IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

Zane Michael Floyd and Robert Ybarra, Jr.,
Appellants,
v.
Nevada Board of Pardons Commissioners, James Dzurenda, Director, Nevada Department of Corrections, et al.,
Respondents.

Docket No. _91040

DOCKETING STATEMENT CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with Nevada Rules of Appellate Procedure (NRAP) 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment, and compiling statistical information.

WARNING

This statement must be completed fully, accurately, and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or the appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal. *Id*.

A complete list of the documents that must be attached appears as Question 28 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions. *Id*.

This court has noted that when obligations under NRAP 14 to complete the docketing statement properly and conscientiously are not taken seriously, valuable

judicial resources of this court are wasted, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use divider pages to separate any attached documents.

1. Judicial District: Eighth County: Clark

Judge: The Honorable Jacqueline Bluth District Ct. Case No.: A-25-911260-C

Department: VI

2. Person filing this docketing statement:

Name: Rene L. Valladares, Bar #: 11479

David Anthony, Bar #: 07978

Jocelyn S. Murphy, Bar #: 15292

Katie Chadliev, Bar #: 14981

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Client name(s) (if represented by counsel): Zane Michael Floyd and Robert Ybarra, Jr.

If this is a joint statement by multiple appellants, add the names and addresses of the other appellants and, if applicable, the names of their counsel and have them sign the certification below.

Name:

Law Firm Name:

Address:

Telephone #:

Email address:

Client name(s) (if represented by counsel):

I certify I concur in the filing of this statement.

Signature of other appellant(s) or of counsel for other appellant Date

3. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☒ Grant/Denial of injunction
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify):
- ☐ Divorce Decree:
  - ☐ Original
  - ☐ Modification
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination

☐ Other disposition (specify): _____

4. **Does this appeal raise issues concerning any of the following?**

   ☐.Child Custody

   ☐ Venue

   ☐ Termination of parental rights

5. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

   Zane Michael Floyd Pending and Prior Proceedings in this Court:

   Floyd v. State, Supreme Court of the State of Nevada, Case No. 36752, Opinion (42 P.3d 249 (March 13, 2002)) (per curiam)

   Floyd v. State, Supreme Court of the State of Nevada, Case No. 44868, Order of Affirmance (178 P.3d 754 (February 16, 2006))

   Floyd v. State, Supreme Court of the State of Nevada, Case No. 51409, Order of Affirmance (367 P.3d 769 (November 17, 2010))

   Floyd v. The Eighth Judicial District Court, Supreme Court of the State of Nevada, Case No. 83108

   Floyd v. The Eighth Judicial District Court, Supreme Court of the State of Nevada, Case No. 83167

   Floyd v. The Eighth Judicial District Court, Supreme Court of the State of Nevada, Case No. 83225

   Floyd v. State, Supreme Court of the State of Nevada, Case No. 83181

   Floyd v. Gittere, Supreme Court of the State of Nevada, Case No. 83436

   Floyd v. State, Supreme Court of the State of Nevada, Case No. 84081

   Floyd v. Cardinal Health, Inc., Supreme Court of the State of Nevada, Case No. 85826

   Robert Ybarra, Jr. Pending and Prior Proceedings in this Court:

   Ybarra v. State, No. 13590

   Ybarra v. State, No. 17462

Ybarra v. Director, Nevada State Prison, No. 19705

Ybarra v. Warden, Nevada State Prison, E.K. McDaniel, No. 32762

Ybarra v. Warden, Nevada State Prison, E.K. McDaniel, No. 43981

Ybarra v. State, No. 52167

Ybarra v. Filson, No. 72942

Ybarra v. Royal, No. 89824 (pending)

6. **Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:
Zane Michael Floyd Pending and Prior Proceedings in other Courts:

Floyd v. Daniels, et al, United States District Court, Case No. 3:21-cv-00176-RFB-CLB

Floyd v. Gittere, District Court, Clark County, Nevada, Case No. A-21-832952-W

Floyd v. Nevada Department of Corrections, District Court, Clark County, Nevada, Case No. A-21-833086-C

Robert Ybarra, Jr. Pending and Prior Proceedings in other Courts :

State of Nevada v. Robert Ybarra, Jr., CR-0001511, Seventh Judicial District Court

Ybarra v. Dzurenda, A-24-903549-P, Eighth Judicial District Court

Ybarra v. Board of State Prison Commissioners, James Dzurenda, and Nevada Department of Corrections, A-24-905175-P, Eighth Judicial District Court

Floyd v. Daniels, et al, United States District Court, Case No. 3:21-cv-

7. **Nature of the action.** Briefly describe the nature of the action and the result below:

   On January 29, 2025, Plaintiffs Floyd and Ybarra filed a Complaint for Declaratory and Injunctive Relief, or in the Alternative, Petition for Writ of Mandamus. On March 31, 2025, Plaintiffs filed a Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction. On April 14, 2025, Respondents filed their Opposition to Motion for Temporary Restraining Order, Or, in the Alternative, For Preliminary Injunction. On April 21, 2025, Plaintiffs Floyd and Ybarra filed their Reply to Opposition to Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction. At a hearing on May 8, 2025, the court denied relief. On June 26, 2025, the court entered an Order Denying Plaintiffs' Motion for Temporary Restraining Order, or, in the Alternative, For Preliminary Injunction.

8. **Issues on appeal.** State concisely the principal issue(s) in this appeal:
   Whether the district court erred in denying Plaintiffs' motion for TRO/preliminary injuction enjoining the Respondents from effectuating their death sentences until the Pardons Board has amended its rules and regulations to be in compliance with constitutional requirements and has given Plaintiffs an opportunity to apply for commutation under the new regulations.

9. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

10. Constitutional issues: Does this appeal challenge the constitutionality of a Nevada Statute or ordinance?

☒ No. Continue to #11.

☐ Yes:

a. Identify the Nevada statute or ordinance being challenged:

b. Is the State, any State agency, or a State officer or employee a party to this appeal in an official capacity?

☐ Yes ☐ No.

11. Other issues.

a. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

b. If so, explain: The current clemency procedures and regulations make the process inaccessible to death condemned inmates like Zane Floyd and Robert Ybarra, Jr. The current procedures do not account for the unique circumstances that exist in a capital case, do not provide capital defendants with clear instructions and definitions, do not provide a procedure for seeking a stay of execution pending a hearing for commutation, and do not provide the most minimal safeguards as required by the Due Process

Clause.

12. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is retained by the Supreme Court or presumptively assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls.

Under NRAP 17(a)(1), this case is retained by the Supreme Court because it is a death penalty case.

13. Trial. If this action proceeded to trial, how many days did the trial last? _____ days.

Was it a: ☐ bench trial ☐ jury trial?

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice/judge recuse him/herself from participation in this appeal? *See* NRAP 35. If so, which Justice/Judge? _____

15. Oral argument. Would you object to submission of this appeal for disposition without oral argument? ☒ Yes ☐ No

TIMELINESS OF NOTICE OF APPEAL

16. Date the written judgment(s) or order(s) appealed from was/were filed in the district court: _____June 26, 2025_____

If no written judgment or order has been filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of the judgment(s) or order(s) was/were served: _____June 27, 2025____

Was service by:

☒ Electronic or personal delivery

☐ Mail

18. Were any motions seeking relief under NRCP 50(b), 52(b), 59, or 60 or seeking rehearing or reconsideration filed in the district court either before or after the notice of appeal was filed? (attach a copy of the motion)

☒ No, continue to # 19.

☐ Yes:

a. Specify the type of motion and the date the motion was filed in the district court (check all that apply)

☐ NRCP 50(b) Date filed: _____

☐ NRCP 52(b) Date filed: _____

☐ NRCP 59 Date filed: _____

☐ NRCP 60 Date filed: _____

☐ Rehearing/Reconsideration Date filed: _____

b. Date the motion was served: _____

c. How was the motion served:

☐ Electronic or personal delivery

☐ Mail

d. Date the written order resolving the motion was filed: _____

e. Date written notice of entry of the order resolving the motion was served: _____

f. Was service by:

☐ Electronic or personal delivery

☐ Mail

19. Are there any motions other than those identified in #18 above still pending in the district court?

☐ Yes. Identify the motion and the date it was filed in the district court:

_____

☒ No.

20. Date the notice of appeal was filed in the district court: July 25,

2025_____

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

21. Specify the statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other: ____NRAP 4(a)(1) provides for 30 days to file a timely notice of appeal._____

SUBSTANTIVE APPEALABILITY

22. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

a.

☐ NRAP 3A(b)(1)	☐ NRAP 3A(b)(2)
☒ NRAP 3A(b)(3)	☐ NRAP 3A(b)(4)
☐ NRAP 3A(b)(5)	☐ NRAP 3A(b)(6)
☐ NRAP 3A(b)(7)	☐ NRAP 3A(b)(8)
☐ NRAP 3A(b)(9)	☐ NRAP 3A(b)(10)
☐ NRAP 3A(b)(11)	☐ NRAP 3A(b)(12)
☐ NRS 38.205	☐ NRS 233B.150
☐ NRS 703.376	☐ Other (specify): _____

b. Explain how each authority provides a basis for appeal from the judgment or order:
NRAP 3A(b)(3) provides for an appeal from the denial of a motion for preliminary injunction.

23. List all parties involved in the action or consolidated actions in the district court:

a. Parties:
Nevada Board of Pardons Commissioners and the Executive Secretary; James Dzurenda, Director of Nevada Department of Corrections

b. If all parties in the district court are not parties to this appeal, explain in

detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

All parties noted above are parties to this appeal.

24. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

NRS 30.010 (injunctive relief)

25. Did the judgment or order appealed from adjudicate ALL of the claims alleged below and the rights and liabilities of ALL of the parties to the action or consolidated actions below? ☐ Yes ☒ No

26. If you answered "No" to question 25, complete the following:

a. Specify the claims remaining pending below:

1. Lack of meaningful access to the commutation process and lack of procedural safegaurds violate Plaintiffs' due process rights.

2. Improper delegation of powers violates the separation of powers and Plaintiffs' due process rights.

b. Specify the parties remaining below:

All parties remain.

Plaintiffs: Zane Michael Floyd and Robert Ybarra, Jr.,

Defendants: Nevada Board of Pardons Commissioners and Their Secretary; James Dzurenda, Director, Nevada Department of Corrections

c. Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)? ☐ Yes ☒ No

d. Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment? ☐ Yes ☒ No

27. If you answered "No" to any part of question 26, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

Order is independently appealable under NRAP 3A(b)(3), as it is an order refusing to grant an injunction.

28. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any motion(s) identified in questions 18 and the order(s) resolving the motion(s)
- Any motions identified in question 19
- Orders or NRCP 41(a)(1) dismissals that formally resolve each claim, counterclaim, cross- claim and/or third-party claim asserted in the action or consolidated action below, **even if not at issue on appeal**
- All orders that finally disposes of any parties in the action below, **even if not at issue on appeal**
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information, and belief, and that I have attached all required documents to this docketing statement.

/s/ David Anthony Bar # 007978 _08/19/2025
David Anthony Date

Nevada, Clark County

CERTIFICATE OF SERVICE

I certify that on the 19 day of August, 2025, I served a copy of this completed docketing statement upon all parties to this appeal:

☒ by electronic means to registered users of the court's electronic filing system

If served other than through the court's electronic filing system, enter the names and email address of the parties served by this means and attach a copy of each party's written consent authorizing service by this means. *See* NRAP 25(c)(2)

☐ by personally serving it upon him/her;

☐ by mailing it by first class mail with sufficient postage prepaid to the following address(es):

/s/ David Antony Bar # 007978 _08/19/2025_
David Anthony Date

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CASE NO: A-25-911260-C
Department 9

DISTRICT COURT
CLARK COUNTY, NEVADA

Zane Michael Floyd and Robert Ybarra, Jr., Plaintiffs/Petitioners, v. Nevada Board of Pardons Commissioners, James Dzurenda, Director, Nevada Department of Corrections, *et al.*, Defendants/Respondents.	Case No. # Dept. No. # Hearing Requested **Complaint for Declaratory and Injunctive Relief, or the in the Alternative, Petition for Writ of Mandamus** Date of Hearing: Time of Hearing: **DEATH PENALTY CASE**

COMPLAINT

I. Introduction

1. "A prisoner under a death sentence remains a living person and consequently has an interest in his life." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring in part and concurring in the judgment).[1] This protected interest continues to exist even once an individual is sentenced to death, and continues to be protected by the Due Process Clause—meaning that a state cannot deprive a death row inmate of their life without due process. *See id.* at 28–89. These due process protections extend to the process for seeking commutation of a death sentence.

2. Nevada has created a commutation process, with the Legislature passing numerous statutes regarding death row inmates and the ability to seek commutation of their death sentences. *See* NRS 213.030, 213.080, 213.085, 213.1099.

3. The Nevada Supreme Court acknowledged in *Goldsworthy v. Hannifin*: "[I]f the legislature undertakes to enact laws granting parole when it need not constitutionally have done so, we think those rights granted as acts of clemency or grace must be administered in accordance with concepts of due process[.]" 86 Nev.

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[1] Justice O'Connor's concurrence in the plurality decision has been treated by courts as binding precedent. *See, e.g., Hall v. Barr*, No. 17-cv-2587-TSC, 2020 WL 6743080, at *3, 9 (D.C. Cir. Nov. 16, 2020) (citing *Woodard*, 523 U.S. at 289 and referring to Justice O'Connor's concurrence as "controlling Supreme Court precedent"); *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (recognizing that Justice O'Connor's concurrence "set binding precedent").

252, 256–57, 468 P.2d 350, 353 (1970). The Nevada Supreme Court has also acknowledged that NRS 213.085 provides death row inmates with an opportunity to seek commutation of a death sentence. *See Colwell v. State*, 112 Nev. 807, 812, 814–15, 919 P.2d 403, 406–08 (1996) (rejecting the argument that NRS 213.085 denies capital defendants an opportunity to seek commutation of their sentence and explaining that the statute addresses one aspect of clemency). Thus, there must be a mechanism for a death row inmate to gain meaningful access to the process—and if it exists then it must be administered in accordance with due process. Yet, death row inmates like Zane Floyd and Robert Ybarra, Jr. are left with no knowable or meaningful access to the clemency process, and thus no procedure to protect their due process rights.

4. The current clemency procedures and regulations make the process completely inaccessible to condemned inmates like Zane Floyd and Robert Ybarra, Jr. (hereinafter "Plaintiffs"). As discussed below, the current procedures do not account for the unique circumstances that exist in a capital case, do not provide capital defendants with clear instructions and definitions, do not provide a procedure for seeking a stay of execution pending a hearing for commutation, nor do the procedures provide even the most minimal safeguards as required by the Due Process Clause. Even something as simple as the opportunity to participate in an interview is missing. *See Creech v. Idaho Comm'n of Pardons & Parole*, 94 F.4th 851, 855–56 (9th Cir.), *cert. denied*, (2024); *see also Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 290 (1998) (O'Connor, J., concurring in part and concurring in the judgment).

5. For the following reasons and for those stated below, Plaintiffs seek declaratory and injunctive relief preventing their execution until the Pardons Board provides constitutionally adequate procedures for them to seek commutation of their death sentences.[2] In the alternative, Plaintiffs seek a writ of mandamus to order the Pardons Board to stay their execution and adopt constitutionally adequate procedures so that their request for commutation can be considered.

II. Parties

6. Plaintiff Zane Floyd is a death row inmate in the custody of Nevada Department of Corrections ("NDOC") at High Desert State Prison in Indian Springs, Nevada. Plaintiff Floyd brings this complaint seeking declaratory and injunctive relief, to protect his due process right to have a knowable and accessible process for seeking commutation of his sentence before his execution. Plaintiff Floyd seeks meaningful and fair access to Nevada's commutation process.

7. Plaintiff Robert Ybarra, Jr., is a death row inmate in the custody of NDOC at Ely State Prison in Ely, Nevada. Plaintiff Ybarra brings this complaint seeking declaratory and injunctive relief, to protect his due process right to have a knowable and accessible process for seeking commutation of his sentence before his execution. Plaintiff Ybarra seeks meaningful and fair access to Nevada's commutation process.

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[2] Plaintiff Floyd challenged the legality of the Pardons Board's regulations in a third state postconviction petition. On appeal, the Nevada Supreme Court ruled that such a claim was not cognizable in a postconviction habeas petition. *Floyd v. Gittere, et al.*, No. 83436 (Nev., November 21, 2024) (Order Denying Petition), at 3–5; 2024 WL 4865438, at *2.

8. Respondents are the Nevada Board of Pardons Commissioners ("the Board") and their Secretary. The Board is made up of the seven justices of the Nevada Supreme Court, the Governor, and the Attorney General. *See* Nev. Const. art. 5 §14. The Respondents are sued in their official capacities.

9. Respondent James Dzurenda is the Director of the Nevada Department of Corrections ("NDOC"). NDOC conducts mental health evaluations of inmates seeking commutation for the Pardons Board and the Director makes recommendations to the Board regarding whether to commute a sentence. The Director also effectuates the decisions made by the Board with respect to whether to stay and/or commute a sentence. In death penalty cases, the Director is charged by statute with effectuating the death sentence. NRS 176.355.

III. Jurisdiction

10. This Court has jurisdiction over the Plaintiffs, as at all relevant times they have been citizens of the State of Nevada. Jurisdiction is also conferred to Respondents as all are Nevada citizens, a state agency, and/or state actors.

11. Jurisdiction is conferred by NRS 30.010–30.170 and NRS 33.010–30.670, which authorizes this Court to decide actions for declaratory relief and grant injunctions. This Court also has jurisdiction to grant mandamus relief pursuant to NRS 34.150–34.310.

IV. Venue

12. Venue is appropriate in the Eighth Judicial District Court held in Clark County, in Las Vegas, Nevada.

13. Since 2013, the Board has held its public meetings in both Las Vegas and Carson City. *See* Nevada Board of Pardons Commissions, *Public Meeting Information*, https://pardons.nv.gov/Meetings/. Since Plaintiff Floyd began applying in 2021, the meetings have taken place at both the Nevada Supreme Court's Las Vegas and Carson City courthouses. Members of the Board appear in both locations, applicants can appear at either location, and individuals are invited to speak in support or opposition at both locations regardless of where the applicant is appearing.

14. Moreover, the criminal offenses for which Plaintiff Floyd was convicted and sentenced to death for occurred in Las Vegas, and all of his postconviction litigation challenging his conviction and death sentence occurred in Clark County.

15. Plaintiff Floyd is a resident of Clark County.

16. Certain members of the Pardons Board are residents of Clark County and Director Dzurenda is also a resident of Clark County.

17. The location of death row is at High Desert State Prison in Clark County. Until recently, Plaintiff Ybarra was a resident of Clark County. He was recently transferred to Ely State Prison.

18. Venue is therefore proper in Clark County pursuant to NRS 13.020(2).

V. Legal Standards

A. Declaratory and Injunctive Relief

19. NRS 30.040(1) provides in relevant part, "Any person . . . whose rights, status, or other legal relations are affected by statute . . . may have determined any question of construction or validity arising under the . . . statute and obtain a

declaration of rights, status or other legal relations thereunder." In order to obtain relief under NRS 30.040, a litigant must "demonstrate a 'legally protectible interest,' or injury-in-fact." *National Association of Mutual Insurance Companies v. Department of Business and Industry, Division of Insurance*, 524 P.3d 470, 477, 139 Nev. Adv. Op. 3 (2023).

20. NRS 33.010 states a party may obtain injunctive relief when: (1) it appears from the complaint "that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually"; (2) it appears "by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff"; or (3) it appears, "during the litigation, that the defendant is doing or threatens . . . some act in violation of the plaintiff's rights . . . tending to render the judgment ineffectual."

B. Mandamus Relief

21. A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion. *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981). "When there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available." *Neville v. Eighth Judicial Dist. Court in and for County of Clark*, 133 Nev. 777, 779, 406 P.3d 499, 501 (2017) (citation omitted).

22. Mandamus is also available as a vehicle for challenging the constitutional validity of regulations adopted by the Pardons Board. *Tam v. Colton*, 94 Nev. 453, 459, 581 P.2d 447, 452 (1978) (citations omitted). "To require a litigant first to seek a declaratory judgment and then to seek mandamus, it is said, is to needlessly hamper the timely vindication of important rights and to unduly burden the courts with a multiplicity of related legal actions." *Id.* Once a constitutional violation is established, the remedy "is both self-evident and exclusive." *Id.* at 460.

23. "A writ of mandamus may be issued 'to control a manifest abuse or arbitrary or capricious exercise of discretion.'" *State Office of the Attorney General v. Justice Court of Las Vegas Township*, 133 Nev. 78, 80, 392 P.3d 170, 172 (2017) (quoting *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011)). "A manifest abuse of discretion is a clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State Office of the Attorney General*, 133 Nev. at 80, 392 P.3d at172 (citing *Armstrong*, 127 Nev. at 932, 267 P.3d at 780).

