No. 24-_____
CAPITAL CASE

In the Supreme Court of the United States

MARCELLUS WILLIAMS,

Petitioner,

v.

STATE OF MISSOURI EX REL. GOVERNOR MICHAEL L. PARSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITION FOR WRIT OF CERTIORARI

TRICIA J. ROJO BUSHNELL
MIDWEST INNOCENCE PROJECT
3619 Broadway Blvd. #2
Kansas City, MO 64111

HANNAH FITZSIMONS
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013

CHARLES A. WEISS
Counsel of Record
JONATHAN B. POTTS
BRYAN CAVE LEIGHTON PAISNER LLP
211 N. Broadway
Suite 3600
St. Louis, MO 63102
(314) 259-2000
caweiss@bclplaw.com
jonathan.potts@bclplaw.com

Counsel for Petitioners

Execution Scheduled for September 24, 2024 at 6:00 p.m. Central

QUESTIONS PRESENTED

The former Governor of Missouri granted Marcellus Williams an eleventh-hour stay of execution. By executive order, the Governor formed a special Board of Inquiry under Mo. Rev. Stat. §552.070, directed the Board to investigate Williams' case, ordered the Board to issue a report and recommendation whether to grant clemency, and stayed Williams' execution "until . . . the Governor makes a final determination" on clemency. Before the Board completed the process, however, the current Governor dissolved the Board and revoked the stay of execution. Williams' execution is now set for September 24, 2024.

The Supreme Court of Missouri held the Governor could terminate Williams' special clemency proceedings because "a capital offender retains no protectible due process interest within the clemency process." App. 14a. The court further held that the Governor could revoke the stay at "any time" as a matter of "discretion" because the stay of execution "create[d] no rights." App. 7a. The questions presented are:

1. Whether the State of Missouri will deprive Williams of his life without due process by executing him after the Governor initiated a special process to evaluate Williams' request for clemency, but the next Governor terminated that process before its completion.

2. Whether the State will deprive Williams of his life without due process by executing him when the Governor revoked his stay of execution without completing the State's self-imposed conditions for lifting the stay.

PARTIES TO THE PROCEEDING

Petitioner is Marcellus Williams, who is the plaintiff in the trial court and the real party in interest in the writ proceedings.[1]

Respondent is Governor Michael Parson, who is a defendant in the trial court and the relator in the writ proceedings.

Attorney General Andrew Bailey was a defendant in the trial court, but he was dismissed before the writ proceedings.

[1] The Hon. S. Cotton Walker is the circuit judge in the trial proceedings, who served as the nominal respondent in the writ proceedings before the Supreme Court of Missouri. Williams defended the trial court ruling in the name of the respondent. *See State ex rel. Burtrum v. Smith*, 206 S.W.2d 558, 564 (Mo. 1947).

RELATED PROCEEDINGS

State ex rel. Parson v. Walker, No. SC100352 (Mo.) (opinion and judgment issued on June 4, 2024; rehearing denied on July 12, 2024)

State ex rel. Parson v. Walker, No. WD86751 (Mo. Ct. App.) (order issued on November 30, 2023)

Williams v. Parson, et al., No. 23AC-CC05323 (Cir. Ct. Cole Cnty., Mo.) (order issued on November 16, 2023; judgment entered on September 3, 2024)

State v. Williams, No. SC83934 (Mo.) (death warrant issued on June 4, 2024; opinion overruling motion to withdraw warrant of execution issued on July 12, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marcellus Williams respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

INTRODUCTION

Clemency has existed in Anglo-American law for nearly 1,300 years. *Herrera v. Collins*, 506 U.S. 390, 412 (1993). "[S]ince the British Colonies were founded, clemency has been available in America," *id.* at 414, first with colonial governors and today with State governors, William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 497–501 (1977). Clemency has survived the ages because of the "unalterable fact that our judicial system, like the human beings who administer it, is fallible." *Herrera*, 506 U.S. at 14 (internal footnote

omitted). By making clemency available, the government not only "soften[s] the rigour of the general law," 4 W. Blackstone, Commentaries on the Law of England 390 (1769), but provides a "'fail safe" against wrongful convictions, *Herrera*, 506 U.S. at 415.

Today, 27 States and the federal government permit capital punishment. Every one of those jurisdictions has codified procedures for seeking clemency by constitution, statute, or both. Until recently, there was "no debate that death-row prisoners have a limited cognizable due-process interest in their state clemency proceedings." *Zack v. Gov. of Fla.*, No. 23-13021, 2023 WL 6376654, at *3 (11th Cir. Sept. 26, 2023). The existence of a protected life interest was uncontroversial because "[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). The decision below, however, changed that landscape. The Supreme Court of Missouri departed from the Court's holding in *Woodard* and the subsequent holdings of at least 15 other State and federal courts by concluding that "a capital offender retains no protectible due process interest within the clemency process." App. 14a.

The facts are compelling. Just hours before the State of Missouri carried out Williams' death sentence, Governor Eric Greitens halted the execution because of newly discovered DNA evidence. For only the third time in Missouri history, the Governor formed a special Board of Inquiry under Mo. Rev. Stat. §552.070 with a specified purpose: to investigate Williams' case and issue a report and

recommendation to the Governor whether to grant clemency. The Governor stayed Williams' execution until that process was complete and the Governor had made the final clemency determination.

The Board worked for the next six years. According to the Supreme Court of Missouri, however, none of that work mattered. Before the Board delivered its report and recommendation, Governor Michael Parson pulled out the rug beneath Williams' feet by dissolving the Board and lifting the stay of execution. The court below upheld the Governor's actions by holding that Williams had no due process rights in the clemency process, or even in the stay of execution that saved his life. App. 7a, 12a.

Contrary to the decision below, *Woodard* did *not* hold that capital prisoners lack due process rights during clemency proceedings. *Woodard* also did not declare open season for Governors to revoke their predecessors' exercises of clemency. Instead, *Woodard* merely upheld Ohio's clemency procedures for death penalty cases by rejecting a capital prisoner's request for additional procedural rights not found in Ohio law. The controlling opinion explained that the Due Process Clause of the Fourteenth Amendment requires "minimal procedural safeguards" in State clemency proceedings for death penalty cases to protect a capital prisoner's life interest; found Ohio's existing procedural safeguards to be sufficient; and concluded there was no purpose in remanding the case for an as-applied challenge because Ohio officials had complied with those procedures. 523 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment).

By rejecting the existence of *any* due process rights, the decision below directly conflicts with this Court's holding in *Woodard*. The decision also created or deepened conflicts among lower courts on the following issues of national importance: (1) whether Chief Justice Rehnquist's opinion or Justice O'Connor's opinion is the controlling opinion regarding due process rights in *Woodard*; (2) whether, in death penalty cases, the Due Process Clause of the Fourteenth Amendment allows State officials to terminate State-created clemency proceedings before their completion; and (3) whether recipients of State clemency possess protected interests that cannot be revoked without due process. The Court should grant certiorari to resolve these exceptionally compelling issues in a matter of life or death.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri (App. 1a–16a) is reported at 690 S.W.3d 477. The court's order denying rehearing (App. 17a) is not reported. The summary order of the Missouri Court of Appeals denying Governor Michael Parson's petition for a writ of prohibition (App. 18a) is unreported. The order of the Circuit Court of Cole County, Missouri denying Governor Michael Parson's motion for judgment on the pleadings (App. 19a–29a) is unreported.

