IN THE SUPREME COURT OF THE STATE OF NEVADA

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| Zane Michael Floyd and Robert Ybarra, Jr.,<br><br>Appellant,<br><br>vs.<br><br>Nevada Board of Pardons Commissioners, James Dzurenda, Director, Nevada Department of Corrections, et al.,<br><br>Appellee. | Case No. 91040<br><br>DEATH PENALTY CASE<br><br>District Court Case No. A-25-911260-C |



Appeal from the Eighth Judicial District Court

# Appellant's Opening Brief

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in Nev. R. App. P. 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

> The Federal Public Defender, District of Nevada, represented Plaintiffs Zane Floyd and Robert Ybarra in the district court proceedings below.

*/s/ David Anthony*
David Anthony
Attorney of record for Plaintiffs

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## I. Jurisdictional Statement

This is an appeal from the district court's order denying Plaintiff/Appellants Zane M. Floyd and Robert Ybarra, Jr.'s Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction. 1AA0228. Notice of Entry of Order was entered on June 27, 2025. 1AA0225. On July 25, 2025, Plaintiffs filed a timely Notice of Appeal. 2AA0261. The district court's order denying Plaintiffs' motion is appealable under NRAP 3A(b)(3) as it is an order in a civil action "refusing to grant an injunction."

## II. Routing Statement

Although appeals involving the grant or denial of injunctive relief are presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(12), this matter must remain with the Nevada Supreme Court because this is a death penalty case. The Nevada Supreme Court retains original jurisdiction over "all death penalty cases." NRAP 17(a)(1).

## III. Statement of the Issues Presented for Review

1. Did the district court abuse its discretion by denying Plaintiffs' Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction?

1(a). Whether the Nevada Board of Pardons Commissioners unconstitutionally denies capital inmates access to the clemency process by: first, failing to provide a mechanism for requesting a stay of execution; second, failing to provide clear regulations for capital applicants; third, failing to provide a procedure guaranteeing capital inmates the due process requirements of notice and meaningful participation; and fourth, failing to establish a quorum voting procedure that accounts for conflicts of interest?

1(b). Did the district court err by failing to consider Plaintiffs' arguments under Article 5, Section 14 of the Nevada Constitution concerning the improper delegation of authority by the Board to the governor and the executive secretary?

1(c). Did the district court misapply the "irreparable harm" standard when Plaintiffs remain under real, active threats that the State will issue warrants for their executions, which will trigger deadlines requiring Defendant James Dzurenda to execute Plaintiffs in three weeks, and will have the effect of making any efforts to seek clemency unavailable?

1(d). Did the district court err by weighing the public interest factor in equipoise when Defendants and the public share Plaintiffs' interests in the existence of a constitutional clemency process?

## IV. Statement of the Case

This appeal arises from the district court's denial of Floyd and Ybarra's Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction. Plaintiffs seek to enjoin Defendant Dzurenda from carrying out their executions because the Board of Pardons Commissioners' current rules and regulations fail to provide them meaningful access to the clemency process in violation of both the state and federal constitutions. U.S. CONST. amends. VIII, XIV; NEV. CONST. art. 1, §§ 6, 8, art. 4, § 21. Plaintiffs also assert that the Board's regulations violate the separation of powers provision of Article 5, Section 14 of the Nevada Constitution.[1]

The undisputed facts of this case are as follows[2]:

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[1] Floyd previously raised these issues in a habeas petition but this Court declined to consider them because they are not a challenge to the conviction or sentence. *See Floyd v. Gittere*, 559 P.3d 1275, at *2 (Nev. 2024).

[2] All facts are admitted by Defendants in their Answer to the Complaint and are therefore uncontested. 1AA0237.

Plaintiff Zane Floyd[3] is a death row inmate in the custody of the Nevada Department of Corrections ("NDOC") at High Desert State Prison in Indian Springs, Nevada. Plaintiff Robert Ybarra, Jr.,[4] is also a death row inmate in the custody of NDOC at High Desert State Prison.[5]

The Nevada Board of Pardons Commissioners ("the Board") is a constitutionally created agency made up of the seven justices of the Nevada Supreme Court, the Governor, and the Attorney General. NEV. CONST. art. 5, § 14. The Secretary of the Board also has a role in the consideration of commutation applications. Defendant James Dzurenda is the Director of NDOC, which conducts mental health evaluations of inmates seeking commutation for the Pardons Board, and the Director

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[3] A detailed statement of the facts of the offenses for which Floyd was convicted and sentenced to death may be found in the direct appeal opinion of this Court. *See Floyd v. State*, 118 Nev. 156, 42 P.3d 249 (2002).

[4] Similarly, a detailed statement of the facts of the offenses for which Ybarra was convicted and sentenced to death may be found in the direct appeal opinion of this Court. *See Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984).

[5] At the time that the original complaint was filed, Plaintiff Ybarra was housed by NDOC at Ely State Prison in Ely, Nevada. He has since been transferred back to High Desert State Prison.

