarranted do-over in his bid for clemency. But in so arguing, he has entirely failed to engage this Court's criteria for certiorari. Although not exhaustive, Rule 10 outlines circumstances where certiorari may be warranted, as a matter of judicial discretion and "only for compelling reasons." Sup. Ct. R. 10. These circumstances include a conflict among courts of appeals on a matter of importance, a conflict between a federal court of appeals and a state court of last resort on an important federal question, an instance where a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," or when a state court or a United States court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in such a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(a)–(c). In the same sense, this Court has issued the following caution: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Here, Underwood does not mention, much less attempt to satisfy, Rule 10, which is practically disqualifying by itself. None of his arguments fall within its auspices. For example, Underwood admits that precedent from this Court, the Tenth Circuit, Fifth Circuit, and Eleventh Circuit holds that the Due Process Clause applies

to state clemency hearings. Pet. at 10-12. And he identifies no federal court of appeals that has held to the contrary. *See* Sup. Ct. R. 10(a). There is no apparent circuit split. Going further, Underwood does not argue that his case presents "an important question of federal law that has not been, but should be, settled by this Court[.]" *See* Sup. Ct. R. 10(c). At most, he suggests that *his case* is important because it involves the death penalty. But this Court routinely denies certiorari in capital cases. Underwood's complete failure to engage with the criteria should lead to denial.

The reasons Underwood does cite for review are not "compelling." Sup. Ct. R. 10(c). Underwood is not arguing that he is innocent, that he did not receive a fair trial, or that his death sentence is unlawful. Rather, Underwood argues that he should have had the opportunity to attempt to persuade two additional Board members to recommend clemency, ignoring that a 3-2 vote is still a denial. Underwood also argues that his preferred attorney was not present and that the Board did not get an opportunity to hear directly from his expert. And Underwood argues that the process of scheduling the hearing of which he had more than two months' notice, and which was ultimately held more than ten days after the original setting, was a technical violation of a state statute. Again, these are not "compelling reasons" for review.

Second, Underwood's Question Presented is also deficient. It is entirely possible to answer his Question Presented—"Whether the due process clause provides any protection for petitioners in state clemency proceedings that are explicitly required by state law"—in the affirmative but deny the relief he seeks. Indeed, that is exactly what both courts did below. Relying on Tenth Circuit precedent, the district

court assumed the Due Process Clause applies to clemency proceedings and held that the Board complied with state law and did not violate any due process owed to Underwood. *See* Underwood's App. 5a–6a, 11a–12a (assuming "that some minimal level of procedural due process applies to clemency proceedings" (quoting *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998)). And the Tenth Circuit gave no indication in its short order that it was calling its prior precedent (*Duvall*) into question. Respondents' App. 2a–3a; *see Bay v. Anadarko E&P Onshore LLC*, 73 F.4th 1207, 1216 (10th Cir. 2023) ("subsequent panels follow legal rulings of earlier panels").

In sum, neither the district court nor the Tenth Circuit actually disagreed with Underwood about his Question Presented. Quite literally, there is no legal ruling on that question for this Court to reverse. Like the district court and Tenth Circuit, this Court could answer "Yes" and still easily deny relief. Underwood presents a purely abstract question that this Court need not answer in his case. This Court should thus deny certiorari because Underwood's claims do not depend on the answer to his Question Presented—it is disconnected from his actual case.[7] This Court decides cases only "in the context of meaningful litigation," and when the issue may not affect the ultimate judgment of the court below, that issue "can await a day when [it] is posed less abstractly." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).

***Third*,** what Underwood really seeks is error-correction review. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup.

---

[7] As they did below, Respondents contend that the answer to the Question Presented is "No." But that does not make the Question sufficient here for a grant of certiorari.

Ct. R. 10. Because the lower courts assumed a due process right exists, the resolution of this case depends on whether the lower courts properly applied the law to the facts at hand. Such error-correction is "outside the mainstream of th[is] Court's functions." *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007)); *see also McWilliams v. Dunn*, 582 U.S. 183, 201 n.2 (2017) (Alito, J., dissenting) ("the question decided is not just narrow, it is the sort of factbound question as to which review is disfavored").

Fourth, the operative filing here is Underwood's emergency application for a stay of execution, not his petition for certiorari. But his emergency application is barely eight pages long, it does not bother to incorporate the petition for certiorari by reference, and its section on a likelihood of success on the merits contains no specific explanation for why Underwood is likely to succeed on the merits. Rather, it contains a brief explanation for why the Due Process Clause applies to clemency hearings—again, a point the lower courts *accepted*. The rest of the emergency application just contains generic references to an unfair clemency hearing that allegedly violated the law, without any specifics whatsoever. This is not enough to obtain what even Underwood admits is extraordinary relief. *See* Emerg. App. at 9 ("Last-minute stays should be the extreme exception, not the norm …." (quoting *Bucklew,* 587 U.S. at 150)); *Grant v. Trammell*, 727 F.3d 1006, 1025 (10th Cir. 2013) ("Even a capital defendant can waive an argument by inadequately briefing an issue ….").