JURISDICTION

The Supreme Court of Missouri entered judgment on June 4, 2024. App. 1a–16a. The court denied the timely motion for rehearing on July 12, 2024. App. 17a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amdt. 14, §1.

42 U.S.C. §1983 provides, in relevant part:

> **Civil action for deprivation of rights.** Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Article IV, §7 of the Missouri Constitution provides:

> **Reprieves, commutation and pardons—limitations on power.** The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

Mo. Rev. Stat. §552.070 provides:

> **Power of governor to grant reprieves, commutations and pardons.** In the exercise of his powers under Article IV, Section 7 of the Constitution of Missouri to grant reprieves, commutations and pardons after conviction, the governor may, in his discretion, appoint a board of inquiry whose duty it shall be to gather information, whether or not admissible in a court of law, bearing upon whether or not a person condemned to death should be executed or reprieved or pardoned, or whether the person's sentence should be commuted. It is the duty of all persons and institutions to give information and assistance to the board, members of which shall serve without remuneration. Such board shall make its report and recommendations to the governor. All information gathered by the board shall be received and held by it and the governor in strict confidence.

STATEMENT OF THE CASE

I. Factual Background

In 2001, Williams received a death sentence for first-degree murder. E20.[2] The victim, Felicia Gayle, was brutally stabbed with a kitchen knife inside her home in 1998. E20. Police investigators recovered head and pubic hairs from the carpet around Ms. Gayle's body. E20. Those hairs did not come from Williams. E31. Investigators also located bloody footprints leading away from Ms. Gayle's body. E20. Those footprints did not match Williams' shoe or size, nor those of Ms. Gayle's husband or any first responders. E25. Investigators also located bloody fingerprints, which they subsequently lost. E20, E31.

At trial, the prosecution acknowledged to the jury that it lacked forensic evidence that connected Williams to the crime scene. E31. There were also no eyewitnesses to the crime. Instead, the prosecution relied on testimony from a jailhouse snitch and Williams' ex-girlfriend, who were both interested in receiving a $10,000 reward from the victim's family. E31. As a result, the prosecution's case rested on these two witnesses' hearsay testimony that Williams had confessed to the murder. Before trial, the State used its peremptory strikes to eliminate six of seven Black jurors from the venire. E32. The jury found Williams guilty and sentenced him to death. E32; *see also State v. Williams*, 97 S.W.3d 462 (Mo. 2003).

In 2015, Williams sought habeas corpus relief from the Supreme Court of Missouri, requesting DNA testing on the knife used in the murder. E32. The court

[2] Citations to "E_" refer to the Exhibits filed with the Supreme Court of Missouri.

appointed a special master, stayed Williams' execution, and ordered the DNA testing, which subsequently established that Williams was not the source of the male DNA on the kitchen knife. E22. The court, however, denied habeas corpus relief without issuing an opinion on the merits and instead set an execution date of August 22, 2017. E33. Williams applied to this Court for a stay of execution and petitioned for a writ of certiorari, which was denied. *See Williams v. Larkins*, 583 U.S. 902 (2017).

Williams also applied to Governor Eric Greitens for clemency and requested the appointment of a special Board of Inquiry to review the available evidence and provide the Governor with a recommendation on Williams' application for clemency. E172. By statute, a Governor may only form a Board of Inquiry for a death penalty case. *See* Mo. Rev. Stat. §552.070.

On August 22, 2017, just hours before Williams' execution, the Governor issued Executive Order 17-20 and halted the execution. E172–73. For only the third time in Missouri's history, the Governor took the exceptionally rare step of forming the Board as requested by Williams. E23, E172. To establish the Board, the Governor "invoke[d]" §552.070 and appointed five retired judges as members. E172. The Governor granted the Board subpoena power, directed the Board to "consider all evidence presented to the jury, in addition to [the] newly discovered DNA evidence, and any other relevant evidence not available to the jury," and ordered that "[t]he Board shall assess the credibility and weight of all evidence." E172. The Governor further ordered that the Board "shall report and make a recommendation to the Governor as to whether or not Williams should be executed or his sentence of death commuted." E173.

Accordingly, the Governor "order[ed] a stay of execution for Williams until such time as the Governor makes a final determination as to whether or not [Williams] should be granted clemency." E173.

The Board began its investigation and solicited significant information from Williams' legal team and the Missouri Attorney General's Office.[3] E35. Williams' counsel worked with the Board to reinvestigate and examine various aspects of the underlying case. E35. Williams' counsel also made presentations to the Board, suggested lines of investigation, requested that the Board issue subpoenas, and requested that the Board order additional forensic testing. E39. This process continued through a change in gubernatorial administrations so that, after six years, the Board had not yet issued a report or made its recommendation to the Governor. E21, E35.

On June 29, 2023, before the Board finished the process, Governor Michael Parson terminated the process entirely. E36, E175. Under Executive Order 23-06, Governor Parson "rescind[ed] Executive Order 17-20, thereby dissolving the Board of Inquiry established therein." E21, E175. Governor Parson's executive order continued: "With this Executive Order, I remove any legal impediments to the lawful execution of Marcellus Williams created by Executive Order 17-20, including the order staying the execution." E175.

[3] Under §552.070, [a]ll information gathered by the board shall be received and held by it and the governor in strict confidence." Although this provision does not apply to Williams, out of respect for the process, Williams has not pleaded specific details in publicly available court filings.

II. Proceedings Below

Williams filed a Petition for Declaratory Relief against Governor Parson in Missouri state court. E18. Williams' petition alleges that Governor Parson deprived Williams of life and liberty interests without due process by issuing Executive Order 23-06 and dissolving the Board before the Board's completion of its work as directed in the Executive Order 17-20 and Mo. Rev. Stat. §552.070. E37–45. Williams sought injunctive and declaratory relief under state law and 42 U.S.C. §1983, including a declaration that Governor Parson's executive order is null and void; reinstatement of the original executive order that contained the stay of execution; restoration of the Board; and an injunction against further interference with the Board's mandate. E37–45. In his answer to Williams' petition, Governor Parson refused to admit or deny whether the Board had issued a report and recommendation to him before he issued the executive order.[4] E61. The Governor continued to refuse to disclose this information before the Supreme Court of Missouri. *See* Relator's Br. 77 n.15.

The Governor moved for judgment on the pleadings on the basis that Chief Justice Rehnquist had authored the controlling opinion in *Woodard* and that "procedural due process requirements do not apply in state clemency consideration." E72–99. The trial court denied the motion. E11–12. The trial court held that, "when Governor Greitens appointed the Board of Inquiry to investigate Plaintiff's innocence, that executive order triggered Plaintiff's due process rights." E11–12. The trial court further held that Williams "has a liberty and a life interest in demonstrating his

[4] This refusal to answer an allegation is an admission under Missouri law. *State ex rel. Koster v. Bailey*, 493 S.W.3d 423, 432 (Mo. Ct. App. 2016).

innocence that flows from an expectation created by state law, namely, section 552.070, RSMo., and Executive Order 17-20." E11.