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 has statutory authority to effectuate the death sentence. NRS 176.355.

The Board and the NDOC Director are required to perform certain functions by the Nevada Constitution, statutes, and regulations. However, the Board has not always followed these requirements.

In 2020, the Nevada Constitution was amended to require that the Board meet quarterly and to clarify that the governor need not vote with the majority of the Board in order for an action to be taken.[6] Despite this amendment, and the administrative code directing the Board to adopt necessary regulations, the Board itself has not amended its rules and regulations to comply with the constitutional amendment.

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[6] Amy Alonzo, *Ballot Question Results: Votes Recognize Same-Sex Marriage, Narrowly Disagree on State Ed Oversight*, Reno Gazette Journal (Nov. 18, 2025, at 5:32 PM), https://www.rgj.com/story/news/politics/2020/11/03/election-results-2020-nevada-ballot-measures-voting-questions/6000400002/. [hereinafter Alonzo].

Similarly, the Board is statutorily 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." *Id.* The Board has not submitted a report regarding review of its regulations in over a decade.

Since 2021, Floyd has submitted applications to be placed on the Board's agenda for commutation of his sentences from death to life without parole. On the occasions where he has received responses, those responses have been form letters 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.[7] Except for the "pending judicial appeals" provision, the remainder of the reasons for denial apply only to an applicant seeking release from confinement into the community. With no identifying information in these letters, it is unclear to which application cycles the denial letters correlate.

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[7] Floyd provided all response letters that he had received at the time of the filing of his Motion as exhibits. 1AA0049–56.

Although the letters are dated, the dates fall after multiple application cycles for which Floyd had applied.

Ybarra first applied to be put on the Board's agenda on October 9, 2024, to seek commutation of his sentence.[8] On October 14, 2024, only three business days after Ybarra submitted his application, the Board mailed him a form letter, identical to the letters received by Floyd, indicating that his application would not be considered. Since then, Ybarra has submitted applications to be placed on the Board's agenda for commutation of his sentence without success. Like Floyd, Ybarra continues to receive form denial letters with no information to identify the specific reason the application was not placed on the agenda.[9]

On January 29, 2025, Plaintiffs filed a complaint for declaratory and injunctive relief, or, in the alternative, mandamus relief, to protect their rights to access Nevada's clemency process before the State effectuates warrants for their executions. 1AA0001.

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[8] Of note, the deadline for submission of inmate applications for consideration on the December 2024 agenda was September 18, 2024. Ybarra applied "off cycle," or after the deadline.

[9] *See* Request to Take Judicial Notice, Exs. 1–4, filed contemporaneously with this opening brief.

On March 26, 2025, the Seventh Judicial District Court issued a warrant scheduling the execution of Ybarra during the week of April 14, 2025. 1AA0165. On March 31, 2025, Ybarra and Floyd filed a Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction to enjoin Defendant Dzurenda from conducting the executions of Plaintiffs before the district court could make a final determination of whether their constitutional rights had been violated by the Pardons Board. 1AA0161.

On April 14, 2025, the State opposed Plaintiffs' motion, arguing that Floyd and Ybarra were unlikely to succeed on the merits.1AA0171. The State argued this Court had already rejected Plaintiffs' argument; that Justice O'Connor's concurring opinion in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), did not merit the weight Plaintiffs argued; and finally, that other states had also rejected similar challenges to state clemency procedures. 1AA0173-179.

Plaintiffs filed their Reply to the State's opposition on April 21, 2025. 1AA0183.

Oral argument on the motion was held on May 8, 2025. 1AA0207. On June 26, 2025, the district court entered an order denying the motion. 1AA0225–228.

This appeal follows.

## V. Summary of the Argument

The district court abused its discretion in denying Plaintiffs' Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction. The district court did not consider Plaintiffs' delegation of powers arguments regarding the Board's unlawful delegation of authority to the governor and the executive secretary. Moreover, when considered as a whole, the Board's current regulations amount to an arbitrary deprivation of the right to seek clemency based on: (1) the absence of a mechanism for seeking a stay of execution; (2) the absence of clear guidelines for capital inmates to seek commutation; (3) the absence of safeguards to prevent the arbitrary deprivation of the right to seek commutation; and (4) the absence of a quorum voting procedure in case of conflicts.

The district court also abused its discretion in failing to appropriately weigh the other factors warranting issuance of

preliminary relief. The court erred in weighing the irreparable harm factor by importing an unsupported imminence requirement into the analysis. Despite the current absence of active execution warrants, Plaintiffs have demonstrated an imminent risk of irreparable harm given that the short time between the issuance of a warrant and the date of execution does not permit meaningful litigation. Moreover, the threat of execution is very real—Plaintiff Ybarra has already faced one execution warrant during the course of this litigation. An execution warrant for either could come at any time and deprive Plaintiffs of an opportunity to fully litigate their claims, as well as their lives. The court further erred by weighing the public interest factor in equipoise when both Defendants and the public have an acknowledged interest in ensuring the constitutionality of the Board's clemency procedures.