Fifth, given the circumstances, Underwood unreasonably delayed in filing this application and petition. Again, after moving relatively quickly earlier in the appellate process, and with Underwood's execution quickly approaching, Underwood's counsel inexplicably waited ***five full days*** after the Tenth Circuit's denial to file his application with this Court. And he waited until the execution was ***within 46 hours***. Underwood argues that this lawsuit, the district court hearing, and his Tenth Circuit appeal were appropriately expedited, Emerg. App. at 9, but he provides no explanation for this lengthy *post*-Tenth Circuit delay. And none is readily apparent, especially given Underwood's quick maneuvering after the district court's denial. In the end, this appears to be pure and blatant gamesmanship at work, which should not be tolerated given the circumstances. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1134 ("the last-minute nature of an application that could have been brought earlier . . . may be grounds for denial of a stay" (internal marks and citation omitted)).

Sixth, Underwood's entire lawsuit is inappropriate under Section 1983, as it circumvents habeas proceedings. The question of "whether a § 1983 action is the proper vehicle for bringing a procedural challenge to state clemency proceedings" is still an open question. *See, e.g.*, *Gardner v. Garner*, 383 F. App'x 722, 725 (10th Cir. 2010) (per curiam) (unpublished) ("This circuit has not definitively addressed the question."). But the answer to that question should be easy: Any such claim as Underwood's should be brought in habeas proceedings.

II. ON THE MERITS, UNDERWOOD IS HIGHLY UNLIKELY TO SHOW THAT HIS ADMITTEDLY 'MINIMAL' DUE PROCESS RIGHTS HAVE BEEN VIOLATED.

Per the Tenth Circuit's decision in *Duvall*—which relied on this Court's split decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998)—the "level of procedural due process [that] applies to clemency proceedings" is "minimal." 162 F.3d at 1061. Thus, a state *may* violate due process during the clemency process only when it deprives an inmate of "the clemency procedures explicitly set forth by state law" and "the procedure followed in rendering the clemency decision" is "wholly arbitrary, capricious or based upon whim, for example, flipping a coin." *Id.*; *see also Ross v. Oklahoma*, 487 U.S. 81, 91 (1988) ("he received all that Oklahoma law allowed him, and therefore his due process challenge fails"). Assuming this is the correct standard, nothing of the sort has occurred here.

A. There is no right to have five Board members vote.

Underwood claims in his petition for certiorari—but not in his emergency stay application—that he "has a due process interest in having a five-member board vote on this clemency petition." Pet. at 15. Oklahoma law contains no such right. Article 6, section 10 of the Oklahoma Constitution merely says the Board is "to be composed of five members." It does *not* say that five members must always vote; rather, it says later that the Board "by a majority vote" makes recommendations. *Id.* This language has never been understood to invalidate any proceeding or create due process problems if only three or four Members vote. Rather, the Board's policies provide for meetings by a quorum. *See* Respondents' App. 65a. Thus, the Oklahoma Constitution requires only three members to hold a proper clemency hearing and make a recommendation. To hold otherwise would invalidate every proceeding wherein a

Board member properly recused. This would be absurd, in no small part because Oklahoma statutes *require* Board members to recuse when their impartiality is reasonably questioned or their participation "creates the appearance of impropriety." OKLA. STAT. tit. 57, § 332.15(C). Per Underwood's logic, this statute is unconstitutional because it lowers the number of participating members.

Underwood halfheartedly pushes back against this point, arguing that his situation is "unlike a situation where a member has to recuse due to conflict." Pet. at 16. Despite facing an immense burden here, Underwood cites nothing for this distinction, nor is it at all obvious that a recusal and a resignation should be treated differently in this context. Underwood's only basis for saying so appears to be his contention that Oklahoma's Governor could have chosen to fill the remaining empty seat but did not do so. *Id.* But this is simply not true, nor is it backed by anything in the record. In reality, the Governor and his team worked hard to fill the fourth seat on an expedited basis by putting Stava on the Board when he did—although it did not happen in "less than a week" like Underwood wrongly claims. *Id.* Rather, the process for Stava began when the *first* resignation occurred, back on November 6. Adding yet *another* member on top of that, on extremely short notice, was simply not feasible. As with many of his arguments, Underwood chooses to cast spurious accusations ("the Governor simply chose to deny Underwood a clemency hearing before a full five-member Board") with no support in the record. *Id.*

Moreover, Underwood's argument is undermined by the Tenth Circuit's decision in *Duvall*—a case Underwood does *not* challenge here on appeal. *See* Pet. at

iv (citing *Duvall* favorably, repeatedly). There, Duvall's request for clemency in Oklahoma was heard by only *four* Board members, with one recused. *Duvall*, 162 F.3d at 1060. The Board's vote was 2-2, which fell short of the majority required. *Id*. Duvall argued that the Oklahoma Constitution did not contemplate tie votes. *Id*. at 1061 n.2. The Tenth Circuit disagreed, holding that the constitutional requirement of a "majority" of the Board "clearly contemplates" tie votes. *Id*. Thus, as found by the district court, the Oklahoma Constitution contemplates votes by fewer than five Board members: "[T]he Tenth Circuit, in upholding the clemency proceedings against a due process challenge, held that the Oklahoma Constitution 'clearly contemplates' such a tie vote." Underwood's App. 10a (quoting *Duvall*, 162 F.3d at 1061 n.2). As such, it is utterly unsurprising that the Tenth Circuit ruled against Underwood. And Underwood provides nothing to show that the Tenth Circuit's decision in *Duvall* was incorrect. Again, he does not challenge that decision on appeal here at all.