The Governor subsequently initiated original proceedings in prohibition seeking a writ from the Missouri Court of Appeals, which was denied (App. 18a), and then from the Supreme Court of Missouri, which was granted (App. 1a–16a). Relying on 85-year-old case regarding sick parole, the court concluded that "a reprieve creates no rights." App. 7a; *see Lime v. Blagg*, 131 S.W.2d 583, 586 (Mo. 1939). Therefore, the court reasoned, "[b]ecause Executive Order 17-20 was a reprieve, [the] Governor was free to rescind it at his discretion," which he could do at "any time." App. 7a; *see also* App. 7a n.6 (The "Governor necessarily is free to exercise that supreme executive power to rescind a reprieve issued by himself or any prior governor."). The court held that "[n]either the statute [§552.070] nor Executive Order 17-20 vested Williams with an existing right triggering due process protection." App. 12a. As a result, the Court held that the Governor's "executive order dissolving the board and ordering the completion of Williams' sentence," *i.e.*, his execution, "in no way denied Williams access to any process to which he was legally entitled." App. 12a.

The court also addressed this Court's fragmented decision in *Woodard*. Applying *Marks v. United States*, 430 U.S. 188 (1977), the court below concluded that "[a] straightforward application of *Marks* shows Chief Justice Rehnquist's opinion controls because it is the position taken by those Justices who concurred in the judgment on the narrowest grounds." App. 14a. The court acknowledged that other jurisdictions recognize that "Justice O'Connor's concurring opinion provides the

Supreme Court's opinion on the specific issue of whether the Due Process Clause applies to clemency," but declined to follow those courts. App. 14a n.10 (citing cases from the Supreme Courts of Kentucky and North Carolina and the Tenth and Eleventh Circuits). Under the Supreme Court of Missouri's reading of *Woodard*, "a capital offender retains no protectible due process interest within the clemency process." App. 14a. Accordingly, the court held that the Governor was entitled to judgment on the pleadings and entered a permanent writ. App. 16a.

That same day, the Supreme Court of Missouri issued Williams' death warrant, scheduling his execution for the 24-hour period beginning at 6:00 p.m. on September 24, 2024. *See State v. Williams*, No. SC83934, Order dated June 4, 2024. Williams timely moved for rehearing regarding the writ on June 17, 2024. The court denied that motion on July 12. App. 17a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With *Woodard* and Created a Lopsided Split Among Federal and State Courts Regarding the Due Process Rights of Capital Prisoners During Clemency Proceedings.

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera,* 506 U.S. at 411–12 (internal footnote omitted). Traditionally, clemency provided "the *only* means by which one could challenge his conviction on the ground of innocence." *Id.* at 412 (emphasis added). Against that backdrop, "history is replete with examples of wrongfully convicted persons who have been

pardoned in the wake of after-discovered evidence establishing their innocence." *Id.* at 415.

After a prisoner receives a death sentence, "it is incorrect . . . to say that a prisoner has been deprived of all interest in his life before his execution." *Woodard*, 523 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment). Instead, the Due Process Clause of the Fourteenth Amendment protects capital prisoners during State clemency proceedings. *Id.* at 288–89. In the 25 years between *Woodard* and the decision below, no other State high court or federal circuit court has issued a published decision that holds otherwise. The Supreme Court of Missouri's decision thus conflicts with the holding of this Court in *Woodard*, consciously departs from an overwhelming number of State and federal courts, and misapplies the *Marks* rule. Furthermore, in rebuffing these other courts, the court failed to evaluate the commonsense, majority rule after *Woodard*—in death penalty cases, States must comply with their own State-created clemency procedures.

A. Nearly Every State High Court or Federal Circuit Court Interpreting *Woodard* Has Concluded That Justice O'Connor's Concurrence Is Controlling.

Woodard established the due process rights of capital prisoners during their clemency proceedings. The case fell toward the end of a long series of prisoner rights decisions that defined various liberty and property interests of non-capital prisoners.[5]

[5] *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (codified right to post-conviction DNA testing); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67–75 (2009) (freestanding right to DNA testing); *Wilkinson v. Austin*, 545 U.S. 209, 221–30 (2005) (assignment to supermax prison); *Olim v. Wakinekona*, 461 U.S. 238, 244–51 (1983) (interstate prison transfer); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463–67 (1981) (non-capital clemency proceedings); *Vitek v. Jones*, 445 U.S. 480, 487–97 (1980) (transfer to mental hospital); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7–16 (1979) (parole proceedings); *Bell v.*

Unlike prior decisions, however, the *Woodard* Court addressed the *life* interests of capital prisoners.

The Court issued a 4-4-1 split decision. *See* 523 U.S. at 279–85 (opinion of Rehnquist, C.J.); *id.* at 288–90 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 290–95 (Stevens, J., concurring in part and dissenting in part).[6] Writing for four Justices, Justice O'Connor concluded that capital prisoners retain a protected interest in their lives, which requires that "*minimal* procedural safeguards apply to clemency proceedings"—just not the specific safeguards requested by *that* prisoner. *Id.* at 289.

Lower courts quickly determined that Justice O'Connor's concurrence is the controlling opinion. *See, e.g.*, *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998); *Wilson v. U.S. Dist. Court for N. Dist. of Cal.*, 161 F.3d 1185, 1187 (9th Cir. 1998); *Woodard v. Ohio Adult Parole Auth.*, 145 F.3d 1335 (6th Cir. 1998) (on remand). A few years later, Chief Justice Rehnquist and Justice O'Connor also agreed when they both joined a dissenting opinion that recognized her concurrence, and its guarantee of due process protection, as the controlling opinion. *See INS v. St. Cyr*, 533 U.S. 289, 345 (2001) (Scalia, J., dissenting).

Wolfish, 441 U.S. 520, 554–55 (1979) (personal packages and food); *Meachum v. Fano*, 427 U.S. 215, 223–29 (1976) (intrastate prison transfer); *Wolff v. McDonnell*, 418 U.S. 539, 555–72 (1974) (revocation of good-time credits); *Gagnon v. Scarpelli*, 411 U.S. 778, 781–91 (1973) (revocation of probation); *Morrissey v. Brewer*, 408 U.S. 471, 477–90 (1972) (revocation of parole).

[6] Chief Justice Rehnquist authored the opinion of the Court as to Part I, which recited the facts and procedural history of the case, and as to Part III, which held that capital prisoners do not have a right against self-incrimination in clemency proceedings. *Woodard*, 523 U.S. at 276–79, 285–88. To avoid cumbersome parentheticals, subsequent citations in the petition will refer to the "opinion of the Court," with respect to Parts I and III, and the "opinion of Rehnquist, C.J.," "opinion of O'Connor, J.," and "opinion of Stevens, J." with respect to the due process issues.