## VI. Argument

### A. Standard of Review

This Court reviews the denial of a temporary restraining order, and/or preliminary injunction, for an abuse of discretion. *See State ex rel. Off. of Att'y Gen., Bureau of Consumer Prot. v. NOS Commc'ns, Inc.*, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004). Questions of law are

reviewed de novo. *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

### B. Plaintiffs are likely to succeed on the merits.

"A party seeking a preliminary injunction must show a likelihood of success on the merits of their case." *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018). However, the party need not establish "certain victory"; rather, they need only "make a prima facie showing through substantial evidence that [they are] entitled to the preliminary relief requested." *Shores*, 134 Nev. at 507, 422 P.3d at 1242.

Here, Plaintiffs have demonstrated a sufficient likelihood of success to warrant preliminary injunctive relief. The Board of Pardon Commissioners' rules and regulations fail to provide capital inmates with meaningful access to the commutation process as required by state and federal constitutional law. *See* U.S. CONST. amends. VIII, XIV; NEV. CONST. art. 1, §§ 6, 8, art. 4, § 21. Furthermore, the Board's regulations improperly delegate its power to the governor and the Board's executive secretary in violation of the Nevada Constitution. Nev. Const. art. 5, § 14. And, given that this Court has never evaluated the constitutionality

of the substance of the Board's procedures, the district court erred in denying preliminary injunctive relief on the ground that prior decisions from this Court preclude Plaintiffs' challenge.

### 1. The Board's rules and regulations violate the state and federal constitutions by preventing capital petitioners from meaningfully accessing clemency proceedings.

A state cannot deprive a person on death row of their life without due process. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–89 (1998) (O'Connor, J., concurring) ("A prisoner under a death sentence remains a living person and consequently has an interest in his life."). Thus, when a state elects to establish proceedings through which a death row inmate may seek clemency, due process requires those proceedings to encompass at least "minimal" procedural safeguards. *Creech v. Idaho Comm'n of Pardons & Parole*, 94 F.4th 851, 855–56 (9th Cir. 2024) (emphasis omitted), *cert. denied*, 144 S. Ct. 1027 (2024); *accord Wilson v. U.S. Dist. Ct.*, 161 F.3d 1185, 1187 (9th Cir. 1998) (holding that clemency petitioner's allegation that he lacked notice of the issues to be considered in his clemency proceeding "state[d] a claim of a violation of due process").

The Board's commutation procedures fail to provide the minimal safeguards required to satisfy the state and federal constitutional guarantees of due process. Even the opportunity to participate in an interview—a basic element of fair procedure—is lacking. *See Creech*, 94 F.4th at 855–56 (explaining that notice and the opportunity to participate in an interview "generally satisfy the demands of the Due Process Clause"); *accord Woodard*, 523 U.S. at 289–90 (O'Connor, J., concurring). Moreover, by failing to account for the unique circumstances of capital cases and providing ambiguous instructions to capital petitioners, the current procedures "arbitrarily den[y]" capital petitioners "any access to [the] clemency process." *Creech*, 94 F.4th at 855 (quoting *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring)).

First, although Nevada law expressly authorizes the Board to stay an execution, *see* NRS 176.415(1), the Board provides no mechanism for seeking such relief. Neither the relevant statutory scheme nor the Board's regulations state how and where a condemned inmate may request a stay. *See* NRS 213.005–100; NAC 213.005–205. Given that Nevada law requires an execution to occur just three weeks after a warrant is issued, *see* NRS 176.495(2), but the Board meets only

quarterly, *see* NEV. CONST. art. 5 § 14(4), the absence of an available procedure for seeking a stay of execution creates the risk that a person who would have otherwise received a hearing and/or commutation will be executed before the Board can consider their plea for mercy. Denying an individual the opportunity to apply for clemency based on the timing of their execution warrant is "wholly arbitrary." *See Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013) (per curiam) (citing *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring)) ("[D]ue process concerns might be implicated in a situation in which the clemency proceeding's outcome is wholly arbitrary[.]"), *cert. denied*, 571 U.S. 948 (2013).

Second, the Board's regulations regarding eligibility are vague and ambiguous, preventing a capital inmate from ascertaining what is required of them in order to apply for clemency. Specifically, NAC 213.120 provides that the Board "will not consider an application" from a capital petitioner unless they have "exhausted all available judicial appeals." Likewise, the Board's Criteria for the Evaluation of Inmate Applications for Clemency indicate that "judicial remedies must be

exhausted prior to being eligible for clemency review."[10] But the Board offers no further guidance regarding the application of this requirement in the capital context. It is unclear whether it applies only to litigation concerning the validity of an inmate's conviction and sentence, or whether it encompasses other forms of litigation—such as claims regarding an individual's competency to be executed or method of execution challenges—that capital inmates regularly pursue until the moment of execution. The vagueness of the Board's eligibility criteria permits it to "arbitrarily den[y]" capital inmates "any access to its clemency process" without identifying how they can conform their applications to the Board's requirements. *See Woodard*, 523 U.S. at 289 (O'Connor, J., concurring).