VI. Facts

A. The Pardons Board's Rules and Regulations

24. The Board is a constitutionally created state agency which has the power to "remit fines and forfeitures, commute punishments, except as provided in subsection 3, and grant pardons, after convictions." Nev. Const. Art. 5, § 14. The composition of Board members is unique among the fifty states, with Nevada being

the only one to have its state supreme court justices and attorney general as members that have pardon power.[3]

25. In 2020, after approval from voters, the Nevada Constitution was amended requiring that the Board meet quarterly, and clarifying that the Governor does not need to vote with the majority of the Board in order for an action to be taken.[4] The Board itself has not amended its rules and regulations in over a decade. The Board is governed by Chapter 213 of the Nevada Administrative Code, but Chapter 213 in regard to the Board's provisions has not been updated since 2010.[5] The Board is a state agency, and as such has authority to "adopt reasonable regulations to aid it in carrying out functions" and "adopt such regulations as necessary to the proper execution of those functions." NRS 233B.040(1).[6] Both

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[3] Most commonly, the power of clemency is contained wholly within the executive branch with the Governor, with a board made up of individuals he or she appoints. While some states, such as Nebraska, do have the Attorney General on the board, no other state has its supreme court justices on the board as well. *See* NEB. CONST. art. IV, § 13.

[4] Amy Alonzo, *Ballot Question Results: Votes Recognize Same-Sex Marriage, Narrowly Disagree on State Ed Oversight*, Reno Gazette Journal (Nov. 2, 2020, at 11:23 PM), https://www.rgj.com/story/news/politics/2020/11/03/election-results-2020-nevada-ballot-measures-voting-questions/6000400002/.

[5] *See generally Chapter 213 Nevada Revised Statutes, Pardons Paroles and Probation; Remissions of Fines and Commutations of Punishments,* https://www.leg.state.nv.us/nac/NAC-213.html#NAC213Sec055 (last visited Sept. 23, 2024) ; *see also* State Board of Pardons Commissioners, Adopted Regulation of the State Board of Pardons Commissioners LCB File No. R085-09, https://www.leg.state.nv.us/register/2009Register/R085-09A.pdf (last visited Sept 23, 2024).

[6] The Board's own website links to the State Agencies page, where the Board is listed under "Public Safety." *See State Agencies and Departments*, https://nv.gov/agencies.

passed regulations, and temporary and emergency regulations have the force of law and must be enforced. *Id.*

26. As an agency the Board is required to review its regulations "at least once every 10 years to determine whether it should amend or repeal any of the regulations." NRS 233B.050. After this review, within 30 days "the agency shall submit a report to the Legislative Counsel for distribution to the next regular session of the Legislature."[7] *Id.* The Board has not submitted a report regarding review of its regulations in over a decade. The Office of the Governor submitted a report in 2019 regarding the actions taken by the Board, which covered January 1, 2016 to December 31, 2018. However, this report was only of the Board's actions related the grant or denial of pardons, not regulation review. *See* Nev. Const. Art. 5 § 13. The Office of the Governor also filed a similar report on February 1, 2021, covering January 1, 2019 to December 31, 2020. Again, there was no mention of the Board reviewing its rules and regulations. The Board has had the opportunity to review and potentially amend its rules and regulations in relation to death row inmates, and has not done so.

27. The only death penalty specific provisions are contained in NAC 213.120, which states:

> 1. Except as otherwise provided in subsection 2 of NAC 213.055, the Board will not consider an application for a pardon or the commutation of a punishment submitted by a person sentenced to the death

[7] Reports are available online, currently going back to the 2009–2011 Biennium. See Research Division, Legislative Counsel Bureau, *Reports Submitted to the Nevada Legislature*, https://www.leg.state.nv.us/Division/Research/Library/Documents/ReportsToLeg/.

> penalty unless the person has exhausted all available judicial appeals.
>
> 2. If a death penalty is being considered, the presence of the Governor is required and any judgment must be made by a majority of the members of the Board.

28. There are no further instructions or considerations for a death row inmate, with an active execution warrant or not, outside of the standard application system. The term "judicial appeals" is not defined, and it is unknown whether this provision applies to any litigation or whether it is limited to the litigation of state and federal postconviction petitions for writ of habeas corpus. Further, while the Board has the authority to grant a stay of execution there is no mechanism for a death row inmate to access this form of relief. *See* NRS 176.415(1).

B. Plaintiff Floyd's Applications

29. For the past three years Plaintiff Floyd has consistently, and properly, applied to be placed on the Board's agenda for consideration of the commutation of his sentences from death to life without parole. Beginning in 2021, Plaintiff Floyd applied to be put on the Board's agenda to have his plea for a commutation of his sentence considered by the Board. Plaintiff Floyd has consistently applied since that time in each of the application cycles. At the time of this complaint, Plaintiff Floyd has applied to be placed on the Board's agenda over 10 times. Plaintiff Floyd has never been placed on the agenda, nor has his application been considered on the merits.

30. Most recently, Plaintiff Floyd applied for commutation of his sentence on December 3, 2024. Plaintiff Floyd has yet to receive a response from the Board;

however, the Board recently released its agenda for the March 2025 meeting and Plaintiff Floyd's application is not being considered.

31. Out of the numerous applications Plaintiff Floyd has submitted, he has received only four responses from the Board. Ex. 1; Ex. 2; Ex. 3; Ex. 4. These letters are identical boilerplate messages addressed merely to "Pardon Board Applicant," providing a long list of "not inclusive" reasons why an applicant may or may not be placed on the agenda. *Id.* With the exception of the pending "judicial appeals" provision, the remainder of the reasons for denial apply only to an applicant seeking release from confinement into the community. It is further unclear as to which application cycles the letters are in response to, as there is no identifying information in them. While the letters are dated, the dates fall after multiple application cycles for which Plaintiff Floyd had applied.

32. Plaintiff Floyd, as a death row inmate in Nevada, has no meaningful access to the clemency process. His due process rights have been violated by the Board's failure to amend its rules and regulations to protect death row inmates' remaining life interests, ensure minimal procedural safeguards are in place to make the process knowable, and to provide him with a meaningful chance to be heard.

C. Plaintiff Ybarra's Applications

33. On September 13, 2024, the Seventh Judicial District Court issued an "Order Allowing Points and Authorities," which ordered that the parties may file and serve points or authorities which counsel believe provides a legal reason prohibiting the execution of judgment in Plaintiff Ybarra's case. The parties

stipulated that the points and authorities be filed on or before October 11, 2024 rather than the original September 27, 2024 deadline.

34. On October 9, 2024, Plaintiff Ybarra applied to be put on the Board's agenda to seek commutation of his sentence. Of note, the deadline for submission of inmate applications for consideration on the December 2024 agenda was September 18, 2024. Due to the circumstances discussed above, which highlight the unique problems faced by capital clients, Plaintiff Ybarra was unable to apply by this deadline and, thus, had to apply off-cycle.

35. On October 14, 2024, only three business days after Plaintiff Ybarra submitted his application, the Board mailed Plaintiff Ybarra a letter indicating that his application would not be considered. This letter was identical to the boilerplate letters received by Plaintiff Floyd. It was addressed to "Pardons Board Applicant" and contained the long list of "not inclusive" reasons why an applicant may or may not be placed on the agenda.

36. On December 3, 2024, Plaintiff Ybarra again applied to be put on the Board's agenda. Plaintiff Ybarra has yet to receive a response from the Board; however, the Board recently released its agenda for the March 2025 meeting and Plaintiff Ybarra's application is not being considered.

37. Plaintiff Ybarra, as a death row inmate in Nevada, has no meaningful access to the clemency process. His due process rights have been violated by the Board's failure to amend its rules and regulations to protect death row inmates' remaining life interests, ensure minimal procedural safeguards are in place to make the process knowable, and to provide him with a meaningful chance to be heard.

VII. Claims for Relief

38. The United States Supreme Court and the Ninth Circuit have both acknowledged that "some minimal procedural safeguards apply to clemency proceedings.'" *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999) (quoting *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 274 (1998) (O'Connor, J., concurring in part and concurring in the judgment)). As noted by Justice O'Connor in her concurrence in *Woodard*, "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life." *Woodard*, 523 U.S. at 288. According to Justice O'Connor:

> When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect, as Justice [Stevens's] dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution.

Id. at 289 (O'Connor, J., concurring).

39. With respect to due process considerations, life interests and liberty interests are distinct under the Federal Constitution. Justice O'Connor highlighted this distinction, explaining what "limitations the Due Process Clause may impose on clemency proceedings," at least for capital clemency applicants. *Id.* at 290 (O'Connor, J., concurring). In *Woodard*, the Ohio Parole Authority systematically provided applicants with a hearing, notice of the hearing, and the opportunity to participate in an interview. *Id.* In contrast, Nevada provides no required notice regarding access or denial of access to the Pardons Board in death penalty cases. Nor have Plaintiffs been provided with an opportunity to fairly present their requests for commutation to any member of the Board. The Nevada provisions fail

to protect Plaintiffs' minimal due process rights and have created a situation where "the State arbitrarily denied [Floyd and Ybarra] any access to its clemency process." *Id.* This falls below the procedure sustained in *Woodard* and constitutes a violation of Plaintiffs' procedural and substantive due process rights.

40. The Board has failed to enact, or even consider, proper rules and regulations to allow a capital inmate access to Nevada's commutation procedure. The process therefore fails to comply with minimal due process requirements of notice and an opportunity to be heard.

Count I: Lack of meaningful access to the commutation process and a lack of procedural safeguards violates Plaintiffs' due process rights.

41. Plaintiffs reallege and incorporate herein by reference all of the preceding paragraphs of this Complaint as if set forth in full below.

42. Plaintiffs have a constitutional right to due process under Article I, Section 8(2) of the Nevada Constitution and under the Fourteenth Amendment to the United States Constitution.