Below, however, the Supreme Court of Missouri concluded that Chief Justice Rehnquist's opinion was controlling and held that "a capital offender retains no protectible due process interest within the clemency process." App. 14a (citing *Woodard*, 523 U.S. at 282 (opinion of Rehnquist, C.J.)). The court openly acknowledged the existence of conflicting authority, citing four courts that recognize Justice O'Connor's concurrence as controlling. *Id.* n.10. Nevertheless, the court chose to split from those other jurisdictions.

The resulting conflict is more significant than the Supreme Court of Missouri recognized. The court's decision conflicts with holdings of the Third, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits, the Supreme Courts of Alaska, Florida, Georgia, Kentucky, North Carolina, and Pennsylvania, and the Court of Criminal Appeals of Oklahoma. *See Creech v. Idaho Comm'n of Pardons & Parole*, 94 F.4th 851, 855 (9th Cir. 2024); *Barwick v. Gov. of Fla.*, 66 F.4th 896, 902 (11th Cir. 2023); *State v. Federal Defender Program, Inc.*, 882 S.E.2d 257, 283 (Ga. 2022); *Hall v. Barr*, 830 Fed. Appx. 8, 10 (D.C. Cir. 2020); *Larson v. Dept. of Corrections, Board of Parole*, 476 P.3d 293, 300 (Alaska 2020); *Davis v. State*, 142 So. 3d 867, 876 (Fla. 2014); *Com. v. Michael*, 56 A.3d 899, 903 (Pa. 2012); *PA Prison Soc. v. Cortes*, 622 F.3d 215, 243 (3d Cir. 2010); *Baze v. Thompson*, 302 S.W.3d 57, 59 (Ky. 2010); *Workman v. Bell*, 245 F.3d 849, 852–53 (6th Cir. 2001); *Bacon v. Lee*, 549 S.E.2d 840, 848 (N.C. 2001); *Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000); *Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999); *Sellers v. State*, 973 P.2d 894, 896 (Okla. Crim. App. 1999); *Duvall*, 162 F.3d at 1061.

Furthermore, the conflict is particularly problematic because the Supreme Court of Missouri and the Eighth Circuit now disagree on the due process rights of capital prisoners in Missouri. *See Young*, 218 F.3d at 953 (enjoining execution under *Woodard* because State of Missouri had "unconscionably interfere[d] with a process that the State itself has created"); *see also Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) ("[I]f the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated.").

Throughout the country, Williams has identified only one other State high court—in two unpublished decisions with no careful analysis—that treats Chief Justice Rehnquist's opinion as the controlling opinion and concluded that capital prisoners have no protectable due process interest in clemency proceedings. *See Byford v. State*, 367 P.3d 754, 2010 WL 3731121, at *16 (Nev. 2010) (table) (summary holding that did not analyze *Marks* rule); *see also Moore v. State*, 381 P.3d 643, 2012 WL 3139870, at *6 (Nev. 2012) (table).

Therefore, for more than 25 years, there has been no serious "debate that death-row prisoners have a limited cognizable due-process interest in their state clemency proceedings." *Zack*, 2023 WL 6376654, at *3. Now there is. Accordingly, the Court should grant certiorari to resolve this conflict.

B. The Supreme Court of Missouri Wrongly Interpreted *Woodard*.

The Supreme Court of Missouri failed to examine *Woodard* closely. Under Ohio law, upon the setting of an execution date, the parole board automatically commenced a clemency investigation; advised the prisoner that he may have a pre-hearing

interview, if desired; held a final clemency hearing within 45 days of the scheduled execution; completed its clemency review; and made a recommendation to the Governor. *Woodard*, 523 U.S. at 276–77 (opinion of the Court); *id.* at 289 (opinion of O'Connor, J.). The thrust of the prisoner's complaint was an allegation that these existing procedures were inadequate because he received only three days' notice before the available pre-hearing interview date and only 10 days' notice before the final clemency hearing. *Id.* at 289 (opinion of O'Connor, J.). The prisoner decided not to request the interview and instead objected because he wanted the assistance of counsel (which was not allowed). *Id.* at 277 (opinion of the Court); *id.* at 289 (opinion of O'Connor, J.). He similarly wanted a guarantee of assistance of counsel at the final hearing, which was only permitted in the discretion of the parole board. *Id.* at 277 (opinion of the Court); *id.* at 289 (opinion of O'Connor, J.).[7]

Chief Justice Rehnquist's opinion concluded that Ohio's clemency procedures, as written, did not violate due process. *Woodard*, 523 U.S. at 282. He acknowledged that the capital prisoner maintained a life interest, but he concluded that discretionary clemency proceedings did not "require[] the procedural protections [respondent] *seeks*." *Id.* at 281 (emphasis added); *see also id.* at 280, 282, 285 (rejecting "[t]he process respondent seeks," "the types of procedural protections sought by respondent," and "the sort of procedural requirements that respondent urges").

[7] It does not appear, however, the final hearing ever took place, in light of a consent decree that postponed the clemency proceedings indefinitely. *See Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1182 (6th Cir. 1997).

On the other hand, Justice O'Connor disagreed "with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards." *Id.* at 288. Justice O'Connor concluded that a prisoner sentenced to death nevertheless retains an interest in his life, which requires that "*minimal* procedural safeguards apply to clemency proceedings," including protection against certain arbitrary actions. *Id.* at 289. Like Chief Justice Rehnquist, however, Justice O'Connor agreed that Ohio's clemency procedures survived a facial due process challenge and thus rejected the *additional* safeguards requested by the prisoner. *Id.* Importantly, however, the concurrence determined there was no reason to vacate and remand for an as-applied challenge because Ohio had "complied with" its facially acceptable procedures. *Id.*; *see also id.* at 290 ("The process respondent received, including notice of the hearing and an opportunity to participate in an interview, comports with Ohio's regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings.").[8]

Justice O'Connor's opinion, which does not foreclose future due process challenges, is the "narrowe[r]" position. *Marks*, 430 U.S. at 193. Accordingly, the Supreme Court of Missouri's decision conflicts with *Woodard*.

[8] Justice Stevens, in dissent, also agreed on the existence of a life interest protected by the Due Process Clause, but believed that life interest "warrants even greater protection" than liberty interests and, unlike the concurrence, would have remanded "for a determination whether Ohio's procedures meet the minimum requirements of due process." *Id.* at 291, 293–94 (opinion of Stevens, J.).

C. The Decision Below Reinforces Another Conflict Among Lower Courts Regarding As-Applied Challenges to State-Created Procedures Under *Woodard*.

There is a separate, longstanding conflict within lower courts whether States must comply with their own State-created clemency procedures in death penalty cases. In rejecting Justice O'Connor's opinion, the decision below also criticized her opinion as "providing no analytical framework for assessing the contours of minimal due process." App. 13a. The court interpreted Justice O'Connor's opinion as barring only "wholly arbitrary state action" and held that Williams had "no right to the . . . continuation of the board of inquiry process." App. 12a, 16a nn.9, 11.