Third, the Board's rules and regulations fail to encompass even "the most basic elements of fair procedure." *See Creech*, 94 F.4th at 855 (quoting *Woodard*, 523 U.S. at 292 (Stevens, J., concurring in part and

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[10] *See* Board of Pardons, *Criteria for the 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 Oct. 20, 2025).

dissenting in part)). As previously noted, the Board's procedures do not include "an opportunity to participate in a[n] . . . interview." *Cf. id.* at 855–56 (identifying the opportunity to interview as one of several procedural safeguards that "generally satisfy" due process). The Board's rules and regulations also fail to furnish adequate notice of the issues to be considered in its evaluation of clemency applications: not only are the Board's eligibility criteria for capital petitioners vague and ambiguous, as explained above, but Board members are not required to adhere to the Board's established criteria and procedures when selecting applications for consideration. *See* NAC 213.055(2). Clemency petitioners therefore lack notice of what issues the Board considers in determining whether to sponsor an applicant or place a case on its agenda. *See Wilson v. U.S. Dist. Ct.*, 161 F.3d 1185, 1187 (9th Cir. 1998) (holding "a lack of adequate notice of the issues to be considered [in clemency proceedings] implicates a fundamental right of due process"). The absence of these minimal procedural safeguards—clearly defined eligibility criteria, notice of the issues to be considered, and an opportunity to interview—violates due process. *See Creech*, 94 F.4th at 855–56.

Finally, the Board's failure to establish a quorum voting procedure, without having nonvoting members count against the applicant, when Board members have a conflict of interest or are otherwise absent deprives capital petitioners of access to a full, unconflicted Board. To receive clemency, an applicant must receive votes from the majority of the Board's nine members. NEV. CONST. art. 5, § 14(7). If a Board member recuses themselves or is unable to appear, that member's absence counts as a vote against the applicant. For example, one non-capital petitioner was denied a pardon because, although he received votes from four of the seven Board members present at his hearing—a majority—those four votes did not constitute a majority of the entire nine-member Board. *McKinney v. Smith*, 126 Nev. 738, 367 P.3d 799, 2010 WL 3929207 (2010) (unpublished disposition).[11]

The absence of a quorum voting procedure particularly impacts capital petitioners. Individuals on death row often pursue litigation

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[11] While *McKinney* is an unpublished decision predating January 1, 2016, and therefore cannot be cited as legal authority, *see* NRAP 36(c)(3), Plaintiffs reference this case for purposes of demonstrating what occurred as a factual matter.

until the moment of their execution. Nevada's attorney general, one of the nine members of the Pardons Board, serves as opposing counsel in such litigation, as well as in capital inmates' federal habeas proceedings. Indeed, Attorney General Ford currently represents NDOC in a 42 U.S.C. § 1983 action challenging NDOC's execution protocol brought by Plaintiffs in federal court. *See Floyd v. Dzurenda*, Case No. 3:21-cv-00176-RFB-CLB. And Attorney General Ford has previously recused himself from consideration of Pardons Board cases when active litigation gave rise to a conflict of interest on his part.[12]

The Nevada attorney general's categorical self-recusal in capital clemency cases is equivalent to a permanent vote against clemency for capital inmates. This is "wholly arbitrary." *See Schad*, 732 F.3d at 947. Moreover, the absence of a single additional Board member heightens a

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[12] *See 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 (Attorney General Ford recusing himself because clemency applicant had a pending federal habeas proceeding in which his office served as opposing counsel); *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 (same).

capital petitioner's burden: when only seven Board members participate in consideration of a clemency petition, acquiring favorable votes from a simple majority of those Board members is insufficient to obtain clemency. *See McKinney*, 126 Nev. at 738, 367 P.3d at 799. Thus, due to the absence of a quorum voting procedure, a capital petitioner's outcome in clemency proceedings is dependent on the "wholly arbitrary" factor of whether all eight unconflicted Board members are able to participate in the proceedings. *See Schad*, 732 F.3d at 947. For all of these reasons, the Board's clemency procedures lack the minimal procedural safeguards required to satisfy state and federal due process guarantees.

The Board's regulations violate Plaintiffs' right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 4, Section 21 of the Nevada Constitution. As explained above, the absence of an available procedure for seeking a stay of execution from the Board means that an individual may be arbitrarily deprived of the opportunity to apply for clemency based on the timing of their execution warrant. *See* NRS 176.495(2) (requiring an execution to occur three weeks after a warrant is issued); NEV. CONST. art. 5 § 14(4) (requiring the Board to meet no more than quarterly).