43. Due process applies to clemency applications and proceedings for death row inmates in their ability to meaningfully access the process. "[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). *Mathews* identifies three factors courts should consider in evaluating the requirements of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

> procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

44. Here, all three factors weigh in Plaintiffs' favor. Plaintiffs have a private interest in their own life. The risk of erroneous deprivation is great, as the deprivation of life through a state-sanctioned execution is irrevocable. The Legislature and the Nevada Constitution establish provisions for a death row inmate to seek commutation of their sentence, and thereby creates a clear and compelling interest in fair access to the clemency process. *See* Nev. Const. Art. 5 § 14; NRS 213.030, 213.080, 213.085, 213.1099. Moreover, the United States Supreme Court has recognized that "process is not an end in itself," and "its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

45. While clemency decisions themselves are not usually a question for the courts, as noted in *Woodard*, "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Woodard*, 523 U.S. at 289. Here, Plaintiffs are being denied access to the clemency process in violation of their due process rights. These concerns implicate not just Plaintiffs' procedural due process rights but also their substantive due process rights, as the substantive unfairness resulting from the Board's failure to provide minimally knowable

procedures in the face of the regulations discussed above and below are disproportionate to their stated purpose as applied to death row inmates facing imminent execution. And the cost involved in promulgating knowable procedures in compliance with state law is minimal.

1. The vagueness and unknowability of the process to access the Board's commutation authority violates Plaintiffs' due process rights.

46. Considered singly or cumulatively, the following provisions of the Nevada Administrative Code ("NAC") violate Plaintiffs' right to have meaningful access to the Board to seek commutation of their death sentence due to the unknowability, vagueness, and lack of safeguards they provide:

47. NAC 213.055(2) states:

> Except as otherwise provided in subsection 4, a member of the Board may select an application for clemency for the consideration of the Board at a meeting notwithstanding the procedures and criteria established by the Secretary pursuant to subsection 1, any regulation of the Board or the recommendation or absence of a recommendation from the Director of the Department or the Chief Parole and Probation Officer. A member of the Board who wishes to select an application for the consideration of the Board must inform the Secretary of the selection not less than 50 days before the date of the meeting at which the Board will consider the application, unless the member demonstrates good cause for a shorter period of time.

48. NAC 213.055(4) states: "Before a meeting of the Board, the Governor may remove from consideration any application for clemency that has been selected for the consideration of the Board."

49. NAC 213.107 states: "Except as otherwise provided in subsection 2 of NAC 213.055, the Board will not consider an application for clemency if other forms of judicial or administrative relief are reasonably available to the applicant."

50. NAC 213.120, entitled "Death Penalty," states:

> 1. Except as otherwise provided in subsection 2 of NAC 213.055, the Board will not consider an application for a pardon or the commutation of a punishment submitted by a person sentenced to the death penalty unless the person has exhausted all available judicial appeals.
>
> 2. If a death penalty is being considered, the presence of the Governor is required and any judgment must be made by a majority of the members of the Board.

Under NRS 233B.040, these provisions of the NAC are given the same weight as law:

> 1. To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law and shall adopt such regulations as are necessary to the proper execution of those functions. If adopted and filed in accordance with the provisions of this chapter, the following regulations have the force of law and must be enforced by all peace officers:
>
> (a) The Nevada Administrative Code . . . .

51. When determining whether a statute or regulation is vague and violates due process generally a two-factor test under the void-for-vagueness doctrine is used. Vagueness exists if a statute or rule: "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, here by encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Silvar v. Eighth*

Judicial Dist. Court ex rel. County of Clark, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Here, as stated above, the relevant provisions of the administrative code have the "force of law" as any other statute. As such, they are analyzed under the same two-factor test for unconstitutional vagueness.

a) Nevada's clemency provisions are unconstitutionally vague.

52. The provisions in NAC 213.120 and NAC 213.055 are vague and create an unconstitutional violation of due process with respect to access to the commutation process in Nevada for death row inmates. It is unclear what "judicial appeals" the requirements are referencing as a precondition to seeking commutation. The term is not defined, nor is it limited in any capacity to a form of litigation such as a habeas petition. It could be read to apply only to litigation that impacts the sentence, but could also apply to other forms of litigation a death row inmate pursues—such as a challenge to the lethal injection protocol, which could be ongoing up until the point of death.[8] In their Criteria for Evaluation of Inmate Applications for Clemency, the Board states that "judicial remedies must be

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[8] The Nevada statutes do not require any advance notice to a death row inmate regarding the lethal injection protocol that will be used in his execution. *See* NRS 176.355. And the current execution protocol adopted by the Nevada Department of Corrections only provides for seven days notice of the execution protocol. *See* Execution Manual, Section 103.01(B). The execution protocol also provides that the Director may change the protocol as well as the drugs used in the protocol even after written notice is given but before the execution. EM 103.01(B)(1). These sections of the execution protocol are not currently posted on NDOC's website unlike other sections of the execution manual. *See* https://doc.nv.gov.

exhausted prior to being eligible for clemency review."[9] But again, the Board provides no further guidance on what this provision means. The absence of a definition is problematic as it does not inform a death row inmate whether they are expected to forego available litigation in order to gain access to the Board's commutation procedures. The Board also does not provide any specific instructions or considerations for death row inmates.

53. There is also no notice of any kind to the applicant within the provisions to inform a death row inmate if a Board member pulled their application, and the Governor overrode that decision.[10] The two-factor test from *Silvar* renders these statutes vague because these provisions: (1) fail to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited in terms of judicial appeals and/or other forms of relief; and (2) lack notice to the applicant regarding whether the application was not considered based on these requirements. Consequently, these provisions fail to prevent the arbitrary and discriminatory obstruction of clemency access for death row inmates in Nevada. *See Silvar v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark,* 122 Nev. 289, 293, 129 P.3d 682, 685 (2006).

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[9] *See* Board of Pardons, *Criteria for Evaluation of Inmate Applications for Clemency*, https://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/About/Criteria%20for%20the%20Evaluation%20of%20Inmate%20Applications%20for%20Clemency%202023.pdf (last visited Sept. 23, 2024).

[10] This provision is inconsistent with the Nevada Constitution as explained below. *See* Claim II.

54. NAC 213.107 states that an application for clemency will not be considered if "judicial or administrative relief are reasonably available." However, it is unclear what "reasonably available" means. Then, NAC 213.120 uses mandatory language regarding available judicial appeals: "the person has exhausted all available judicial appeals." These provisions fail to provide minimal notice of what is required of death row inmates who have available avenues of litigation.

55. Further, the Board has already illustrated that this rule is not necessarily enforced as a matter of practice as in the past year alone they have disregarded it multiple times, which further showcases how arbitrary access is.

56. While NAC 213.107, 213.120, and the Board's own application instructions and criteria state that cases under appeal and/or with available relief will not be considered, at the June 2023 meeting the Board placed Sally Villadere's case on the agenda. Villadere had an active, pending habeas petition in federal district court at the time.[11] The Board would have been aware of this active case before placing him on the agenda, as the Application for Commutation of Sentence requires an applicant to disclose if an applicant's case is "under appeal in a Nevada or Federal Court" or if they plan to appeal their case in the future. Nevada Pardons Board, *June 2023 Timeline*, https://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/Meetings/2023/june%20timeline.pdf at 3, (last visited Sept. 23, 2024).

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[11] Villaverde had filed a petition for writ of habeas corpus on November 8, 2021, in federal district court. *See Villaverde v. Hutching et al.*, Case No. 2:21-cv-01595-GMN-BNW. This case was not resolved until 2024.

57. The Board continued Villadere's case to the September 2023 meeting for further consideration. Ultimately, Villadere was not granted his requested commutation, but his case shows how those rules and regulations are inconsistently and arbitrarily applied. During this meeting it appeared that the Board was not in full agreement on how to handle cases with pending appeals. During the September 2023 meeting, the Board heard Villadere's case,for the second time even though there was a pending action. Justice Herndon noted that the Nevada Administrative Code (NAC) made references to pending appeals being a potential barrier to placement on the agenda, and expressed concerns about the Attorney General not participating due to a conflict. This started a discussion as to these provisions not being mandatory due to NAC 213.055(2). The Board even solicited legal counsel for the applicant's position on this issue. *Nevada Board of Pardons September 2023 Meeting*, at 3:31:39–3:45:54/5:20:18, pardons.nv.gov/uploadedFiles/pardonsnvgov/content/Meetings/2023/092023_PardonsBoard.mp3. The case was ultimately continued for a third time for the federal habeas case to resolve so that the Attorney General could participate. *Id.* at 3:45:46–3:45:48/5:20:19. However, this public discussion shows how unclear the rules and regulations are. The Board has the power to disregard its rules and regulations in an arbitrary and capricious manner, but when and how it does so is unclear.

58. Villadere's case is not unique. During the March 2024 meeting, the Board had Mia Christman on the agenda as a community case. While Christman was not in custody, she had an active case that was highly publicized due to pending litigation between Christman and the District Attorney's office, the state

district court, and the Nevada Supreme Court. *See* Vanessa Murphy, *Las Vegas Judge's Controversial Decision at Center of Woman's case*, April 18, 2024, https://www.8newsnow.com/investigators/las-vegas-judges-controversial-decision-at-center-of-womans-case/. Yet, despite pending judicial action and potential appeals, Christman's case was still placed on the agenda and heard.

59. Again, the criteria on the Board's website does nothing to assist an ordinarily intelligent person in determining what is needed regarding judicial remedies in order to pursue clemency, nor does the criteria provide any guidance on how to interpret the provisions contained in NAC 213.

60. While NAC 213.055 may appear to provide a safety valve by allowing the rules and the requirements in NAC 213.120 to be suspended, the provision only makes the problem of arbitrariness worse. NAC 213.055 suggests that any Board member, so long as the Governor does not object, can override the rules set forth in the NAC and the Board's rules. However, this provision only makes the due process issues surrounding the clemency process in the Nevada more unclear, leading to further problems.[12]

61. Although NAC 213.120 includes mandatory language regarding the Board's consideration of an application, NAC 213.055 appears permissive in that a member of the Board can select an application while ignoring the strict limitations in other provisions. However, there are no provisions on how and if an individual

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[12] *See* Claim II regarding improper delegation of powers to the Governor in violation of the state constitution. Plaintiffs incorporates those allegations as if fully set forth herein.

will get notice if this authority was used by any of the Board members and if the Governor removed the application from consideration. The letters Plaintiffs received lack any individuality and do not address any portion of their applications specifically. This lack of notice leaves a death row inmate who seeks commutation of his sentence without any answer or direction on if they received any consideration by the Board.