Duvall aside, a five-member board temporarily lacking a fifth (or fourth) member does not cease to exist as a constitutional board, any more than a nine-justice Supreme Court ceases to exist as a constitutional court because it temporarily lacks a ninth justice. Much like its Parole Board language, the Oklahoma Constitution states that the State "Supreme Court shall consist of nine Justices." OKLA. CONST. art. VII, § 2. Yet no one doubts the Oklahoma Supreme Court's ability to hear cases even though it currently contains only eight justices. *See* Emma Murphy, *Oklahoma Judicial Nominating Commission launches search for state's next Supreme Court*

justice, OKLA. CITY FREE PRESS (Nov. 29, 2024);[8] *see also, e.g.*, *Med. Park Tel. Co. v. Okla. Corp. Comm'n*, 441 P.3d 113 (Okla. 2019) (decision issued with six justices participating).

In response, Underwood protests that the "Board is not akin to a court" because "Courts consider legal arguments and reach rational decisions regardless of the number of members" whereas "with a clemency board, mercy and sympathy are the criteria, not reason." Pet. at 15. Underwood cites nothing for any of this pablum, nor is it correct that the Board members are or should be rejecting the use of their reason in determining whether mercy and sympathy are appropriate. Moving along, Underwood then claims that five members are required because with "any member missing, that is one less opportunity for Underwood to reach three votes." *Id.* at 16. But the same situation happens with courts: a recused member of this Court (such as Justice Gorsuch in this very appeal) means that an applicant will have one less opportunity to reach the votes necessary. Such a situation has never been viewed as invalidating a court's action—nor a board's action. Moreover, Underwood received zero votes on December 13, meaning even with a full Board he could not have attained a clemency recommendation.[9]

Underwood also argues that the Board took the opposite position, citing the Oklahoma Attorney General's state court case seeking a writ of mandamus. Pet. at

---

[8] *Available at* https://freepressokc.com/oklahoma-judicial-nominating-commission-launches-search-for-states-next-supreme-court-justice/.

[9] Notably, Underwood's position that five votes are always required would, ironically, invalidate the highly publicized clemency granted to Julius Jones after a 3-1 Board vote in Jones' favor in 2021.

17. But all the Attorney General told the OCCA there was that the Board "*apparently* … *preferred* for the hearing to be held once new Board members are appointed." Emerg. Pet. for Writ of Mand. at 2, *Drummond v. Pardon and Parole Bd.*, No. MA-2024-943 (OCCA Dec. 2, 2024) (emphases added). That the Board might "prefer" to have all five Board members present is no shock, and it in no way indicates that the Board thinks or has ever argued that five voting members always is constitutionally *required*. Indeed, the Board has recently taken the opposite position in state court. *See* Motion to Dismiss at 7, *Glossip v. Okla. Pardon and Parole Bd.*, Case No. CV-2023-1001 (Okla. County Dist. Ct. Jan. 17, 2024) (Board: "Nowhere … does an inmate have a right to clemency considerations by the full, five-member board.").

Changing gears, Underwood next claims the Board is not impartial because the Oklahoma Attorney General is representing the Board here. *See* Pet. at 17–18. Once again, Underwood relies on wild, unsubstantiated, and accusatory rhetoric against State officials, claiming the "Board and the Attorney General were in cahoots." Pet. at 17. This argument is waived, however, as it was not in Underwood's Complaint or motion to stay below. *See Grant*, 727 F.3d at 1025 ("Even a capital defendant can waive an argument by inadequately briefing an issue …."). In any event, the accusations are false. The Attorney General initially sued the Board because the Board is required to hold a clemency hearing in advance of Underwood's execution. *See* OKLA. CONST. art. VI, § 10. After the Attorney General's lawsuit was filed, and without prior consultation, the Board notified the Attorney General and Underwood's counsel of its scheduling of a new clemency hearing for December 9—

before the execution. The Attorney General's position is and always has been that the Board must hold a clemency hearing before December 19 so long as a quorum is possible. For this reason, the Board asked the Attorney General to provide representation in the present proceeding. And there have not been any communications with the Board or its members regarding the substance of Underwood's request for clemency, aside from the arguments made at the clemency hearing itself.