Justice O'Connor's opinion, however, has four distinct analytical components. *First*, the Due Process Clause guarantees "minimal procedural safeguards" to protect a prisoner's life interest, which does not include certain safeguards that resemble criminal trial procedures, such as the right to counsel during a clemency interview. *Woodard*, 523 U.S. at 282, 285 (opinion of Rehnquist, C.J.); *id.* at 289–90 (opinion of O'Connor, J.). *Second*, Ohio's State-created clemency procedures, which required notice, a hearing, and a recommendation from the parole board (as the evaluating entity) to the governor (as the decision-maker), survived a facial challenge against that guarantee of minimal procedural safeguards. *Id.* at 276 (opinion of the Court); *id.* at 282 (opinion of Rehnquist, C.J.); *id.* at 289–90 (opinion of O'Connor, J.). *Third*, any as-applied challenge failed because the State had "complied with" the State-created procedures, so that "[t]he process respondent received . . . comports with" the regulations that survived the facial challenge. *Id.* at 289 (opinion of O'Connor, J.).

Finally, the Due Process Clause prohibits arbitrary action, such as the two illustrations above, which had not occurred in that case. *Id.*

Until the decision below, the lower-court conflict about *Woodard* concerned a different issue: whether States must comply with their own State-created procedures. This was not the source of the Court's original fracture. *See, e.g.*, Oral Arg. Tr. 34:48-35:03 (Scalia, J.) ("I can understand, and I think *Dumschat* permits your claiming a right to the procedure which the State has accorded, so that if they violate their own procedures for clemency, yes, you would have some right to complain."), *available at* https://www.oyez.org/cases/1997/96-1769 (last visited Sept. 17, 2024). Rather, consistent with prior prisoners' rights cases, the difference of opinion arose over the existence of *unwritten* minimum safeguards to permeate every capital clemency proceeding. *Cf. Greenholtz*, 442 U.S. at 15 (finding State's existing procedure for parole eligibility "adequately safeguards against serious risks of error and thus satisfies due process"); *Gagnon*, 411 U.S. at 786 (establishing "minimum requirements of due process" for probation revocation); *Morrissey*, 408 U.S. at 488–89 (establishing "minimum requirements of due process" for parole revocation").

This is a critically important conflict. Every State that allows capital punishment has established a right and procedures to seek clemency.[9] A "'state-

[9] Ala. Const., Amdt. 38; Ala. Code §15-18-100; Ariz. Const., Art. V, §5; Ariz. Rev. Stat. Ann. §§31-443, 31-445; Ark. Const., Art. VI, §18; Ark. Code Ann. §5-4-607, §16-93-204; Cal. Const., Art. V, §8; Cal. Penal Code Ann. §§4800-4807; Fla. Const., Art. IV, §8; Fla. Stat. §940.01; Ga. Const., Art. IV, §2; Ga. Code Ann. §§42-9-20, 42-9-42; Idaho Const., Art. IV, §7; Idaho Code §20-240; Ind. Const., Art. V, §17; Ind. Code §§11-9-2-1 to 11-9-2-4, 35-38-6-8; Kan. Const., Art. I, §7; Kan. Stat. Ann. §22-3701; Ky. Const., §77; La. Const., Art. IV, §5(E); La. Rev. Stat. Ann. §15:572; Miss. Const., Art. V, §124; Miss. Code Ann. §47-5-115; Mo. Const., Art. IV, §7; Mo. Rev. Stat. §§217.220, 217.800, 552.070; Mont. Const., Art. VI, §12; Mont. Code Ann. §§46-23-301 to 46-23-316; Neb. Const., Art. IV, §13; Neb. Rev. Stat. §§83-1,127 to 83-1,132; Nev. Const., Art. V, §13; Nev. Rev. Stat. §213.080; N.C. Const., Art. III, §5(6);

created right can . . . beget yet other rights to procedures essential to the realization of the parent right.'" *Osborne*, 557 U.S. at 68 (quoting *Dumschat*, 452 U.S. at 463).

Under this framework, a majority of jurisdictions hold that, when a State grants prisoners the right to pursue clemency in death penalty cases, the Due Process Clause requires State officials to comply with their own State-created procedures. *See, e.g.*, *Bryan v. DeSantis*, 343 So. 3d 127, 129 (Fla. DCA 1st 2022) ("Clemency proceedings satisfy the Due Process Clause as long as the State follows the procedures set out in State law, the State does not arbitrarily deny the prisoner all access to the clemency process, and the clemency decision is not wholly arbitrary or capricious.") (quoting *Allen v. Hickman*, 407 F. Supp. 2d 1098, 1103–04 (N.D. Cal. 2005)); *Young*, 218 F.3d at 853 ("The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it."); *Duvall*, 162 F.3d at 1061 ("[T]he minimal application of the Due Process Clause only ensures a death row prisoner that he or she will receive the clemency procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin."); *Sellers*, 973 P.2d at 896 ("Due process requires, at a minimum, notice and the opportunity to be heard according to established procedures."). This approach allows

N.C. Gen. Stat. §§147-23 to 147-25; Ohio Const., Art. III, §11; Ohio Rev. Code Ann. §§2967.01 to 2967.12; Okla. Const., Art. VI, §10; Okla. Stat., Tit. 21, § 701.11a; Ore. Const., Art. V, §14; Ore. Rev. Stat. §§144.640 to 144.670; Pa. Const., Art. IV, §9; S.C. Const., Art. IV, §14; S.C. Code Ann. §§ 24-21-910 to 24-21-1000; S.D. Const., Art. IV, §3; S.D. Codified Laws §§23A-27A-20 to 23A-27A-21, 24-14-1 to 24-14-7; Tenn. Const., Art. III, § 6; Tenn. Code Ann. §§40-21-101 to 40-27-109; Tex. Const., Art. IV, §11; Tex. Code Crim. Proc. Ann., Art. 48.01; Utah Const., Art. VII, §12; Utah Code Ann. §77-27-5.5; Wyo. Const., Art. IV, §5; Wyo. Stat. §7-13-801.

flexibility for different States to establish different clemency procedures. *See Osborne*, 557 U.S. at 69 ("'[W]hen a State chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the exact form such assistance must assume.'") (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987)).[10]

The State of Missouri, however, did not comply with the procedures set forth in Mo. Rev. Stat. §552.070 and Executive Order 17-20. Instead, the Governor prevented the Board from completing the report and recommendation required by both the statute and the executive order. As a result, the State violated Williams' rights under the majority rule.

The minority position, adopted by the Eleventh Circuit, holds that the Due Process Clause does *not* require State officials to comply with State law. *See Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 794 F.3d 1327, 1333 (11th Cir. 2015) ("Nothing in Justice O'Connor's concurring opinion suggests that a clemency board's compliance with state laws or procedures is part of the *minimal* procedural safeguards protected by the Due Process Clause.") (internal quotation omitted). That court recognizes its conflict with the Eighth Circuit. *See id.* Under the Eleventh Circuit's interpretation of Justice O'Connor's opinion, the Due Process Clause only protects capital prisoners against the two types of arbitrary action suggested in Justice O'Connor's opinion: total denial of access or a coin flip to determine whether

[10] As one example, Kentucky lacks formalistic requirements. *Baze v. Thompson*, 302 S.W.3d 57, 59–60 (Ky. 2010). Under the majority interpretation of *Woodard*, however, the Kentucky Supreme Court has held "[t]he minimal application requires only that a death row prisoner receive the clemency procedures explicitly set forth by state law." *Id.* at 60. That court has thus upheld two very limited procedural requirements against a due process challenge: filing an application with the governor, followed by the governor filing a statement of the reasons for his clemency decision. *Id.*

to grant clemency. *Id.* This minority rule appears to suggest—wrongly—that nothing unconstitutional could possibly exist between those two illustrations.