62. NAC 213.120 and NAC 213.055 provide no meaningful way for a death row inmate to be heard during the clemency process, and at the time of this complaint, Plaintiff Floyd has heard back from the Board less than 40% of the time, and Plaintiff Ybarra has heard back once out of the two times he has applied. Further, while the letters state that "[t]here is no exclusive reason why an application is not approved[,]" this is not consistent with NAC 213.183(3). Under this provision, "[a] list of all applicants who are denied a hearing and the reason for the denial *must* be available for the Board's consideration." (Emphasis added). Thus, there should be specific reasons why Plaintiffs' applications for commutation were not considered. The Board does not state those reasons in the letters provided nor in response to the numerous applications that the Plaintiffs have filed . There is no justification for not providing the actual reason to Plaintiffs that comport with principles of fair notice and avoids an arbitrary and discriminatory obstruction of clemency access. *See Woodard*, 523 U.S. at 289 (O'Connor, J., concurring); *see also Silvar*, 122 Nev. at 293, 129 P.3d at 685

63. The current regulations and rules establishing Nevada's clemency process for death row inmates are unconstitutional, and effectively create a system

where Nevada has "arbitrarily denied a prisoner any access to its clemency process." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring). Moreover, the current regulations violates the Plaintiffs' substantive due process rights as it is constitutionally intolerable for them to be forced to forego available judicial remedies in order to receive the opportunity to seek commutation of their death sentence. *Cf. Simmons v. United States*, 390 U.S. 377, 394 (1968) ("we find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

64. Defendant Dzurenda is responsible for effectuating the death sentence unless the Board stays the execution and/or votes to commute it. Due to the vagueness of the commutation regulations discussed above Dzurenda will execute the Plaintiffs, if ordered by an execution warrant to do so, without allowing them an opportunity to seek commutation of their sentences as provided for under the constitution and the state statutory scheme.

2. The Pardons Board has failed to take into consideration the unique circumstances of a death row inmate in seeking clemency, creating several procedural gaps that violate Plaintiffs' due process rights.

65. As noted above, the Board has not updated its regulations in over a decade. Nor has the Board complied with the review requirements. This has left large gaps in how the Board operates and exercises its power that negatively impacts death row inmates like the Plaintiffs. The Board has failed to provide an avenue to request a stay of execution and failed to take into consideration the

specific litigation a death row inmate is party to during the last stages leading up to a potential execution.

a) The Board has no procedures or instructions in place for a death row inmate to request a stay of execution as required under NRS 176.415.

66. Pursuant to NRS 176.415(1), the Board has the authority to stay an execution. However, NAC 213 and the Board's rules are silent as to this power and the process by which a death row inmate can request the Board invoke it. It is clear by the language used that NRS 176.415 deals with only a stay and not commutation—"[t]he execution of a judgement of death must be stayed only . . ." (Emphasis added.) The Board, the Nevada Administrative Code, and the Nevada Revised Statutes provide no guidance or forum to access a stay or to request the Board invoke its power.

67. It is unclear if asking the Board to invoke this power requires a legal pleading such as a motion, a form similar to the standard application, or a mere email to the secretary. There is no procedure for acknowledging the receipt of such a request or whether it was granted or denied. There is no procedure providing for a real party in interest to respond to the request. There is no procedure by the Board for publishing notice of the grant or denial of such a request. There is further no procedure or criteria to indicate what factors the Board would take under consideration in granting a stay of execution. The Plaintiffs and other death row inmates have no information about how to access a potentially lifesaving form of relief because the Board has completely failed to create procedures to access it. The absence of standards and guidance is prejudicial as death row inmates may receive

as little as three weeks notice of the date of an execution after entry of an execution warrant. *See* NRS 176.495(2) (execution date "must be not less than 15 days nor more than 30 days after the date of the warrant"). This lack of safeguards is the exact sort of situation that Justice O'Conner foresaw warranting judicial intervention. *See Woodard*, 523 U.S. at 289 (O'Conner, J., concurring). This lack of safeguards violates Plaintiffs' due process rights as they may be executed before the Board could consider whether to put their application on an agenda and/or commute their death sentence after a hearing.

b) The lack of procedures to allow a quorum vote in place of the entire Board, in case of a conflict deprives a death row inmate of access to a full and impartial Board.

68. As mentioned in Section V, above, Nevada's Pardons Board membership is a unique outlier. No other state has Supreme Court Justices and the Attorney General as board members deciding whether to grant mercy to those they have already denied relief, fought to keep in custody, or are litigating against in pending litigation. This creates several problems for those seeking access to the clemency process, especially death row inmates such as Plaintiffs.

69. The Attorney General is the chief prosecutor in the state. Along with representing the state in federal habeas matters, the Attorney General also represents the state in civil actions. For example, currently the Attorney General and his office are opposing counsel on Plaintiff Floyd's pending challenge to the

lethal injection protocol.[13] *See Floyd v. Daniels, et al.*, USDC Case No. 3:21-cv-00176-RFB-CLB. This creates the unique circumstance in which a litigation opponent on a pending case must decide whether to hear a commutation request despite a clear conflict, or recuse themselves. Both situations violate Plaintiffs' due process rights.

70. The current Attorney General is Aaron Ford. During recent Board meetings involving conflicts, Attorney General Ford has chosen to recuse himself. This included during both the June and September 2023 meetings in which Sally Villadere was on the agenda and presented.[14] Villadere had a pending habeas petition in federal district court, and the Attorney General's office was opposing counsel in the matter. Villadere's attorney, when asked about the pending petition, noted that Villadere had a pending petition and would be willing to dismiss if it was a condition of getting relief from the Board. Nevada Board of Pardons June 2023 Meeting, at 27:08–27:20/2:52:07, https://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/Meetings/2023/062723_PardonsBoard(1).mp3. The Board continued to move forward with the presentation despite this information, including allowing Villadere to speak directly to the Board. *Id.* at 33:00/2:52:07. While Attorney

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[13] On January 13, 2025, Plaintiff Ybarra filed a Motion to Intervene in this action. The Attorney General and his office filed its non-opposition to this motion on January 28, 2025.

[14] *See* Nevada Board of Pardons, *Meeting Notice and Agenda for June 27, 2023 Meeting*, https://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/Meetings/2023/AGENDA%201(1).pdf; *see also* Nevada Board of Pardons, Meeting Notice and Agenda for June 20, 2023 Meeting, https://pardons.nv.gov/uploadedFiles/pardonsnvgov/content/Meetings/2023/AGENDA%201.pdf09-20-23.pdf.

General Ford recused himself, no substitute was appointed to sit in his place, nor was there a discussion of a quorum vote. That is because there is no mechanism or process by which to obtain a pardon or commutation through a quorum vote. This means that when a Board member recuses themselves, or is not present at a meeting, that vote is counted against the individual requesting commutation.

71. At the June 2023 meeting, Attorney General Ford stated that he was conversing with counsel to decide if he had to abstain or not due to the pending federal action, and that he needed to determine "what [he] can and cannot do here." *Id.* at 28:06–28:33/2:52:07. Ultimately, Attorney General Ford recused himself from the matter. *Id.* at 1:11:13–1:11:45. Attorney General Ford again recused himself from the matter at the September 2023 meeting. *Nevada Board of Pardons September 2023 Meeting*, at 3:35:16–3:36:00/5:20:18, pardons.nv.gov/uploadedFiles/pardonsnvgov/content/Meetings/2023/092023_PardonsBoard.mp3.

72. Villadere's case is not the first time Attorney General Ford has noted the limitations and issues his position places on him as a member of the Board. Indeed, at the December 20, 2022, meeting that addressed commuting all capital sentences to life without parole, Attorney General Ford stated:

> People wonder why I haven't spoke up, I'm sure. It's because I'm wearing several hats right now, one of which is the Pardons Board and I'm the lawyer for the governor. And I'm very cautious of what I say about the issues that we have to concern ourselves with in that regard.

Ex. 5 at 77.

73. While the lack of any rules and regulations to allow a quorum vote may not appear significant, it ensures that many clemency applicants, especially those facing a death sentence, will never have access to the full Board as required by the Nevada Constitution, and would go before the Board with a vote against them before they are even able to begin their presentation.

74. This gap poses a substantial due process violation for death row inmates like Plaintiffs. For an action to pass, the Nevada Constitution requires "[a] majority of members of the State Board of Pardons Commissioners." Nev. Const. Art. 5, § 14(7). The relevant administrative code also echoes these requirements. When the death penalty is being considered, not only is the presence of the Governor required but also "any judgement must be made by a majority of members of the Board." NAC 213.120. There is no mention of a quorum to have a judgment pass—the requirement is not dependent on how many Board members are present but always on the entire nine members of the Board. This creates a higher burden for certain applicants who may have an absent Board member from their presentation, or one who must recuse. And regardless of how compelling a plea for mercy they present, they will already have at least one "missing" vote due to the empty seat. This lack of mechanism for allowing a quorum vote in these circumstances violates procedural and substantive due process guarantees.

75. Because of Nevada's unique process, the absence of a Board member can mean the difference between an application being granted or denied. In the case of *McKinney v. Smith*, McKinney only had seven out of nine board members present due to absences. While McKinney obtained four out of seven votes, the Board's

Executive Secretary "announced that the motion had failed" because the total number of votes was not a majority of the Board as a whole. *McKinney v. Smith*, 126 Nev. 738, 367 P.3d 799, 2010 WL 3929207 (2010) (unpublished table disposition).[15] McKinney appealed to the Nevada Supreme Court. While the court declined to reach the merits of the issue on procedural grounds, in her concurrence Justice Pickering noted that even if the court had reached the question on the merits, it is unlikely the outcome would have been in favor of McKinney as "nothing suggests empowering a quorum majority to act." *McKinney*, 2010 WL 3929207 at *3 (Pickering, J., concurring). The facts in *McKinney* illustrate the importance of having the full Board hear a commutation application as envisioned by the Nevada Constitution. Under the current framework, with no possible system of allowing a quorum vote, it is unlikely that a death row inmate would ever have the ability to present his case to the full Board in violation of their due process rights and the Nevada Constitution.

76. Death row inmates like Plaintiffs are often pursuing judicial remedies up until the moment of their execution. Lethal injection litigation is particularly necessary in a state like Nevada that intends to use a novel and never before used execution protocol, and death row inmates have the right to ensure not only that their execution will not violate the Eighth Amendment, but to litigate the deeply

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[15] Plaintiffs recognize that this case is an unpublished decision issued prior to January 1, 2016, and therefore cannot be cited as authority. NRAP 36(c)(3). This case is not cited for any provision of law, but only to show to as a factual matter what occurred in the *McKinney* case and how a missing Board member can impact a request for commutation.

personal manner of their own death. *See Nance v. Ward,* 597 U.S. 159, 164 (2022). The Attorney General's office is opposing counsel on all these matters, meaning that the Attorney General would likely have to recuse himself on all commutation applications. By failing to ensure proper safeguards are in place to allow an applicant access to a full unconflicted Board by a quorum vote, the Board has placed death row inmates like Plaintiffs in an untenable position.