Nevertheless, Underwood argues that the "Attorney General changed his position on the lawfulness of rescheduling the hearing to align himself with the Board's position." Pet. at 17. This is nonsense. The Attorney General believed from the beginning that the Board had a duty—assuming a quorum existed—to hold the hearing before the execution. Thus, when the Board scheduled a new hearing for December 9, he was in full agreement and did not have to change any position whatsoever. *See infra* at pp.27–30. Nor is his representation of the Board here an "anomaly." Pet. at 17. The Attorney General wears multiple hats in State government and representation all the time, and the fact that a state entity has its own general counsel in no way prevents that counsel from requesting the Attorney General's representation. *See, e.g.*, OKLA. STAT. tit. 74, § 18c(B) ("At the request of any state officer, board or commission . . the Attorney General shall defend any action in which they may be sued in their official capacity."); OKLA. STAT. tit. 74, § 18b(A)(1) (broadly requiring the Attorney General "[t]o appear for the state and prosecute and defend

all actions and proceedings, civil or criminal, in the Supreme Court and Court of Criminal Appeals in which the state is interested as a party").

Apparently out of ideas, Underwood concludes this section by attacking the Board wholesale, claiming—based on an alleged investigation of an ex-member and an unproven complaint in a different case—that the Board's "history" is tainted. Pet. at 17–18. But even ignoring the unsupported and unproven nature of these allegations, this argument gives away the game. Underwood has claimed, previously in this litigation, that all he wants is a clemency hearing with five members. But by now switching to wholesale attacks on the Board's fairness based even on the actions of an ex-member—attacks, again, that were not present in his Complaint—he is effectively admitting that what he really demands here is an indefinite stay of his execution because no action this Board takes would suffice. This Court is in no way required to accept this view.

In sum, Underwood has no due process right to have his request for clemency heard or ruled upon by five Board members, and he certainly has not shown that Defendants' approach on this point is whimsical, capricious, or biased. Rather, it is rationally grounded in the Board's own written procedures and in the realities of the work of boards, panels, and courts.

B. The Oklahoma Open Meeting Act provides no reason to grant a stay.

To begin, Underwood did not properly raise the Oklahoma Open Meeting Act as a ground for relief below. Specifically, Underwood made no mention of open meeting arguments in his motion for a stay at the district court. *See* Respondents'

App. 22a–32a. That motion is the only item for which the district court sought a response from Defendants and the only item being appealed. *See id.* at 69a. A complaint contains allegations, nothing more, and Defendants have not responded to Underwood's Complaint nor filed a motion to dismiss. Thus, the Complaint is not at issue. To be sure, Underwood's motion below referenced his Complaint, but that was not enough to preserve a point absent at least some *mention* of the argument in question in the motion. Underwood chose to make only three (underdeveloped) due process arguments in his motion below and he should be held to that choice. *See, e.g.*, *Grant*, 727 F.3d at 1025 ("Even a capital defendant can waive an argument by inadequately briefing an issue ....").

In any event, there are two separate questions here regarding the Open Meeting Act: (1) whether the December 4 cancellation complied with the Act; and (2) whether scheduling the December 9 (or now, a December 13) meeting complied. The analysis for, and relevance of, these two questions is not the same.

Regarding the first, Underwood argues that the "Board's two days' notice for the cancelation" violated the Act because it was "less than the statutorily required ten days." Pet. at 20 (citing Section 311(A)(8) of Title 25 of the Oklahoma Statutes, which states that if "any change is to be made to the date . . . of regularly scheduled meetings of public bodies, then notice in writing shall be given . . . not less than ten (10) days prior to the implementation of any such change."). Put simply, it is debatable whether this provision applies here, and debatable does not amount to a "strong showing" of a likelihood of success.

To begin, the statutory language speaks of “change,” not cancellation, and “change” implies a shift or alteration to some other state—here, a different “date.” It does not clearly contemplate an elimination of the meeting. One doubts “Hope and Change” as a political slogan, to give just one linguistic example, was ever understood to encompass complete elimination of our government or country. Regardless, Underwood cites nothing for his assertion that the “ordinary meaning of a ‘change’ to a scheduled [meeting] includes its cancelation.” Pet. at 20. And it is his burden to earn an “extreme” and “extraordinary” stay, not the Board’s.

In any event, as is widely acknowledged, such notice provisions cannot possibly apply to certain situations, such as where a public body lacks a quorum. *Cf. Hays Cnty. v. Hays Cnty. Water Plan. P’ship*, 106 S.W.3d 349, 356 (Tex. App. 2003) (“[T]he interaction … was not a ‘meeting’ because a quorum of commissioners was not present. In order for there to have been a violation of the Open Meetings Act, a meeting must have occurred.”); *Dewey v. Redevelopment Agency of City of Reno*, 64 P.3d 1070, 1075 (Nev. 2003) (“Nevada follows a majority of states in adopting a quorum standard as the test for applying the Open Meeting Law to gatherings of the members of public bodies.”). Public bodies cannot do business without a quorum, and whether a quorum is present is often undeterminable until the beginning of a meeting. Such bodies cannot possibly violate the law every time they fail to obtain a quorum and cancel a meeting. This view would be untenable, and Underwood points to no authority saying as much. Rather, as he did before the district court, he relies

on the Oklahoma Attorney General's seeking a writ of mandamus against the Board at the OCCA. *See* Pet. at 24.