There can be no rational basis for treating clemency applicants differently based on the date on which their execution warrant is issued. *See FCC v. Beach Comms., Inc.*, 508 U.S. 307, 313–15 (1993) (holding classifications involving neither a suspect class nor a fundamental constitutional right violate equal protection if no reasonably conceivable state of facts "could provide a rational basis for the classification"); *Armijo v. State*, 111 Nev. 1303, 1304, 904 P.2d 1028, 1029 (1995) ("We have interpreted the standard of the Equal Protection Clause of the Nevada Constitution to be the same as the federal standard[.]"). The distinction between an individual whose execution timeline aligns with the Board's schedule for receiving and reviewing applications and one whose execution timeline falls outside of the Board's regular meeting calendar bears no "rational relationship" to any "legitimate governmental purpose." *Romer v. Evans*, 517 U.S. 620, 635 (1996). As a result, disparate treatment of clemency applicants based on this distinction violates state and federal equal protection principles.

Finally, the Board's regulations violate the prohibitions on cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution and the prohibition against cruel or unusual

punishment contained in Article 1, Section 6 of the Nevada Constitution. These protections recognized under both the state and federal constitutions serve to curtail the arbitrary imposition of punishment. *See Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976) (explaining that the Eighth Amendment requires limitations on a sentencer's discretion "to minimize the risk of wholly arbitrary and capricious action"); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("The Eighth Amendment stands to assure that the State's power to punish is 'exercised within the limits of civilized standards.'") (Stewart, Powell, & Stevens, JJ., concurring); *see also* John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 NW J. L. & Soc. Pol'y 307, 334 (Spring 2018) ("Blackstone saw the prohibition against cruel and unusual punishment as constraining arbitrary and discretionary power."). By arbitrarily denying capital petitioners access to Nevada's clemency process—a crucial safety valve to a death sentence—the Board's regulations contravene the federal and state prohibitions on cruel and/or unusual punishment.

Accordingly, the Board's rules and regulations violate the state and federal constitutional guarantees of due process, equal protection, and freedom from cruel and/or unusual punishment by arbitrarily depriving death row inmates of meaningful access to the clemency process.

### 2. The Board's regulations unlawfully delegate the Board's commutation power to the governor and the Board's executive secretary.

The Nevada Constitution grants the power to commute punishment to the Board and the Board alone. NEV. CONST. art. 5 § 14(2). A majority of the Board's members must agree in order to act, *id.* § 14(6), and the governor is no longer required to vote with the majority. *Compare* 1981 Nev. Stat. 2097 *with* 2019 Nev. Stat. 4613. Nevertheless, in contravention of the Board's constitutional mandate, the Board's regulations have delegated its authority to the governor and the Board's executive secretary.

Although Nevada voters eliminated the requirement that the governor vote with the Board's majority in 2020,[13] the Board's

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[13] Alonzo, *supra* note 6.

regulations continue to grant the governor the ability to unilaterally remove an applicant from consideration. *See* NAC 213.055(4). In addition, a "special meeting" of the Board—that is, a meeting outside the Board's regular quarterly schedule—cannot occur without the governor's consent.[14] *See* NAC 213.020(3). Permitting the governor to remove a petition from the agenda or decline to hold an off-calendar meeting without input from any other Board member is the functional equivalent of requiring the governor's favorable vote. Either way, no relief is available without the governor's consent. This violates the Nevada Constitution as amended in 2020. *See* NEV. CONST. art. 5, § 14(1). And, because these regulatory provisions authorize the governor to unilaterally reject clemency applications without establishing any constraints on arbitrary or discriminatory decision-making, the regulations are an unconstitutional delegation of the power vested in the Board. *See id.* § 14(2).

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[14] The availability of an off-calendar meeting is crucial for capital petitioners, given that an execution must occur just three weeks after a warrant is issued and, as discussed above, no mechanism exists for seeking a stay of execution from the Board.

The Board has also unlawfully delegated its power of commutation to its executive secretary. Under the Nevada Constitution, only the Board has authority to set "conditions" for, and establish "limitations" and "restrictions" on, the availability of pardons and commutations. *See id.* § 14(2). However, the Board's regulations authorize the secretary to "establish procedures and criteria for the selection of applications for clemency to be considered" at the Board's quarterly meetings. NAC 213.055(1). Similarly, the Board's regulations give the executive secretary "the final approval in placing an application on the agenda." NAC 213.183(2).

These regulations delegate powers vested in the Board alone to its executive secretary without restriction. No constitutional provision authorizes the Board to outsource the establishment of clemency procedures and criteria—let alone the power to unilaterally remove an applicant from consideration—in such a manner.

Accordingly, the Board's regulations improperly delegate its power of commutation to the governor and the Board's executive secretary in contravention of the Nevada Constitution and separation of powers principles.

### 3. The district court erred in concluding that this Court previously decided the constitutionality of the Board's regulations.

In finding that Plaintiffs did not demonstrate a likelihood of success on the merits, the district court reasoned that "the Nevada Supreme Court has previously considered the whole [clemency] process and rejected challenges to Nevada's clemency procedures." 1AA0231–232. This was error. This Court has never considered whether the Board's procedures pass constitutional muster.