77. Under the current clemency scheme, Plaintiffs must make the unconscionable choice between access to a full unbiased Board as envisioned by the Nevada Constitution and forgo litigating other valid issues—such as prison conditions or the very manner of his death. Or, most importantly, Plaintiffs could be put in the position of having to waive their right to ensure that their potential execution would be consistent with Eighth Amendment principles. This lack of safeguards is the exact sort of situation that Justice O'Conner foresaw warranting judicial intervention. *Woodard*, 523 U.S. at 289 (O'Conner, J., concurring). And the injustice of being required to forego fruitful judicial remedies in favor of the mere hope that the Board would hear Plaintiffs' applications of commutation violates their substantive due process rights. *Simmons*, 390 U.S. at 394. This failure of the Board in both respects violates Plaintiffs' due process rights.

3. The Board's meeting schedule means commutation is effectively unavailable for a death row inmate facing an active execution warrant.

78. Currently, the Board is required to meet at a minimum "at least quarterly." Nev. Const. Art. 5 § 14(4).[16] While the dates change from year to year, the Board's meetings almost always take place in March, June, September, and December, with applications due roughly three months before each meeting. *See* Nevada Board of Pardons, *Public Meetings*, https://pardons.nv.gov/Meetings/. These strict dates and months between meetings are a concern for death row inmates like Plaintiffs. This problem is particularly acute in light of the Board's alleged rules and restrictions regarding cases with pending judicial appeals. This means that an inmate facing imminent execution must hope to get before the Board before their execution warrant is issued. This is unlikely to occur. Or, forgo judicial appeals in hopes of being placed on the Board's agenda.

79. Under Nevada law, the first warrant must be issued not "less than 60 days nor more than 90 days from time of judgement." NRS 176.345(1)(b). However, any new warrants after that must be executed "not less than 15 days nor more than 30 days after the date of the warrant." NRS 176.495(2). With this expedited time frame, it would be exceedingly difficult for a death row inmate with no pending litigation to be placed on the agenda and have his application heard before an

[16] It has been well over a decade since the Board has amended its regulations, and NAC 213.020(1) currently states that the Board "may meet semiannually or more often." This provision is in direct conflict with the Nevada Constitution.

execution occurs. And the Board has no procedure for when an emergency or special meeting is needed.

80. As discussed above, while NRS 176.415(1) grants the Board the power to issue a stay of execution, it is unknown how to request that the Board exercise that power.

81. The Nevada Administrative Code also contemplates that the Board could hold a special meeting in NAC 213.020:

> 1. The Board may meet semiannually or more often.
>
> 2. Meetings may be held during the second week of November and the second week of May on a date determined by the Board, unless otherwise designated by the Board.
>
> 3. Upon the recommendation of any member of the Board or the Secretary, and with the consent of the Governor, a special meeting of the Board may be held.

82. However, this provision has constitutionally problematic issues. The Board has not amended its regulations in over a decade. And despite a constitutional amendment now requiring the Board to meet four times a year and limiting the Governor's power, NAC 213 has not been amended in any respect to reflect these changes. Here, the Governor retains the ability to make the final decision regarding if a death row inmate facing execution gets an opportunity to seek commutation.[17] This provision still remains after the 2020 amendment and it violates the Nevada Constitution.

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[17] This sort of decision-making power is exactly what the voters rejected in 2020.

83. More importantly, this provision does not provide an avenue, instructions, or any method to request the Board hold a special meeting. NRS 176.495 was last amended in 2003. NRS 176.345 was last amended in 2001. *See generally* https://www.leg.state.nv.us/NRS/NRS-176.html. This occurred years before the Board last updated its regulations. To ensure that death row inmates like Plaintiffs have access to the clemency procedure, the Board should have adopted regulations with clear instructions and safeguards for condemned inmates seeking commutation of their death sentences in the three-week time frame that state law provides for notice of an execution. They did not do so.[18] This lack of safeguards is the exact sort of situation that Justice O'Conner foresaw warranting judicial intervention, and amounts to a due process violation. *Woodard*, 523 U.S. at 289 (O'Conner, J., concurring). This means that even a petitioner who would have otherwise been (1) placed on the Board's meeting agenda and/or (2) received a majority vote in favor of commutation risks execution as death row inmates have no way of meaningfully availing themselves of the process.

84. Defendant Dzurenda is responsible for effectuating Plaintiffs' death sentences unless the Board stays the execution and/or votes to commute it. In light of the practical difficulties faced by a death row inmate discussed above with respect the commutation regulations, Defendant Dzurenda will execute Plaintiffs if

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[18] Of note, in 2010 when the regulations were sent by mail to "all law enforcement agencies in the State of Nevada District Court, to each Nevada District Attorney, and to all persons on the Board of Pardons Commissioner's [] mailing list," no entity representing the defense community was included. *See* https://www.leg.state.nv.us/register/2009Register/R085-09A.pdf at page 17.

ordered by an execution warrant to do so without Plaintiffs having an opportunity to seek a stay of execution and commutation of his sentence as provided for under the constitution and the state statutory scheme.

Count II: Improper delegation of powers violates the separation of powers and Plaintiffs' due process rights.

85. Plaintiffs reallege and incorporate herein by reference all of the preceding paragraphs of this Complaint as if set forth in full below.

86. The Nevada Administrative Code governing the Board unconstitutionally delegates power to place or remove clemency applications with the Governor and the Secretary.

87. "States are not required to structure their governments to incorporate the separation of powers doctrine, but Nevada has embraced this doctrine and incorporated it into its constitution." *Commission on Ethics v. Hardy*, 125 Nev. 285, 291, 212 P.3d 1098 1103, (2009) (citations omitted).

88. Nev. Const. art. 3, § 1 provides that:

> The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive, and Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

Accord Blackjack Bonding v. Las Vegas Mun. Ct., 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) (recognizing that the Nevada Constitution establishes that "each branch of government is considered to be co-equal, with inherent powers to administer its own affairs"); *see also Nat'l Ass'n of Mut Ins. Co. v. State Dept. of*

Bus., 139 Nev. __, 524 P.3d 470, 476 (2023) ("[T]he Nevada Constitution includes a robust separation of powers clause the United States Constitution does not.").

89. The Nevada Supreme Court has recognized that separation of powers principles are "particularly applicable when a constitution expressly grants authorization to one branch of government." *Heller v. Legislature of State of Nevada*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004). "Article 5, § 14 of the Nevada Constitution vests authority to commute punishment and grant pardons exclusively in the State Board of Pardons Commissioners." *Anderson v. State*, 90 Nev. 385, 387 n.1, 528 P.2d 1023, 1024 n.1 (1974) (citations omitted).

1. Improper delegation of powers to the Governor

90. Several of the Board's rules and regulations unconstitutionally delegate power to the Governor in violation of the state constitution.

a) NAC 213.055(4) unconstitutionally delegates power to remove clemency applications in the Governor.

91. "[T]he powers of pardon and commutation have been viewed with a high degree of concern from the time of Nevada's birth as a state. Criminal accountability with its associated penalties is achieved at substantial social cost. We should view with equal importance the prospect of granting relief from lawfully imposed sentences, given the potential cost to society of an undiscerning use of the Board's powers." *Kelch v. Director, Nevada Dept. of Prisons*, 107 Nev. 827, 833, 822 P.2d 1094, 1098 (1991) (Steffen, J., concurring).

92. During the 1863 Nevada Constitutional Convention, there was a discussion of the proposed powers of pardon and reprieve which were initially

vested in the Governor. *Id.* "History reveals [] that the initial proposal vesting all such power in the Governor was changed to include the Governor, the Justices of the Supreme Court and the Attorney General acting by majority rule." *Id.*

93. NAC 213.055(4) grants the Governor authority that the Nevada voters invalidated by constitutional amendment. In 2020, the citizens of Nevada approved changes to the Board of Pardons.[19] Specifically, the people voted to require the Board to meet at least quarterly and authorized the Board to grant pardons and make commutation decisions by a majority vote of members without requiring the Governor to be part of the majority vote. Prior to this constitutional amendment the Governor's "yes" vote was required for pardons and sentence reductions. *McKinney*, Nev. 738, 367 P.3d 799,2010 WL 3929207 (2010) (Pickering, J., concurring) (unpublished) (citing Nev. Const. Art. 5, § 14(1)).

94. Permitting the Governor to remove an item from the agenda, without input from any of the other members, is the functional equivalent of requiring the governor's "yes" vote in order to obtain access to the commutation process. In both instances no relief can be obtained unless the Governor consents. In light of the 2020 amendment to the Nevada Constitution, NAC 213.055(4) is now an impermissible delegation of authority. The Nevada Constitution vests authority to grant commutations and pardons with the entire Board. Nev. Const. art. 5, § 14(1).

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[19] Amy Alonzo, *Ballot Question Results: Voters Recognize Same-Sex Marriage, Narrowly Disagree on State Ed Oversight*, Reno Gazette Journal (Published Nov. 2, 2020, at 11:23 PM; Updated Nov. 16, 2020, at 3:45 p.m.), https://www.rgj.com/story/news/ politics/2020/11/03/election-results-2020-nevada-ballot-measures-voting-questions/6000400002/.

Allowing the Governor to unilaterally remove an item from the agenda is an unconstitutional delegation of the power vested in the Pardons Board.

95. The Governor's ability to remove an application from the schedule is an unconstitutional denial of the opportunity to seek commutation of a death sentence. Based on their approval of a constitutional amendment in 2020, Nevada voters expressly disapproved of requiring the Governor's consent in order to obtain access to the Board's commutation process. Due to the opacity of the process for seeking commutation, Plaintiffs do not know whether the Governor has removed their applications from a proposed schedule. This only exacerbates the due process notice problems with the regulations and the continued existence of these obsolete and invalid regulations violates the separation of powers of the state constitution.

b) NAC 213.055(4) violates Due Process because it deprives applicants of the opportunity to be meaningfully heard.

96. The Fourteenth Amendment to the United States Constitution and Article 1, Section 8(5) of the Nevada Constitution guarantee that no person shall be deprived of life, liberty, or property without due process of law. *Hernandez v. Bennett-Haron*, 128 Nev. 580, 587, 287 P.3d 305, 310 (2012). Due Process requires that individuals receive a fair opportunity to be heard and to present their case before an impartial decision-maker. *Nellis Motors v. State*, 124 Nev. 1263, 1268, 197 P.3d 1061, 1065 (2008).