The Fifth Circuit has not applied a consistent rule, vacillating between both positions. *Compare Tamayo v. Perry*, 553 Fed. Appx. 395, 402 (5th Cir. 2014) (petitioner "failed to show a substantial likelihood that he could demonstrate the Board violated its policies," including those regarding notice and opportunity to participate), *with Faulder*, 178 F.3d at 344 ("Faulder's clemency procedures exhibited neither of these extreme situations" of flipping a coin or total denial of access).

Without adopting Justice O'Connor's opinion, the Supreme Court of Missouri endorsed its compliance with the minority reading of that opinion. *See* App. 13a, 16a n.11. Like the Eleventh Circuit, the court considered the two hypothetical illustrations as the only possible due process violations. App. 13a. Observing that Williams was allowed to "participate" in the clemency process before the Governor's dissolution of the Board, App. 16a n.11, the court concluded that mere participation was constitutionally sufficient because there was not a *total* denial of access.

But illustrations are meant to furnish examples, not to enumerate every possibility. The minority rule fails to recognize that, if the State never *completes* the clemency process because the State *prohibited* its "realization," *Osborne*, 557 U.S. at 68, that interference has the same practical effect for capital prisoners as a total denial of access. Such a rule makes no sense and does not safeguard a life interest at all. If States can disregard these procedures, they serve no purpose. Accordingly, the Court should also grant certiorari to resolve this conflict.

D. The Case Presents an Opportunity to Clarify Lingering Uncertainty About the *Marks* Rule.

Granting certiorari will not only settle an important constitutional issue for capital prisoners, but also clarify the *Marks* rule. *Cf. Glossip v. Gross*, 576 U.S. 863, 879 n.2 (2015) (clarifying *Baze v. Rees*, 553 U.S. 35 (2008)); *Panetti v. Quarterman*, 551 U.S. 930, 949–50 (2007) (clarifying *Ford v. Wainwright*, 477 U.S. 399 (1986)). Under *Marks*, when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Although the Supreme Court of Missouri's reasoning is unclear, the court concluded that Chief Justice Rehnquist's position (in its view) that "Ohio's clemency procedures did not implicate due process" at all was narrower than Justice O'Connor's position that "minimal due process protections" existed, but no violation had occurred under the circumstances. *See* App. 14a. This is incorrect; Justice O'Connor's position is narrower because it forecloses a smaller number of future legal challenges. In other words, "maybe next time" is narrower than "never."

Furthermore, courts quietly continue to grapple with the import of Justice Stevens' opinion because he agreed that the Due Process Clause applies in clemency proceedings but dissented from the affirmance of that aspect of the judgment. *Compare* App. 12a–15a, *with Creech*, 94 F.4th at 855 n.1 ("Justice O'Connor's concurring opinion, joined by a plurality of justices, constitutes the Court's holding in

light of Justice Stevens' partial concurrence."), *and Foley v. Beshear*, 462 S.W.3d 389, 394 (Ky. 2015) ("Justice O'Connor's opinion, with a narrower holding on the due-process question than the opinion of Justice Stevens, is the one that controls."); *see also Byford*, 2010 WL 3731121, at *16 (no analysis).

The application of *Marks* to *Woodard*'s 4-4-1 result is straightforward in light of the eight Justices who concurred in the judgment with respect to the Court's due process holding. *See St. Cyr*, 533 U.S. at 345 (Scalia, J., dissenting). Nevertheless, the splintered opinion has sown confusion, most noticeably in the court below. Accordingly, the Court should also grant certiorari to help clarify the proper approach under *Marks*.

II. The Supreme Court of Missouri Created Another Conflict Regarding the Due Process Rights of Prisoners Against the Revocation of Executive Clemency.

Woodard addresses the rights of *applicants* for executive clemency. But the decision below also conflicts with more than a century of decisions that recognize the due process rights of clemency *recipients* against revocation. *See, e.g.*, *In re Bush*, 193 P.3d 103, 106–08 (Wash. 2008); *Kelch v. Director, Nev. Dept. of Prisons*, 10 F.3d 684, 688 (9th Cir. 1993); *Kelch v. Director, Nev. Dept. of Prisons*, 822 P.2d 1094, 1095–97 (Nev. 1991); *Pope v. Chew*, 521 F.2d 400, 404 (4th Cir. 1975); *State ex rel. Murray v. Swenson*, 76 A.2d 150, 154–55 (Md. 1950); *Guy v. Utecht*, 12 N.W.2d 753, 759 (Minn. 1943); *Fleenor v. Hammond*, 116 F.2d 982, 986 (6th Cir. 1941); *Hudson v. Youell*, 17 S.E.2d 403, 408–09 (Va. 1941); *Ex parte Bess*, 150 S.E. 54, 62 (S.C. 1929); *Ex parte Alvarez*, 39 So. 481, 484–85 (Fla. 1905); *People v. Moore*, 29 N.W. 80, 81–84 (Mich. 1886).

Clemency takes several forms, including pardons, commutations, remissions, and, here, reprieves. *Herrera*, 506 U.S. at 396 n.12. Since inception, Missouri's Constitutions have conveyed to Governors the power to "grant" clemency, but never to *revoke* it. *See* Mo. Const. art. V, §6 (1820) (pardons, reprieves, and remissions of fines and forfeitures); Mo. Const. art. V, §6 (1865) (pardons, commutations, and reprieves); Mo. Const. art. V, §8 (1875); Mo. Const. art. IV, §7 (1945) (same); Mo. Const. art. IV, §7 (1945) (same).

For nearly 150 years, Missouri followed the black-letter rule that, upon receipt of executive clemency, "the grantee, or donee of the favor, becomes entitled as a matter of right to all the benefits and immunities it confers, and of which he cannot be deprived by revocation or recall." *Ex parte Reno*, 66 Mo. 266, 269 (1877); *see also Adkins v. Com.*, 23 S.W.2d 277, 279 (Ky. 1929) ("[I]t has been universally held that the Governor has no power to revoke an unconditional pardon after its delivery."). In other words, a Governor cannot revoke an unconditional grant of clemency "at any time upon the Governor's whim." *Makowski v. Governor*, 852 N.W.2d 61, 75 & n.8 (Mich. 2014). A recipient of clemency "is not to be let out with a rope around his body . . . with one end in the hands of the warden, to be hauled back at the caprice of that officer." *Moore*, 29 N.W. at 81; *cf. Burns v. United States*, 287 U.S. 16, 223 (1932) ("While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."). "Great evils would inevitably flow . . . from the exercise of any such power; and hence, wisely, no such power exists." *Knapp v. Thomas*, 39 Ohio St. 377, 382 (1883).