The district court cited two prior decisions from this Court in support of its contrary conclusion: *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018), and *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). But, in both cases, the appellants argued only that "Nevada does not grant clemency to death penalty inmates" as "a practical matter," citing the fact that just one death sentence has been commuted in Nevada since the reinstatement of the death penalty. *Jeremias v. State*, No. 67228, 2015 WL 5928543 (Oct. 1, 2015) (Appellant's Opening Brief); *Nunnery v. State*, No. 51870, 2009 WL 8589307, at *78–79 (Mar. 6, 2009) (Appellant's Opening Brief). Neither defendant contested the constitutionality of the Board's procedures.

The district court stated that "the specific regulations [Plaintiffs] are challenging involve different elements of the [clemency] procedure than those discussed in" *Jeremias* and *Nunnery*. 1AA0231–232. However, this statement misapprehends the issue that was presented in those cases. The defendants in *Jeremias* and *Nunnery* did not assert that any element of the clemency procedure violated due process; rather, they argued that the Board's historical refusal to commute death sentences rendered clemency effectively unavailable to death row inmates. In other words, the issue raised by the defendants concerned the availability of clemency generally, not the constitutionality of the Board's clemency procedures.

The precise holdings in *Jeremias* and *Nunnery* confirm the limited scope of the appellants' challenges. In *Jeremias*, this Court rejected the appellant's claim that executive clemency is unavailable to death row inmates on the ground that "clemency is available through the pardons board." *Jeremias*, 134 Nev. at 59, 412 P.3d at 54–55. And, in *Nunnery*, the Court held that it had "previously rejected similar challenges," citing *Colwell v. State*, 112 Nev. 807, 812, 919 P.2d 403, 406–07 (1996). *Nunnery*, 127 Nev. at 782–83, 263 P.3d at 257. *Colwell*, in turn, was

confined to the question of whether NRS 213.085—which prohibits the commutation of a sentence of death or life imprisonment without the possibility of parole imposed after July 1, 1995, to a sentence that would allow parole—abrogated executive clemency altogether. *Colwell*, 112 Nev. at 812, 919 P.2d at 406–07 (holding that NRS 213.085 does not render Nevada's death penalty scheme unconstitutional because it does not entirely eliminate the Board's clemency power). In each of these cases, the Court addressed a narrow question: whether clemency is available to death row inmates as a general matter.

Here, Plaintiffs do not dispute that Nevada has established a procedure through which capital inmates can seek clemency. Instead, Plaintiffs argue that the clemency procedure currently in place violates the state and federal constitutional guarantees of due process, equal protection, and freedom from cruel and/or unusual punishment, because the Board's rules and regulations arbitrarily deny capital inmates access to clemency proceedings. Plaintiffs also allege that the Board's regulations unconstitutionally delegate its commutation power to the governor and the Board's executive secretary—a claim that the district court failed to address. *See* 1AA0231–232.

The nature and scope of the relief sought in the instant case further underscores that the issues Plaintiffs now raise are distinct from the question presented in *Jeremias* and *Nunnery*. In *Jeremias* and *Nunnery*—both of which were direct appeals from judgments of conviction—the defendants sought invalidation of their capital sentences. *See Jeremias*, 2015 WL 5928543; *Nunnery v. State*, 2009 WL 8589307. By contrast, Plaintiffs seek a significantly narrower remedy: the opportunity to seek commutation pursuant to constitutionally valid procedures before Plaintiffs are executed. The distinction between the relief sought in the instant case and that sought in *Jeremias* and *Nunnery* reflects the difference in the substance of the arguments presented.[15] Hence, contrary to the district court's conclusion, no prior decisions from this Court preclude the instant challenge.

Plaintiffs have, therefore, satisfied their burden of demonstrating a likelihood of success on the merits. *See Shores*, 134 Nev. at 505, 422

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[15] Further, this Court has held a challenge to the Board's regulations is not cognizable in a postconviction petition, and as such it also could not have considered this issue in *Jeremias* and *Nunnery*. *See Floyd v. Gittere*, 559 P.3d 1275, 2024 WL 4865438, at *2 (Nev. 2024).

P.3d at 1241. The district court's contrary decision was erroneous and an abuse of discretion.

### C. Plaintiffs will face irreparable harm without injunctive relief.

The district court concluded "there is no debating that if an execution is wrongfully carried out, irreparable harm exists," however, the court found that Plaintiffs had not demonstrated they would suffer irreparable harm due to not having active execution warrants. 1AA0232. This was in error.

Constant imminence is not a requirement for injunctive relief. Under NRS 33.010(3), injunctive relief is warranted "[w]hen it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." This Court only requires a "reasonable probability that real injury will occur if the injunction does not issue." *Berryman v. Int'l Broth. of Elec. Workers*, 82 Nev. 277, 280, 416 P.2d 387, 389 (1966) (citing *Sherman v. Clark*, 4 Nev. 138, 142 (1868)). There is a reasonable and real probability that Plaintiffs will

again face execution throughout the litigation of this case. Given that both Plaintiffs have had active orders and/or warrants of execution within the past four years, the threat is real and not theoretical as required by *Berryman* and *Sherman*.