97. The ability of the Governor to unilaterally remove an item from the agenda violates due process. As set forth above, due process requires the opportunity to be heard. *Mathews*, 424 U.S. at 333. Allowing the Governor to

remove an application that would have otherwise been scheduled deprives an applicant of the ability to have their application heard by the entire Board. *Home Warranty Adm'r of Nev., Inc. v. State Dep't of Bus. and Indus.*, 137 Nev. 43, 48, 481 P.3d 1242, 1248 (2021). Plaintiffs incorporate the allegations of Count I as if fully set forth herein.

c) NAC 213.055(4) lacks any mechanism to ensure that the Governor's removal of an application is not arbitrary or discriminatory.

98. Additionally, NAC 213.055(4) lacks any guidelines for the Governor's decision-making process, creating a risk of arbitrary and discriminatory decisions. The Nevada Supreme Court has upheld statutes against challenges by reasoning that in both instances the legislature had not unlawfully delegated its authority because the provisions at issue contained guidance to ensure decisions were not made arbitrarily. *See Sheriff, Clark County v. Luqman*, 101 Nev. 149, 152–53, 697 P.2d 107, 109–10 (1985) (rejecting argument that an amendment to Uniform Controlled Substances Act (UCSA) delegated authority to the State Board of Pharmacy because the Legislature provided the Pharmacy Board with guidelines and factors to guide their decisions); *Floyd v. Dep't of Corr.*, 139 Nev. __, 536 P.3d 445, 448–49 (2023) (holding that NRS 176.355[20] was not an unconstitutional delegation of authority because it must be read in context with NRS 200.030 and thus, the Legislature identified the types of crimes that are punishable by death

[20] NRS 176.355 provides that: a judgment of death must be inflicted by a lethal drug, sets forth several requirements the Director of the Department of Corrections must complete before and during an execution, specifies the location of an execution, and limits who may attend.

and determined the manner of execution and the Director's discretion in choosing the drugs to be used in an execution). NAC 213.055(4) does not provide any guidance or constrain the Governor's power in any way.

99. As discussed above, there is no actual notice requirement when the Governor removes an application from the agenda. Additionally, due to the lack of guidance in NAC 213.055(4), an application could be removed from the agenda for any reason and there is no requirement that the Governor provide a reason for the removal. The Governor could remove an application for an improper basis and the applicant would have no way to know that it was so removed and no remedy to correct this deprivation.

2. Improper delegation of powers to the Board's Secretary

100. Several of the Board's rules and regulations unconstitutionally delegate power to the Board's Secretary. The Nevada Constitution is clear that "[t]he governor, justices of the supreme court, and the attorney general shall constitute the State Board of Pardons Commissioners." Nev. Const. Art. 5 § 14(1). And it is the State Board of Pardons Commissioners that "upon conditions, and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments." *Id.* at § 14(2).

101. Similarly to how the Nevada Constitution endowed the Board with its pardon power, the Nevada Constitution also granted the judicial power to the court system alone. *See* Nev. Const. art. 5 § 1. In *Bautista v. Picone*, the Nevada Supreme Court held that a district court improperly delegated its decision-making authority

to a parenting coordinator as the "authority was not limited in scope to nonsubstantive issues." 134 Nev. 334, 337, 419 P.3d 157, 160 (2018); *see also Cosner v. Cosner*, 78 Nev. 242, 245, 371 P.2d 278, 279 (1962) ("The constitutional power of decision vested in a trial court in child custody cases can be exercised only by the duly constituted judge, and that power may not be delegated to a master or other subordinate official of the court."). And just as a judge cannot delegate his or her power to a subordinate officer, neither can the Board. Yet, it has done just that through its current regulations.

102. NAC 213.055(1) states that "[t]he Secretary shall establish procedures and criteria for the selection of applications for clemency to be considered by the Board at the meeting." This is a violation of the Nevada Constitution, as the power to establish the criteria is granted to the Board and the Board only. *See* Nev. Const. art 5 § 14(2). No provision in the Nevada Constitution allows for the Board to outsource its procedure and criteria creation to any others—that includes the Board's own Secretary.

103. NAC 213.073 grants the Board's Secretary the power to request the Division of Parole and Probation of the Department of Public Safety (the "Division") to investigate applicants "as the Secretary deems necessary and appropriate." If the investigation reveals information that merely "indicates that the Board may be unlikely to grant a pardon to the applicant," the Secretary on his or her own may remove the application completely from consideration by the Board. *See* NAC 213.073(1). This delegation of power is unconstitutional. This provision grants the Secretary immense power in the substantive decision-making process in place of the

Board members themselves. The Secretary can simply choose to reject an applicant based on their own arbitrary view of what could cause the Board to reject the application, even before the Board sees the application. And again, pursuant to NAC 213.055(1) it is the Secretary who has the power to establish the criteria by which the application is viewed—thus these applicants are being rejected by the Secretary alone, with their own criteria in mind and not the Board's.

104. Under NAC 213.183(2), "the Secretary has the final approval in placing an application on the agenda." NAC 213.183(2). The Nevada Constitution in creating the Board and granting it its powers does not allow any other decision makers to be involved, especially in deciding who gets on the agenda.

105. The Board's current regulations have unconstitutionally delegated broad decision-making powers to its Secretary in violation of the Nevada Constitution. Under the current iteration, the Secretary decides how the applications are viewed and who moves forward in the process, and the Secretary has the power to deny access arbitrarily using criteria he or she creates. An applicant could be removed by the Secretary and the Board may have never seen their application, and the applicant would never know. The Nevada Constitution does not allow for it, and by granting their Secretary broad decision-making powers the Board has violated Plaintiffs' due process rights and the separation of powers.

106. Defendant Dzurenda is responsible for effectuating Plaintiffs' death sentence unless the Board stays the execution and/or votes to commute it. Due to the violation of the separation of powers described above Defendant Dzurenda will execute Plaintiffs if ordered by an execution warrant to do so without Plaintiffs

having an opportunity to seek a stay of execution and commutation of his sentence as provided for under the constitution and the state statutory scheme.

VIII. Prayer for Relief

WHEREFORE, Plaintiffs request the following relief:

1. That this Court assume jurisdiction of this case and set this case for a hearing on the merits.

2. On each claim for relief, a declaratory judgment that the Board and Defendant members of the Board have violated Plaintiffs' rights under Article I, Section 6 (cruel or unusual punishment), Article I Section 8(2) (due process), and Article III, Section 1 (separation of powers) as well as to due process and to be free from cruel and unusual punishment in violation of the Fourteenth and Eighth Amendments of the United States Constitution, and further in violation of the Nevada Constitution's prohibition on cruel or unusual punishment and the right to due process of law. Nev. Const. art 1, § 6, 8.

3. Because the Board is not in compliance with the Nevada Constitution and federal law, a declaratory judgment that no execution of Plaintiffs can take place until the Board and its rules and regulations are legally constituted, and Plaintiffs have had meaningful access to the clemency process, and had an opportunity to be heard by the Board.

4. A stay of execution under NRS 176.415(1) until the Board of Pardons creates procedures for considering stays of execution under the statute, and further provides Plaintiffs with an opportunity to avail themselves of the procedure.

5. Alternatively, a writ of mandamus ordering the Board to stay Plaintiffs' execution under NRS 176.415(1) until the Board has adopted constitutionally adequate regulations and given Plaintiffs the opportunity to seek a stay of execution and apply for commutation under the new procedures.

6. On each claim of relief, a declaratory judgment and injunctive relief stating that the Board, once it amends its rules and regulations to be in compliance with due process requirements, place Plaintiffs' applications on their agenda on the next meeting thereafter.

7. Injunctive relief preventing Defendant Dzurenda from effectuating the death sentence until the Pardons Board has amended its rules and regulations to be in compliance with constitutional requirements and has given Plaintiffs an opportunity to apply for commutation under the new regulations.

8. Any other relief that this Court deems appropriate.

Dated this 29th day of January, 2025.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ David Anthony
David Anthony
Assistant Federal Public Defender

/s/ Jocelyn S. Murphy
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 29, 2025 a true and correct copy of the foregoing document was filed electronically with the Eighth Judicial District Court. Electronic service shall be made in accordance with the master service list as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD and ROBERT YBARRA, JR., Plaintiff(s), vs. NEVADA BOARD OF PARDONS COMMISSIONERS AND THEIR SECRETARY, in their official capacities; and JAMES DZURENDA, DIRECTOR OF NEVADA DEPARTMENT OF CORRECTIONS, in his official capacity; Defendant(s).	Case No. A-25-911260-C Dept. No. 6 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Denying Plaintiffs' Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction was entered on the 26th day of June, 2025, a copy of which is attached hereto as Exhibit "A".

Dated: June 27, 2025.

AARON D. FORD
Attorney General

By: /s/ *Jessica E. Whelan*
Jessica E. Whelan (Bar No. 14871)
Chief Deputy Solicitor General

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on June 27, 2025, I filed the foregoing document via this Court's electronic filing system. Parties that are registered with this Court's EFS will be served electronically.

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EXHIBIT A

ODM
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DISTRICT COURT

CLARK COUNTY, NEVADA

ZANE MICHAEL FLOYD and ROBERT YBARRA, JR., Plaintiff(s), vs. NEVADA BOARD OF PARDONS COMMISSIONERS AND THEIR SECRETARY, in their official capacities; and JAMES DZURENDA, DIRECTOR OF NEVADA DEPARTMENT OF CORRECTIONS, in his official capacity; Defendant(s).	Case No. A-25-911260-C Dept. No. 6 **[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, OR, IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION**

Plaintiffs, Zane Michael Floyd and Robert Ybarra, Jr., moved this Court to enter a temporary restraining order or, in the alternative, a preliminary injunction to prohibit Defendant Dzurenda from carrying out any execution of either Plaintiff Floyd or Plaintiff Ybarra before they have had meaningful access to a constitutional commutation process. After reviewing the pleadings and papers on file herein, this COURT HEREBY ENTERS the following findings of facts, conclusions of law, and order.

FINDINGS OF FACT

1. Through their Complaint, Plaintiffs allege that a lack of meaningful access to the commutation process in Nevada and a lack of procedural safeguards violate Plaintiffs' due process rights. Compl., Count I, ¶¶ 41–84. They further allege the improper delegation of powers violates the separation of powers and Plaintiffs' due process rights. *Id.*, Count II, ¶¶ 85–106.

2. Plaintiffs seek a declaratory judgment that Defendants have violated Plaintiffs' rights under the Nevada Constitution Article I, section 6 (cruel and unusual punishment), Article I, section 8(2) (due process), Article III, section 1 (separation of powers), Article V, section 14 (division of responsibilities of Pardons Board), as well as Plaintiffs' rights to due process and to be free from cruel and unusual punishment under the Fourteenth and Eighth Amendments to the United States Constitution. Compl., p. 44.