Courts, including this one, analogize clemency to a deed and scrutinize the underlying instrument accordingly. *See United States v. Wilson*, 32 U.S. 150, 161 (1833); *Rathbun v. Baumel*, 191 N.W. 297, 299 (Iowa 1922) (collecting cases). They only recognize two grounds for its revocation. The first ground is fraud in the procurement. *See Rathbun*, 191 N.W. at 299–301. *But see Knapp*, 39 Ohio St. at 394 (even fraud is not a ground for revocation of pardon because "[i]t is far better that he should escape punishment than that a plain principle of law should be set at naught").

The second ground is the recipient's breach of an express condition imposed by the instrument. *See, e.g.*, *Ex parte Strauss*, 7 S.W.2d 1000, 1001 (Mo. 1928); *Ex parte Rice*, 162 S.W. 891, 901 (Tex. Crim. App. 1913). "At the time of the drafting and adoption of our Constitution it was considered elementary that" the king could "extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend." *Schick v. Reed*, 419 U.S. 256, 261 (1974) (quoting 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)). If clemency is "conditioned that upon the transpiring of some event it becomes void, the convict is at liberty *until the event transpires*." *Ex parte Collins*, 239 P. 693, 697 (Okla. Crim. App. 1925) (emphasis added).

If no such ground for revocation exists, however, "it is a proposition too clear to require arguments or authorities to sustain it, that if the [recipient], by a compliance with the terms of mercy . . . has entitled himself to its benefits, no subsequent act of the president, or of any other department of the government, could

deprive him of the rights so acquired." *United States v. Hughes*, 26 F. Cas. 420, 421 (S.D. Ohio 1864) (amnesty issued by President Lincoln). Thus, long before *Woodard* and *Dumschat*, state and federal courts held that the Due Process Clause protects *recipients* of executive clemency, complete with a notice and hearing before revocation. *See, e.g.*, *Pope*, 521 F.2d at 404; *Fleenor*, 116 F.2d at 986; *Hudson*, 17 S.E.2d at 408; *Bess*, 150 S.E. at 62; *Alvarez*, 39 So. at 484–85; *see also Moore*, 29 N.W. at 83 (confirming historical practice in England).

The only recognized exception to a requirement of notice and a hearing is that some jurisdictions have permitted Governors to retain a summary right of revocation upon the Governor's finding of breach of—but only if that right was expressly reserved for the Governor by statute or the clemency instrument.[11] Missouri has no such statute, and no such reservation exists in Executive Order 17-20. In any event,

> [t]he established practice at common law and in the American states, in the absence of statutory regulation and in the absence from the pardon itself of express stipulations for that purpose, is for some court of general criminal jurisdiction upon having its attention called, by affidavit or otherwise, to the fact that a pardoned convict has violated, or failed to comply with, the condition or conditions of his pardon, to issue a rule, reciting the original judgment of conviction and sentence, the pardon and its conditions, and the alleged violation of, or noncompliance with, the condition or conditions thereof . . . .

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[11] *See, e.g.*, *In re Saucier*, 167 A.2d 368, 371 (Vt. 1961) (statute); *Muckle v. Clarke*, 12 S.E.2d 339, 341–42 (Ga. 1940) (instrument stated it was "revocable at the pleasure of the Governor upon violation of" state or federal law); *Ex parte Owen*, 131 N.W. 914, 915 (Neb. 1911) (statute); *Arthur v. Craig*, 48 Iowa 264, 267–69 (1878) (instrument provided that the Government's "judgment shall be conclusive as to the sufficiency of the proof" of violation and instrument could be "summarily revoked"). *But see Murray*, 76 A.2d at 153–54 (notwithstanding statutory right of revocation upon breach, recipient was still entitled to notice and a hearing); *Moore*, 29 N.W. at 84 (statute reserving power in state agent held unconstitutional).

Com. ex rel. Meredith v. Hall, 126 S.W.2d 1056, 1058–59 (Ky. 1939) (quoting 20 R.C.L. 574); *accord Hudson*, 17 S.E.2d at 408; *State ex rel. Brown v. Mayo*, 171 So. 822, 823-24 (Fla. 1937).

These rights closely resemble the rights protecting the recipients of parole. *See Morrissey*, 408 U.S. at 480. Following the Court's straightforward logic, "[t]here is no constitutional or inherent right to [clemency], but once a State grants a prisoner the conditional liberty properly dependent on the observance of special [clemency] restrictions, due process protections attach to the decision to revoke [clemency]." *Vitek*, 445 U.S. at 488. This due process interest necessarily attaches because of the "critical" difference between the "denial" of a request for clemency and "revocation" of previously granted clemency. *See Dumschat*, 452 U.S. at 464 (citing *Greenholtz*, 442 U.S. at 9–11). Therefore, after *Morrissey,* courts have reaffirmed that the Fourteenth Amendment protects the recipients of executive clemency against its revocation without due process. *See Bush*, 193 P.3d at 106–08; *Kelch*, 10 F.3d at 688; *Kelch*, 822 P.2d at 1095–97.

Until now, Missouri adhered to the common-law rules adopted throughout the country regarding clemency revocation. *See State ex rel. Lute v. Missouri Bd. of Probation & Parole*, 218 S.W.3d 431, 435 (Mo. 2007); *Silvey v. Kaiser*, 173 S.W.2d 63, 64 (Mo. 1943); *Strauss*, 7 S.W.2d at 1001; *Reno*, 66 Mo. at 269. Below, however, the Supreme Court of Missouri concluded that "a reprieve creates no rights and carries only the necessary expectation that the governor may rescind it at any time." App. 7a. According to the court, the "Governor necessarily is free to exercise that supreme

executive power to rescind a reprieve issued by himself *or any prior governor*." App. 7a n.6 (emphasis added). The court held that the Governor "was free to rescind [the reprieve] at his discretion," *i.e.*, for no reason at all, regardless of the conditions (or lack thereof). App. 7a.[12]

The Governor's revocation of his predecessor's stay of execution, and the court's blessing of that revocation, thus departed from all known precedent and violated Williams' rights. There was no fraud, and Executive Order 17-20 does not contain language that allows revocation, much less at "any time" in the Governor's "discretion." E172–73. The executive order also placed *no* conditions on Williams, much less conditions that Williams breached. E172–73. Instead, the executive order only imposed conditions *on the State itself*. E172–73. The Governor created a special Board; ordered that Board to investigate and evaluate the evidence of Williams' innocence, including the newly discovered DNA evidence; ordered that the Board "*shall* assess the credibility and weight of all evidence"; and ordered that the Board "*shall* report and make a recommendation to the Governor as to whether or not Williams should be executed or his sentence of death commuted." E172–73 (emphasis added). These self-imposed conditions are consistent with the historical purpose of a reprieve: "to give room" for consideration of more permanent clemency relief, 4 W. Blackstone, Commentaries on the Laws of England 387 (1769), as well as the

[12] The court's analysis misinterpreted a single sentence from a single treatise, which, in turn, cited a single case from the Supreme Court of Oregon. *See* 46 C.J. §46, p. 1197 & n.46 (citing *In re Dormitzer*, 249 P. 639 (Or. 1926)). Oregon, however, follows the nationwide rule. As the Supreme Court of Oregon recently explained, "[i]n *Dormitzer*, … the Governor revoked the previously granted conditional reprieve when the defendant violated the condition." *Haugen v. Kitzhaber*, 306 P.3d 592, 606 n.13 (Or. 2013). Even if that were not the case, Oregon would still represent a minority position and further evidence of a conflict.

recognition that "over the past century clemency has been exercised frequently in capital cases in which demonstrations of 'actual innocence' have been made." *Herrera*, 506 U.S. at 415. But the State's self-imposed conditions were never fulfilled. As a result, the stay of execution, by its plain terms, must continue "*until*" the Governor had received the report and recommendation for Williams and made a final clemency decision for Williams. E173 (emphasis added).