In the proceedings below, Defendants denied that "the risk of erroneously depriving Plaintiffs of their life interests is great, as Plaintiffs lawfully have been sentenced to death." 1AA0242. Defendants also argued that the State has an interest in enforcing its judgments. 1AA0180. These statements, and Defendants' failure to allow Plaintiffs meaningful clemency access even with active execution warrants in the past, give rise to the likelihood that they would continue to not provide adequate access with an active warrant. There is more than a reasonable probability that a real injury will occur if the injunction does not issue. *See Berryman*, 82 Nev. at 280, 416 P.2d at 389. An imminent risk of irreparable harm is present because under NRS 175.495, if a new warrant were to issue, it must be executed "not less than 15 days nor more than 30 days after the date of the warrant." Thus, there would not be time for meaningful litigation to occur. Moreover, Plaintiffs face

not only the real threat of their own execution, but the psychological injuries that come with an imminent execution date.

Death is unlike any other harm that can be suffered, particularly because it is final and irreversible. As such, it is an injury "for which compensatory damage is an inadequate remedy." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351, 353 P.3d 720, 723–24 (2015) (quoting *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987)). Any favorable outcome following further litigation on this issue will be useless for Plaintiffs if their executions are not preliminarily enjoined. For these reasons, irreparable harm warranting injunctive relief is established, this factor weighs in favor of Plaintiffs, and the district court's decision was erroneous, or in the alternative, an abuse of discretion.

### D. Injury to Plaintiffs outweighs any arguable injury to Defendants, the State, and the public.

The district court found that with respect "to the public interest prong . . . [t]his factor weighs 50% in favor of Defendants and 50% in favor of Plaintiffs." 1AA0232. The court concluded that the State and public have an interest in bringing criminal judgments to finality, but

that the "public also has an interest in knowing that the state clemency procedures are constitutional" and that "[a]ll citizens should know their constitutional rights are protected, including their rights to due process." *Id.*

However, the same interests the district court mentioned are also admittedly shared by Defendants. Defendants acknowledged that "among the government's interests in its capital punishment scheme is a concern for fair access to the clemency process." 1AA0242. This factor should not have been weighed equally if even Defendants acknowledge the State of Nevada's interest is in part the same as Plaintiffs'.

The district court therefore erred in weighing this factor equally as the public and the parties both have the interest in seeing Nevada's citizens' rights protected in the context of the execution process. *See In re: Kemmler*, 136 U.S. 436 (1890); *see also Legal Aid Soc'y of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402, 1409 (D. Haw. 1997) ("[P]erhaps no greater public interest exists than protecting a citizen's rights under the constitution.").

And while the State has an interest in seeing finality in its criminal judgments, a mere stay of execution to allow Plaintiffs to avail

themselves of a constitutionally adequate clemency process will have little adverse effect and would not cause substantial harm to the State or the public. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) ("mere delay" does not constitute irreparable harm). This is particularly true when considered against Plaintiffs' "strong interest in being executed in a constitutional manner." *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011). The court's conclusions below did not address how constitutionally compliant capital clemency regulations and rules would meaningfully impede finality. In fact, the opposite is true. Ensuring the Board's regulations comply with constitutional requirements would advance the State's interest in finality, as it would include a knowable process for seeking clemency.

Lastly, Defendants here are the Board, their Executive Secretary, and the NDOC Director, not the State of Nevada itself. The district court considered the potential hardships as to the State and the public, but not between the parties. *See* 1AA0232; *Univ. and Cmty. Coll. Sys. of Nev.*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Unlike situations where the State's interests are represented by a district attorney's office or the attorney general's office, here the Board has a distinct interest in

ensuring its regulations comply with constitutional requirements, particularly considering the recent voter referendum amending Article 5, § 14(6). NDOC also has an interest in making sure the executions it conducts comply with constitutional requirements. The district court failed to apprehend these issues in its analysis. Had the court weighed the potential hardships of the relative parties, the results of its balancing test would have led to a different outcome. Instead, the court erroneously imputed the interests of the State to Defendants.

For these reasons, this factor weighs in favor of Plaintiffs, and the district court's decision below was an abuse of discretion.

### E. The district court abused its discretion in weighing the preliminary injunction factors.

The district court abused its discretion when it did not issue an injunction prohibiting NDOC from carrying out Plaintiffs' executions until they have access to a constitutionally adequate clemency process. *Att'y General v. NOS Communications,* 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004) (quoting *United States v. Nutri-cology, Inc.,* 982 F.2d 394, 397 (9th Cir.1992)). Given the balance of preliminary injunction factors,

Plaintiffs request that this Court reverse with instructions to grant the requested injunction.

## CONCLUSION

Plaintiffs request that this Court reverse the district court's order denying their Motion for Temporary Restraining Order, or, in the Alternative, for Preliminary Injunction and remand the case with instructions to enjoin NDOC from carrying out any execution until the Board of Pardons Commissioners promulgates constitutionally adequate rules and regulations that provide Plaintiffs with meaningful access to the commutation process and allow them to apply for commutation under those procedures.