But Underwood misrepresents the Attorney General's previous brief. For starters, Underwood claims that the Attorney General "argued that the Pardon and Parole Board's abrupt *rescheduling* of Underwood's clemency hearing violated the Oklahoma Open Meeting[] Act." Pet. at 24 (emphasis added). But the Attorney General said *nothing* in his argument about "rescheduling" the hearing being a violation of anything. Doing so would have been *impossible* given that when the brief was filed no such rescheduling had yet occurred. *See* Brief in Supp. of Emerg. Pet., *Oklahoma v. Okla. Pardon & Parole Bd.*, No. MA-2024-943 (OCCA Dec. 2, 2024). Indeed, that was the *entire point*: The Attorney General was demanding that the "Board must proceed with the clemency hearing in light of Underwood's active, imminent execution date." *Id.* at 7. The Attorney did not oppose rescheduling—he actively *encouraged* it as a matter of law.

The language Underwood has relied on was not directed toward rescheduling but rather toward the possibility that the original cancellation was unlawful under the Open Meeting Act. *See id.* at 5–7. But the Attorney General's brief was phrased far more cautiously on this point than Underwood acknowledges. "As an additional matter," the Attorney General observed, "it *appears* that the Board's cancelation of the clemency hearing did not comply with the Open Meeting[] Act." Brief in Supp. of Emerg. Pet. at 5, *Oklahoma v. Okla. Pardon & Parole Board*, No. MA-2024-943 (OCCA Dec. 2, 2024) (emphasis added). "Moreover," he wrote, "even assuming the

Open Meeting[] Act allows for cancelations with less notice in emergency situations, no such emergency exists here where the Board has a quorum and could proceed on the scheduled hearing date." *Id.* at 6. He then caveated *that* conclusion by adding that it "is *unclear* why the loss of an additional member is relevant so long as there remains a quorum." *Id.* at 7 (emphasis added). The Attorney General, that is, acknowledged in an emergency brief that he was opining based on initial appearance rather than a definitive analysis, he was aware that emergency situations are a counterpoint, he identified lack of a quorum as a possible emergency, and he admitted a lack of clarity as to what the Board's justification might be. None of this shows the Board definitively "violated Oklahoma's Open Meeting[] Act." Pet. at 19. Rather, it evinces a highly uncertain and challenging situation.

And it was indeed challenging. The Board was concerned that proceeding with the meeting could *itself* be unlawful. The resignation of Board member Calvin Prince on November 29, 2024—just three days before the general December meeting was to begin—caused doubts regarding the validity of the meeting. *See* Underwood's App. 35a. At the time of his resignation, Prince was the Acting Chairman because the previous Chair, Ed Konieczny, had resigned. *Id.* Oklahoma law requires that the Board "shall meet only on the call of the Chair." OKLA. STAT. tit. 57, § 332.2(A). Prince was the listed Acting Chairman for the general December meeting. *See* Respondents' App. 71a–73a.

Prince's resignation left the Board without elected leadership. *See* Underwood's App. 35a. The Board's policy provides: "If a vacancy occurs with the

Chairperson, the Vice-Chairperson will automatically succeed to the Chairperson until a vote to elect a Chairperson and Vice-Chairperson can occur." Respondents' App. 65a. Thus, when Prince resigned, the Board lacked a Chair and Vice-Chair, seemingly nullifying the automatic substitution contemplated by the rule. Because of the extremely short notice of Prince's resignation before the general meeting, there was reasonable concern from the Board that resulted in the Board cancelling. *See* Underwood's App. 35a; *see also* OKLA. STAT. tit. 57, § 332.2(A). The Board's understandable uncertainty led to the dispute with the Attorney General.

The uncertainty is resolved now that December 4 has come and gone, and Underwood is not asking for mandamus (as the Attorney General was). Put differently, the remedy for an alleged violation of the Act in regard to the December 4 cancellation would not be an indefinite stay of a clemency hearing or execution. The remedy would be for the hearing to be placed on the calendar again. This is *exactly* what the Attorney General asked for, that is *exactly* what took place, and this is *exactly* why the Attorney General deemed his own lawsuit moot. The special meeting remedied any potential Open Meeting Act violation. *See* Reply Brief and Suggestion of Mootness, *Oklahoma*, No. MA-2024-943 at 2 (OCCA Dec. 3, 2024) ("The State's concern is satisfied by the new clemency hearing date."). Underwood himself has repeatedly admitted that a new date for his clemency hearing is appropriate; he just contests the specific date chosen. *That* meeting is the bigger issue here, if anything, not whether the original date was improperly cancelled. Thus, Underwood's request

for a stay concerns whether he can make a strong showing that the December 13 date the clemency hearing was held on was inappropriate.