Missouri now falls into a dangerous category of its own, in conflict with other State and federal courts because it does not recognize protectable rights in connection with the revocation of executive clemency. *Bush*, 193 P.3d at 106–08; *Kelch*, 10 F.3d at 688; *Kelch*, 822 P.2d at 1095–97; *Pope*, 521 F.2d at 404; *Guy*, 12 N.W.2d at 759; *Fleenor*, 116 F.2d at 986; *Hudson*, 17 S.E.2d at 408; *Bess*, 150 S.E. at 62; *Alvarez*, 39 So. at 484–85; *Moore*, 29 N.W. at 83. If a stay of execution creates no rights—and a predecessor Governor's actions do not matter—it is meaningless.

Notwithstanding a well-developed history in lower courts, this Court has not squarely addressed the due process rights of citizens in connection with the *revocation* of clemency. The Court closed that loop for the revocation of parole and probation in *Morrissey* and *Gagnon*; the Court should now close the loop for clemency.

Accordingly, the Court should also grant certiorari to resolve this conflict.

III. Williams' Case Presents Exceptionally Compelling Facts to Guide the Resolution of These Important Questions Regarding Executive Clemency.

The questions raised by this case are critically important to the regularity and purpose of clemency. With respect to the revocation of executive clemency, the Court's decision will provide critical guidance to executive officials throughout the country on

how to craft the terms of clemency instruments to ensure they protect the recipients. Exercising clemency is "not a private act of grace from an individual happening to possess power," but rather "the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). The staying power of executive clemency, once granted, requires protection precisely because of the possibility for fair-minded disagreement over the wisdom of clemency decisions. Each age witnesses its own trends and associated politics, such as increased scrutiny over capital and drug offenses, but also inevitable decisions about whether to grant clemency to controversial figures, such as participants in the Whiskey Rebellion, ex-Confederate leaders, Eugene V. Debs, Jimmy Hoffa, Richard Nixon, Iva Toguri (a/k/a "Tokyo Rose"), Roger Clinton, and Scooter Libby. The possibility of controversy extends to Governors, not just Presidents. *See, e.g.*, *Missouri Governor Pardons St. Louis Couple Who Aimed Guns at Protestors*, N.Y. Times (Aug. 3, 2021). Regardless of—or perhaps *because* of—public disagreement, these decisions deserve protection.

To decide these issues, Williams' case presents a far more compelling vehicle than the original *Woodard* case. *First*, the purpose of the stay of execution and appointment of the Board of Inquiry was to investigate Williams' innocence. Actual innocence represents the purest motivation behind executive clemency: to "afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law." *Ex parte Grossman*, 267 U.S. 87, 120 (1925); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970) ("The general rule is that a pardon 'may * * * be used to the

end that justice be done by correcting injustice, as where after-discovered facts convince the official or board invested with the power that there was no guilt or that other mistakes were made.'") (quoting 67 C.J.S. Pardons §6).

Second, *Woodard* concerned standard clemency procedures; these are special clemency procedures. Governor Greitens halted Williams' execution at the last minute and singled out Williams as the beneficiary of special process. A Board of Inquiry has only been convened three times in Missouri's history, including this case. E23. Consistent with the existence of a "life" interest, that process exists *exclusively* for capital cases. Mo. Rev. Stat. §552.070. Governor Greitens chose to "invoke" this rarely used, fail-safe statute; form a previously nonexistent Board to evaluate Williams' evidence of innocence; and issue a tailored Executive Order with unique procedures and obligations designed to address Williams' specific circumstances. E172–73; *see Woodard*, 523 U.S. at 280–81 (opinion of Rehnquist, C.J.) (the "heart of executive clemency" is that it "allow[s] the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations").

Third, the subtext of *Woodard* was the prisoner's resistance to Ohio's automatic clemency deadlines, triggered by the setting of his execution date. The prisoner received a stay of execution *after* a critical deadline in the clemency regime that would have also halted the clemency process. *See Woodard*, 107 F.3d at 1181. Therefore, in the prisoner's view, the clemency process had continued to move forward on an unnecessarily accelerated basis while he preferred to pursue post-conviction

relief for ineffective assistance of counsel. He declined to participate fully in the clemency proceedings, including his pre-hearing interview, and voluntarily chose to postpone the clemency proceedings in their entirety before their completion. *Id.* at 1182. By contrast, Williams availed himself of State-created clemency procedures at every step and desired to continue using them to vindicate his claim of actual innocence—until the State terminated the proceedings. *Cf. Osborne*, 557 U.S. at 70–71 (rejecting due process claim of prisoner attempting to prove his innocence who "ha[d] not tried to use the process provided to him by the State or attempted to vindicate the liberty interest that is now the centerpiece of his claim"). That desire remains true today.

Finally, in *Woodard*, the prisoner sought to secure additional, unwritten safeguards beyond the State's existing procedures. The existing procedures required that the parole authority "must hold the hearing, complete its clemency review, and make a recommendation to the Governor." 523 U.S. at 277 (opinion of the Court). Here, Williams does not seek to superimpose unwritten rights onto the existing procedures. He seeks the *completion* of the procedures as set forth, in writing, in Mo. Rev. Stat. §552.070 and Executive Order 17-20, which involves the Board's completion of its clemency review, with a report and recommendation to the Governor. E172–73.

In sum, the Governor's actions have violated Williams' constitutional rights and created an exceptionally urgent need for the Court's attention. Without intervention, Williams will be executed on Tuesday, September 24.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CHARLES A. WEISS
Counsel of Record
JONATHAN B. POTTS
BRYAN CAVE LEIGHTON PAISNER LLP
211 N. Broadway
Suite 3600
St. Louis, MO 63102
(314) 259-2000
caweiss@bclplaw.com
jonathan.potts@bclplaw.com

TRICIA J. ROJO BUSHNELL
MIDWEST INNOCENCE PROJECT
3619 Broadway Blvd. #2
Kansas City, MO 64111

HANNAH FITZSIMONS
INNOCENCE PROJECT, INC.
40 Worth Street, Suite 701
New York, NY 10013

Counsel for Petitioners

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