Dated this 25th day of November, 2025.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,478 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of November, 2025.

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## CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2025 I electronically filed the foregoing document with the Nevada Supreme Court by using the appellate electronic filing system. The following participants in the case will be served by the electronic filing system:

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## APPENDIX OF RELEVANT AUTHORITY

The following relevant authorities are provided to the Court pursuant to NRAP 28(f).

> **NEV. CONST. art. 5 § 14: State Board of Pardons Commissioners; remission of fines and forfeitures; commutations and pardons; suspension of sentence; probation**
>
> 1. The governor, justices of the supreme court, and attorney general, shall constitute the State Board of Pardons Commissioners.
>
> 2. The State Board of Pardons Commissioners may, upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments, except as provided in subsection 3, and grant pardons, after convictions, in all cases, except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons.
>
> 3. Except as may be provided by law, a sentence of death or a sentence of life imprisonment without possibility of parole may not be commuted to a sentence which would allow parole.
>
> 4. The State Board of Pardons Commissioners shall meet at least quarterly.
>
> 5. Any member of the State Board of Pardons Commissioners may submit matters for consideration by the State Board of Pardons Commissioners.

6. A majority of the members of the State Board of Pardons Commissioners is sufficient for any action taken by the State Board of Pardons Commissioners.

7. The legislature is authorized to pass laws conferring upon the district courts authority to suspend the execution of sentences, fix the conditions for, and to grant probation, and within the minimum and maximum periods authorized by law, fix the sentence to be served by the person convicted of crime in said courts.

**NRS 176.415: When execution of death penalty may be stayed**

The execution of a judgment of death must be stayed only:

1. By the State Board of Pardons Commissioners as authorized in Section 14 of Article 5 of the Constitution of the State of Nevada;

. . . .

**NRS 213.017 Secretary of Board: Appointment; qualifications; duties**

1. The Chair of the State Board of Parole Commissioners shall appoint a person to serve as Secretary of the State Board of Pardons Commissioners.

2. The Secretary must be selected on the basis of his or her training, experience, capacity and interest in correctional services.

3. The Secretary shall perform such duties as are required by the Board, including, but not limited to:

(a) Preparing the agenda for meetings of the Board;

(b) Providing notification to victims on behalf of the Board and the State Board of Parole Commissioners; and

(c) Establishing and facilitating the procedures by which a person may apply to have a fine or forfeiture remitted, a punishment commuted, a pardon granted or his or her civil rights restored by the Board.

**NRS 213.030 When notice of application not required**

No notice shall be required of an application for:

1. A restoration to citizenship to take effect at the expiration of a term of imprisonment; or

2. The commutation of the death penalty.

**NAC 213.020 Meetings**

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.

**NAC 213.040 Availability and submission; time limit**

1. A person seeking clemency, or any person acting on behalf of such a person, must submit an application to the Board in accordance with the instructions prescribed by the Secretary. An application for clemency may be obtained from the Secretary at 1677 Old Hot Springs Road, Suite A, Carson City, Nevada 89706. In addition, an application for the commutation of a punishment may be obtained from the wardens of institutions and facilities of the Department in accordance with the instructions prescribed by the Secretary.

2. Except as otherwise provided in subsection 3, an application for a pardon, the remission of a fine or forfeiture or the commutation of a punishment must be submitted to the Secretary not less than 90 days before a semiannual meeting of the Board.

3. The Governor may prescribe a shorter period for a special hearing of the Board.

**NAC 213.055 Procedures and criteria for selection of applications for consideration by Board; additional selections**

1. The Secretary shall establish procedures and criteria for the selection of applications for clemency to be considered by the Board at a meeting. The Secretary shall:

(a) Post the procedures and criteria on the Internet website maintained by the Board; and

(b) Make the procedures and criteria available for public inspection at the primary office of the Secretary.

2. 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.

3. Members of the State Board of Parole Commissioners and the Director of the Department may provide to the Secretary the names of inmates who may merit consideration for clemency.

4. 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.

**NAC 213.107 Availability of judicial or administrative relief**

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.

**NAC 213.120 Death penalty**

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.

**NAC 213.125 Requirements for reapplication**

Any person whose application for clemency has been considered by the Board and who has been denied favorable action by the Board may not reapply for clemency unless:

1. The person shows a substantial change of circumstance that merits consideration by the Board; or

2. The Board provided instructions to the person at a previous hearing and the person has demonstrated that he or she has complied fully with the instructions.

**NAC 213.183 Recommendation of Director to accompany application; approval of Secretary**

1. The application of an inmate who is selected for consideration by the Board must be accompanied by a recommendation by the Director of the Department to the Secretary.

2. Except as otherwise provided in NAC 213.055, the Secretary has the final approval in placing an application on the agenda. Except as otherwise provided in NAC 213.077, upon such approval, the applicant will be granted a hearing at a regularly or specially called meeting of the Board.

3. A list of all applicants who are denied a hearing and the reason for the denial must be available for the Board's consideration.