He cannot. Underwood argues that the Board's "seven days' notice for the rescheduling violate[d] the Open Meeting[] Act" because it was "less than the statutorily required ten days." Pet. at 20. But it was plainly appropriate for the Board to schedule (on December 2) a meeting on December 9 to analyze Underwood's clemency. This is because the December 9 meeting was not set as a regular meeting, but rather as a "Special meeting." *See* Respondents' App. 75a, 77a. And Section 311(A)(12) of Title 25 of Oklahoma law expressly allows for "Special meetings of public bodies" to be held so long as the public is given notice "at least forty-eight (48) hours prior to the meetings." For the December 9 meeting, the Board exceeded the required 48 hours by giving around seven days' notice. For the December 13 meeting, the Board gave more than 48 hours' notice, as well. Respondents' App. 42a, 46a–47a, 49a.

Underwood offers no authority or facts that would contradict any of this. Nor is there any argument to be made that the December 9 meeting isn't *really* a special meeting, as Underwood tries to argue in a nearly stream of consciousness jeremiad. *See* Pet. at 22 ("clemency hearings are too important and too solemn a meeting to change at the last minute"). That is in part because when the December 4 meeting was cancelled, the Board did not immediately call for, or even have specific plans to call for, the December 9 or December 13 meetings. Rather, there was a cancellation, and then a decision made *later*—after the Attorney General filed suit—that a new

special meeting needed to be called immediately that would contain the clemency hearing. And, as noted above, *numerous* recent clemency hearings have taken place at special meetings, several of which were rescheduled. *Contra* Pet. at 22 ("rescheduling clemency hearings is [sic] not a special meeting"). In sum, nothing about the December 13 special meeting violated the Act, and it cannot possibly contribute to any finding that would entitle Underwood to a stay of his execution.

One of the only arguments Underwood does muster, sans citation, is entirely dependent on his sense of what the Open Meeting Act *should* do, rather than what it does. "If the Board can reschedule any meeting as a special meeting," he complains, "then the Act's requirement of ten days' notice for changes to meetings becomes superfluous and easily avoidable by the Board." Pet. at 22. But even assuming that this characterization of Oklahoma law is accurate, that does not change what the law clearly allows. The Oklahoma Legislature has allowed special meetings to be set on two days' notice, and the Board utilized that mechanism. Underwood also claims that it is less "natural to think of the rescheduling as a new special meeting." Pet. at 23. But whatever one "think[s]" of it, the Board scheduled the clemency hearing to take place during a December 13 special meeting, which was appropriate. Underwood's point also ignores that the meeting was not technically "rescheduled." Rather, it was canceled, with no immediate new date in mind, and then set anew at a later juncture after the Attorney General filed suit. Again, this was appropriate.

Defendants are not alone in this view. Rather, it is Underwood's obviously biased perspective on special meetings that is detached from text, reality, and

common practice. Indeed, an Oklahoma State University media law professor "who trains county officials on the Open Records and Open Meeting Act" told the media regarding this case that "legally the board didn't do anything wrong." Sydnee Batzlaff & John Hayes, *Death row inmate's attorneys argue open meeting violations in request for stay of execution*, KFOR (Dec. 6, 2024) (OSU professor Joey Senat).[10] He added: "I don't know of anything that has ever stopped or told a public body they [] have violated the statute by canceling a regular meeting for any reason and then holding a special meeting." *Id.* Underwood has pointed to no authority to counter this understanding of the law. He certainly hasn't made a "strong showing" that his newfound argument is correct, or that the district court abused its discretion by finding otherwise. *See* Underwood's App. 10a–11a (Court: "[S]pecial meetings require only 48 hours' prior notice; that requirement was complied with here.").

Having said all of that, it should also be emphasized that any technical Open Meeting violation here would not be significant enough, given the circumstances, to amount to a violation of the admittedly "minimal" due process Underwood is provided by *Woodard* and *Duvall*, 162 F.3d at 1061. This is especially so given the need for an inmate to show pure arbitrariness or capriciousness on the part of the State. *See also Lee v. Hutchinson*, 854 F.3d 978, 981–82 (8th Cir. 2017) (en banc) (per curiam) ("[T]he district court was correct in determining that, despite the procedural shortcomings in the clemency process, the inmates received the minimal due process guaranteed by the Fourteenth Amendment."). Underwood received plenty of notice and time to

[10] *Available at* https://kfor.com/news/local/death-row-inmates-attorneys-argue-open-meeting-violations-in-request-for-stay-of-execution/.

prepare for his clemency hearing, he had two attorneys present, his expert's testimony was read to the Board members and she was not subjected to cross-examination, and the reasons for moving the clemency hearing back are obvious and not at all arbitrary. The December 13 hearing, in particular, was scheduled because of the Tenth Circuit's administrative stay combined with the need to hold the hearing before Underwood's execution date. Nothing about that is capricious or arbitrary.