3. On March 31, 2025, Plaintiffs filed a Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction ("Motion"). Therein, Plaintiffs argued that they were likely to succeed on the merits because the current rules and regulations of the Nevada State Board of Pardons Commissioners ("Pardons Board") do not meet the requirements of the basic elements of due process and the Pardons Board's rules and regulations unlawfully delegate powers to the Governor and the Pardons Board Secretary. Mot., pp. 4–10.

4. Plaintiffs further argued in their Motion that they will suffer irreparable harm absent a preliminary injunction because "[d]eath is unlike any other harm that can be suffered, particularly because it is final and irreversible," and because "[n]either Plaintiff Floyd nor Plaintiff Ybarra can be compensated adequately through money damages if or when Defendants execute them in violation of their rights." Mot., p. 11.

5. Finally, Plaintiffs argued that the threatened injury to Plaintiffs—execution without meaningful access to a constitutionally compliant clemency process—outweighs any arguable injury to Defendants—e.g., a delay in carrying out Plaintiffs' executions.

/ / /

6. In response, on April 14, 2025, Defendants filed an Opposition to Motion to Temporary Restraining Order, or in the Alternative, for Preliminary Injunction ("Opposition"). Therein, Defendants argued that Plaintiffs could not demonstrate a likelihood of success on the merits because the Nevada Supreme Court has rejected similar challenges to Nevada's clemency procedures, the case law cited by Plaintiffs does not support their argument, and other states have rejected similar challenges to clemency procedures. Opp., pp. 3–9.

7. Defendants further argued that Plaintiffs could not sufficiently show irreparable harm because, on April 14, 2025, the Nevada Supreme Court issued a stay of Plaintiff Ybarra's execution warrant and because Plaintiff Floyd does not currently have an outstanding warrant of execution. Opp. pp. 9–10.

8. Finally, Defendants argued that the public interest in favor of enforcing criminal judgments outweighs Plaintiffs' interest in access to clemency procedures. Opp., p. 10. To that end, Defendants argued that "there is no entitlement to clemency, only an entitlement to apply for clemency," and that both Plaintiffs have availed themselves of the right to apply for clemency. *Id.* Because Plaintiffs had not, and could not show that, even if Nevada's clemency procedures were amended to cure any perceived deficiency, they would be granted clemency, Plaintiffs' interest was minimal. *Id.*

9. On April 21, 2025, Plaintiffs filed their Reply to Opposition to Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction ("Reply"). Plaintiffs disagreed that the Nevada Supreme Court had considered the precise issues raised in Plaintiffs' Complaint and Motion. Reply, pp. 2–4. Plaintiffs likewise attempted to distinguish the authorities from other jurisdictions cited by Defendants. *Id.*, pp. 9–12.

10. Plaintiffs argued that imminence at all times is not required to satisfy the irreparable injury inquiry; rather, Plaintiffs posited that Nevada law requires only a "reasonable probability that real injury will occur if the injunction does not issue." Reply, p. 13 (quoting *Berryman v. Int'l Broth. Of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966)).

11. Finally, Plaintiffs reiterated their position on the balancing of the public interest, arguing that injunctive relief would serve the public interest. Reply, p. 14–15.

12. On May 8, 2025, the Court held a hearing on the Motion, at which counsel for both Plaintiffs and Defendants presented oral argument.

CONCLUSIONS OF LAW

13. "A preliminary injunction[1] is proper where the moving party can demonstrate that it has a reasonable likelihood of success on the merits and that, absent a preliminary injunction, it will suffer irreparable harm for which compensatory damages would not suffice." *Excellence Cmty Mgmt. v. Gilmore*, 131 Nev. 347, 350–51, 351 P.3d 720, 722 (2022). "[C]ourts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

14. With respect to the likelihood of success prong, the Nevada Supreme Court has already considered at least two constitutional challenges to Nevada's clemency procedures and upheld their constitutionality in both cases. First, in *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018), the appellant offender challenged the validity of his death sentence "because Nevada has no real mechanism to provide for clemency in capital cases," *Jeremias v. State*, 2015 WL 5928543 (Oct. 1, 2015) (Appellant's Opening Brief). The Nevada Supreme Court rejected this argument, stating that, although "[c]lemency is not required to make a death penalty scheme constitutional . . . . clemency is available through the pardons board." *Jeremias*, 134 Nev. at 59 (citations omitted). Similarly, in *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011), the Nevada Supreme Court rejected claims that Nevada's death penalty scheme forecloses executive clemency or violates the Eighth Amendment. Plaintiffs are correct that the specific regulations they are challenging involve different elements of the procedure than those discussed in the cases above. However,

[1] Because Defendants had notice of the Motion, and because the temporary restraining order standard is stricter than the preliminary injunction standard, which the Court finds Plaintiffs do not satisfy, the Court addresses only the preliminary injunction standard.

because the Nevada Supreme Court has previously considered the whole process and rejected challenges to Nevada's clemency procedures, Plaintiffs have not demonstrated a likelihood of success on the merits, and this factor weighs in favor of Defendants.

15. With respect to the irreparable harm prong, there is no debating that if an execution is wrongfully carried out, irreparable harm exists. However, here, there are no exigent circumstances that exist with respect to Plaintiffs' respective executions. On April 14, 2025, the Nevada Supreme Court issued an Order Granting Motion to Stay Warrant of Execution in Case No. 89824. Thus, Plaintiff Ybarra does not have an execution date set. Likewise, there is no outstanding execution warrant that has been issued for Plaintiff Floyd. Given these circumstances, Plaintiffs have not demonstrated that they will suffer irreparable harm absent issuance of a preliminary injunction, and this factor weighs in favor of Defendants.

16. With respect to the public interest prong, the State and the public have an interest in bringing criminal judgments to finality, particularly after a jury trial. Conversely, the public also has an interest in knowing that state clemency procedures are constitutional. All citizens should know their constitutional rights are protected, including their rights to due process. This factor therefore weighs 50% in favor of Defendants, and 50% in favor of Plaintiffs.

17. Given the balance of the preliminary injunction factors, the Court concludes that Plaintiffs have not met their burden to show that a preliminary injunction is warranted.

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ORDER

IT IS HEREBY ORDERED that Plaintiffs' Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction, is DENIED without prejudice.

Counsel for Defendants shall serve a notice of entry of the order on all other parties and file proof of such service within seven days after the date the Court sends the order to counsel for Defendants.

IT IS SO ORDERED.

Dated this 26th day of June, 2025

kj

204 F71 1A[redacted]
Jacqueline
District Court Judge

Dated this 27th day of June, 2025.

Prepared and respectfully submitted by:

AARON D. FORD
Attorney General

/s/ *Jessica E. Whelan*
Jessica E. Whelan (Bar No. 11543)
Chief Deputy Solicitor General - Litigation
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Attorneys for Nevada Board of Pardons Commissioners, and Their Secretary, and James Dzurenda, Director of Nevada Department of Corrections

Dated this 26th day of June, 2025.

Approved as to content and form:

RENE L. VALLADARES
Federal Public Defender

/s/ *David Anthony*
Randolph M. Fiedler (Bar No. 12577)
Assistant Federal Public Defender
David Anthony (Bar No. 7978)
Assistant Federal Public Defender
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Attorneys for Plaintiff

From: David Anthony
To: Jessica E. Whelan
Cc: Kyle J. Hoyt; Jeny M. Beesley; Randall Gilmer
Subject: RE: Floyd/Ybarra - Draft Proposed Order
Date: Wednesday, June 25, 2025 1:39:34 PM
Attachments: image001.png

Thanks Jessica. You have my permission to affix my electronic signature.

From: Jessica E. Whelan <JWhelan@ag.nv.gov>
Sent: Tuesday, June 24, 2025 2:01 PM
To: David Anthony <David_Anthony@fd.org>
Cc: Kyle J. Hoyt <khoyt@ag.nv.gov>; Jeny M. Beesley <JBeesley@ag.nv.gov>; Randall Gilmer <DGilmer@ag.nv.gov>
Subject: RE: Floyd/Ybarra - Draft Proposed Order

David,

Sorry for the delay on getting back to you. I've accepted your edits in the attached clean version. Please let me know if we may affix your signature.

Thank you,
Jessica

From: David Anthony <David_Anthony@fd.org>
Sent: Friday, June 6, 2025 10:06 AM
To: Jessica E. Whelan <JWhelan@ag.nv.gov>
Cc: Kyle J. Hoyt <khoyt@ag.nv.gov>; Jeny M. Beesley <JBeesley@ag.nv.gov>; Randall Gilmer <DGilmer@ag.nv.gov>
Subject: RE: Floyd/Ybarra - Draft Proposed Order

Jessica:

My apologies for the delay in getting back to you. I have attached a draft order with proposed edits in red line. There were a couple minor grammar issues and Jocelyn's bar number was incorrect so I made those changes in red line. Substantively, I put two additions in the conclusions of law section regarding the likelihood of success and public interest sections. I added comment boxes with the page and line number from the transcript where I took the language from the judge's oral findings.

Please ignore the Spanish language comment formatting boxes. I have no idea what causes them.

Please let me know if you would like to discuss any of the proposed additions/edits. Otherwise, you have my permission to affix my electronic signature and send the proposed order to the court. Thanks.

Dave

From: Jessica E. Whelan <JWhelan@ag.nv.gov>
Sent: Wednesday, June 4, 2025 9:49 AM
To: David Anthony <David_Anthony@fd.org>
Cc: Kyle J. Hoyt <khoyt@ag.nv.gov>; Jeny M. Beesley <JBeesley@ag.nv.gov>; Randall Gilmer <DGilmer@ag.nv.gov>
Subject: Floyd/Ybarra - Draft Proposed Order

David,

I have drafted the attached proposed Findings of Fact, Conclusions of Law, and Order in the Floyd/Ybarra case challenging the Pardons Board procedures (A-25-911260-C). Please let me know if you have any revisions or concerns, or if I may affix your e-signature to the attached.

Thank you,
Jessica

Jessica E. Whelan
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Zane Floyd, Plaintiff(s) vs. Nevada Board of Pardons Commissioners, Defendant(s)	CASE NO: A-25-911260-C DEPT. NO. Department 6

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Denying was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 6/26/2025

ECF Notifications CHU	ecf_nvchu@fd.org
Randolph Fiedler	Randolph_Fiedler@fd.org
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