Moreover, the question of arbitrariness does not arise unless Underwood first demonstrates he had a protected liberty interest. He cannot satisfy this standard because the Board's clemency decision is wholly discretionary. *See Olim v. Wakinekona,* 461 U.S. 238 (1983); *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012); *Kyle v. Morton High Sch.*, 144 F.3d 448, 451–54 (7th Cir. 1998).

C. Underwood has no due process right to his preferred attorney or in-person expert, and he failed to raise 18 U.S.C. § 3599 below.

Underwood argues that the Board's decision to set the hearing for December 13 instead of December 4 amounts "to a denial of a fair hearing and the meaningful assistance of counsel during the clemency process" because one of his lawyers was supposedly unavailable and his mental health expert supposedly could only submit written testimony. Pet. at 13-14. This argument fails for multiple reasons. For starters, all of Underwood's arguments below—and especially his points about the potential unavailability of his preferred counsel and expert—centered on the December 9 clemency hearing date, not the eventual December 13 date. But due to his own appeal, and the Tenth Circuit's administrative stay that he obtained, he was able to successfully eliminate the December 9 date, forcing the Board to re-set the

hearing once again for December 13. And Underwood has provided no evidence and made no effort to explain why his counsel and expert were not available for December 13. There is literally nothing in the record that would explain their absences on December 13, and Underwood's team made no effort to do so at the hearing itself. For this reason alone, Underwood cannot prevail on this point.

Moreover, Underwood's mental health expert *did* submit written testimony at the clemency hearing, the reading of which took up the bulk of Underwood's presentation time. *Cf. Gould Elecs. Inc. v. Livingston Cnty. Rd. Comm'n*, No. 20-2257, 2022 WL 1467650, at *5 (6th Cir. May 10, 2022) (unpublished) ("Gould has not presented evidence that the videoconferencing format generally violates due process")*; Harris v. State*, 2004 OK CR 1, ¶ 10 n.3, 84 P.3d 731, 740 n.3 (OCCA 2004) (capital murder defendant used live video testimony in trial). And that same expert, the district court found, "*already* has submitted opinions to the Board via videotape, and there has been no showing that she is unable to adequately participate in the hearing through the use of video conferencing." Underwood's App. 11a (emphasis added). These findings are not clearly erroneous; indeed, Underwood has not claimed otherwise. And the district court's findings combined with what actually happened at the clemency hearing definitively eliminate any argument that he did not receive "minimal" due process in relation to his expert.

Thus, Underwood is left with a claim that he was denied due process because his preferred attorney was supposedly not available for his hearing. But Underwood was represented by *multiple* attorneys at his December 13 hearing, which severely

undermines if not destroys the argument that he did not receive "minimal" due process. And Underwood has made no attempt to explain what efforts were ever made to find a replacement attorney equivalent to his preferred attorney, nor has he cited to any caselaw indicating that this situation—where a preferred attorney is absent, while others remain—amounts to a due process violation. And he certainly has not pointed to anywhere that Oklahoma guarantees a right to a specific counsel in this particular circumstance.

Nevertheless, Underwood argues sans support that his lead counsel, Hunter S. Labovitz, could not attend the December 13 clemency hearing. Pet. at 9. But the only specific days Underwood lists related to Labovitz's unavailability were December 5 through December 11. *See* Pet. at 5 ("Labovitz … 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."). That hearing, however appears to have concluded *before* December 11. *See* Respondents' App. 131a. Specifically, a minute order notes the hearing concluded for the year on December 9, with the remaining portion to recommence January 22, 2025. *Id.* Accordingly, Underwood has provided no evidentiary support for his lead counsel's absence on December 13. Nor, previously, did he ever explain why his attorney's portion of the evidentiary hearing could not be rescheduled for the already scheduled date starting on January 22, 2025. Moreover, as the district court observed, a request for continuance based on Underwood's rescheduled clemency hearing for December 9 *was never made*.

Underwood's preferred counsel, that is, never even *tried* to extricate himself from the other proceeding, despite Underwood's facing an imminent execution.

Underwood also argues that the Board violated 18 U.S.C. § 3599(e) by setting the clemency hearing date to where his preferred attorney could not be present. Pet. at 13-14. But Underwood did not raise this claim in his stay motion below. As a result, the district court expressly declined to address it. *See* Underwood's App. 6a.n.1 ("Because Plaintiff's Motion relies upon his due process claim as the basis for entry of a stay, however, the Court examines only that claim herein."). Underwood makes no mention of this failure, but it is fatal.

Underwood's arguments about the lack of a preferred attorney cannot be reconciled with Underwood's own case law, either. Elsewhere, Underwood cites the Tenth Circuit's *Gardner* case favorably. *See* Pet. at 11 (citing *Gardner v. Garner*, 383 F. App'x 722 (10th Cir. 2010) (per curiam) (unpublished)). But there, the Tenth Circuit held that the "constitutional right to the effective assistance of counsel does *not* extend beyond direct appeal, even if state law provides for the appointment of counsel in post-conviction proceedings." *Id.* at 728 (emphasis added). It is difficult to imagine how an inmate could be deprived of due process by not having his preferred counsel present if, per the Tenth Circuit, he does not even have a right to have that counsel perform effectively if present. Underwood has made no attempt to connect the dots of this argument through caselaw, statutes, or anything else.

If anything, it would be the *victim*'s family that was unduly burdened by the new date. *Cf.* OKLA. STAT. tit. 21, § 142A-2(F) ("The rights afforded victims under the

Oklahoma Victim's Rights Act shall be protected in a manner no less vigorous than the rights afforded the accused."); 18 U.S.C. § 3771(a)(7) ("A crime victim has … [t]he right to proceedings free from unreasonable delay."). But here, "many family and close friends" of the victim made "every effort to attend" the new hearing. Respondents' App. 38a. "Everyone has overcome many obstacles and burdens to be there for Jamie." *Id.* And "[e]very single one of [the victim's family and friends] will suffer from another emotional roller coaster if this clemency hearing is rescheduled again." *Id.* ¶ 7.

In the end, Underwood has not come close to showing that he is likely to succeed in proving a due process claim simply because his expert could not appear in person and his preferred attorney made little attempt to be present for his clemency hearing. There is also no plausible argument here that the Board's setting anew the clemency hearing was an act of whim or capriciousness. And no such showing is possible, given that the Board's actions are obviously tied to the unexpected resignations from the Board. Underwood's "cumulative[]" argument, Pet. at 13, fails as well, both because he never raised it before now, and because each individual due process argument is meritless.

III. THE STATE AND VICTIM'S FAMILY WILL BE GRIEVOUSLY HARMED BY A STAY.

Underwood has focused his equitable arguments mostly on the Board. *See* Emerg. Stay Mot. at 7. In cases like these, however, the interests of the sovereign State, the public, and the victim's family must be considered. *See, e.g.*, OKLA. STAT. tit. 21, § 142A-2(F) (Oklahoma Victim's Rights Act); *see also* OKLA. CONST. art. II, § 34

(Victims' Bill of Rights). And these interests are undeniably harmed by undue delay in executions. *See, e.g.*, *Hill*, 547 U.S. at 584. It has been nearly 20 years since Underwood murdered Jamie, making the claim that Oklahoma is "rushing to judgment" farcical. Emerg. Stay Mot. at 8 (citation omitted). "The people of [Oklahoma], the surviving victims of Mr. [Underwood]'s crimes, and others like them deserve better," *Bucklew*, 587 U.S. at 149, especially when Underwood's justifications for a stay are without merit. As a member of Jamie's family testifies here, "[w]e need a final resolution to this case, so that we can remember Jamie without the shadow of another confrontation with Kevin Underwood following us everywhere we turn." Respondents' App. 38a–39a.

Nevertheless, Underwood has argued that a supposedly "short stay"—tellingly, the length is never specified—is justified because "years" of delay in developing a new protocol are attributable to the State. Emerg. Stay Mot. at 7. This is false. The bulk of the delay between executions in Oklahoma was attributable to the State being unable to acquire the lethal injection drugs required under Oklahoma law. *See, e.g.*, Press Release, *State officials announce plans to resume execution by lethal injection*, Dep't of Corr. (Feb. 13, 2020) ("State officials … announced today that the state has found a reliable supply of drugs to resume executions by lethal injection.").[11] At no point did the State ever sit on its hands; rather, it worked diligently to acquire the proper drugs *and* develop a protocol to protect inmates. Nothing about this can be used to further delay justice here.

[11] *Available at* https://oklahoma.gov/doc/newsroom/2020/state-officials-announce-plans-to-resume-execution-by-lethal-injection.html.

Moreover, Underwood fails to show that a balancing of the equities and harms weighs in his favor. Underwood admits, instead, that his rights are "minimal" in this context. Emerg. Stay Mot. at 4. And Underwood has exhaustively challenged his conviction and sentence, as well as the State's execution protocol, and the present motion makes no attempt to cast doubt on the adequacy of these procedures nor the constitutionality of his conviction and sentence. Execution is the ultimate punishment, to be sure, but Underwood has fully earned that remedy by killing Jamie Bolin. "[I]n the eyes of the law, petitioner does not come before the Court as one who is 'innocent', but, on the contrary, as one who has been convicted by due process of law of [a] brutal murder[]." *Herrera v. Collins*, 506 U.S. 390, 399–400 (1993) (emphasis added). And even assuming he has a "minimal" right in clemency *procedures*, he has no right to obtain clemency itself. These factors compel a conclusion that the balance of harms here favors the State.

CONCLUSION

Oklahoma respectfully asks this Court to deny the Application and Petition.

Respectfully submitted,

s/ *Zach West*

Zach West
Counsel of Record
Gentner Drummond
Attorney General of Oklahoma
Garry M. Gaskins, II
Solicitor General
Kyle Peppler
Assistant Solicitor General
OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st St.

Oklahoma City, OK 73105
(405) 521-3921
Zach.West@oag.ok.gov
Garry.Gaskins@oag.ok.gov
Kyle.Peppler@oag.ok.gov

Counsel for Respondents