No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH C. GARCIA,
Petitioner,

vs.

CARMELLA JONES, et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

****CAPITAL CASE****
Execution Scheduled for TUESDAY, DECEMBER 4, 2018

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****CAPITAL CASE****

QUESTIONS PRESENTED

In 1997, the Texas legislature enacted Texas Government Code section 508.032, which established two membership requirements for the Texas Board of Pardons and Paroles ("Board"): first, "[b]oard members must be representative of the general public"; and second, "a member must have resided in [Texas] for two years before appointment." Tex. Gov't Code § 508.032. According to a 1983 report authored by the Sunset Commission—which the Texas legislature established in 1977 to oversee government agencies—the phrase "general public" in § 508.032 was intended to guarantee the impartiality of the Board by ensuring that members did not, as a whole, represent the same interests. The Commission envisioned "giving the public a direct voice . . . through representation on the board."

In 2003, the Texas legislature took steps to further both the impartiality and representativeness of the Board by adding membership requirements to § 508.032 that prohibited "more than three members" of the Board from being "former employees" of the Texas Department of Criminal Justice ("TDCJ") at any given time.

Currently, and in contravention of the foregoing statutory requirements, six out of seven Board members are either former TDCJ employees, former law-enforcement officers, or both. Accordingly, the Board fails to be representative of the general public. On November 30, 2018, this Board unanimously denied Petitioner Joseph Garcia's application for clemency, in a case where Garcia is scheduled to be executed on Tuesday, December 4, 2018 for the death of a police officer who he neither killed nor intended to kill.

The questions presented by this case are the following:

1. Whether Texas's failure to provide Garcia with a clemency proceeding that comports with Texas law violates the minimal due process rights—including the fundamental due process right to a meaningful opportunity to be heard—to which Garcia is entitled under the Fourteenth Amendment's Due Process Clause?

2. Whether this Court's decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), requires states to adhere to state laws governing clemency proceedings in order to comport with the Fourteenth Amendment's minimal due process guarantees?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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TABLE OF CONTENTS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

State Cases

State Statutes

PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph C. Garcia, a Texas prisoner under a sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court's dismissal of Garcia's § 1983 action with prejudice and dismissing Garcia's motion for a stay of execution as moot.

OPINIONS BELOW

The Fifth Circuit's order affirming the district court's dismissal of Garcia's § 1983 complaint and dismissing Garcia's motion for a stay of execution as moot was issued on December 2, 2018 and is attached hereto in the Appendix at A-1.

Also attached hereto in the Appendix at A-7 is the Memorandum and Order from the United States District Court for the Southern District of Texas denying Garcia's Motion for Preliminary Injunction and dismissing his 42 U.S.C. § 1983 complaint with prejudice, which was issued on November 30, 2018.

STATEMENT OF JURISDICTION

The Fifth Circuit affirmed the district court's dismissal of Garcia's 42 U.S.C. § 1983 complaint and dismissed Garcia's motion for a stay of execution as moot on December 2, 2018. In accordance with Supreme Court Rule 13.1, Garcia now timely files his petition for a writ of certiorari to review the Fifth Circuit's judgment within 90 days of the entry of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional amendments.

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

This case also involves Texas Government Code section 508.032, which provides, in relevant part:

> (a) Board [of Pardons and Paroles] members must be representative of the general public.

STATEMENT OF THE CASE

Joseph Garcia, as a death-sentenced prisoner, "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 recognition of that protectable life interest, the Due Process Clause provides minimal constitutional safeguards in clemency proceedings. *Id.* at 288-89, 292. Those minimal constitutional safeguards may be violated in the clemency context when a state fails to comport with its own regulations, fails to provide notice, or fails to provide a meaningful opportunity to be heard. *See id.* at 290 (O'Connor, J., concurring).

As currently constituted, the Texas Board of Pardons and Paroles ("Board") is in violation of Texas Government Code section 508.032, which requires Board membership to be "representative of the general public." The requirement is a part of Texas's statutory scheme governing clemency proceedings and is meant to provide applicants with a meaningful opportunity to be heard by an impartial decision-maker. Consequently, the requirement is one mechanism through which the Texas legislature sought to ensure that applicants like Garcia have a meaningful opportunity to be heard in clemency proceedings before the State can take his life. Texas's violation of its statutory clemency scheme thus violates Garcia's minimal due process rights, necessary to protect his life interest, under *Woodard* and the Fourteenth Amendment.

I. Texas's statutory scheme affords death-sentenced prisoners a neutral decision-maker and a meaningful opportunity to be heard during their clemency proceedings

The Board is currently governed by statutes designed to ensure that the Board is representative of the "general public," and that it provides impartial consideration to requests for mercy lodged by, *inter alia*, capitally-sentenced prisoners. In 1997, the Texas Legislature enacted section 508.032 of the Texas Government Code and thereby established membership requirements for the Board. The original membership requirements were simply two: "Board members must be representative of the general public," and a "member must have resided in [Texas] for the two years before appointment." Tex. Gov't Code Ann. § 508.032 (1997).

The Sunset Commission, which was created by the state legislature in 1977 to oversee state agencies, provided a report in 1983 to the Governor of Texas and the Texas Legislature; in that report, the commission reviewed 32 agencies and explained the phrase "general public," which appeared in the statutes governing multiple agencies. According to that commission, the meaning of the phrase "general public" in section 508.032 is consistent with its meaning across agencies. As the Sunset Commission explained, the requirement was meant to ensure that agency members did not all represent the same interests. The commission envisioned "giving the general public a direct voice . . . through representation on the board." (App. A-126.) The purpose of the enactment of section 508.032 in 1997, then, was to avoid the overrepresentation of a narrow set of interests by Board members. In other words, the Texas Legislature sought to require a Board that would be impartial in its decision-making by giving the broader general public "a direct voice" in the clemency process through the Board's membership.

But that language was not enough to ensure that the Board provided a fair and meaningful process. After Texas enacted section 508.032, the Board and the clemency process came under fire through a series of lawsuits and the resulting media coverage. In 1998, Karla Faye Tucker alleged that the clemency procedures in Texas were "so inadequate as to violate her due process rights." *Ex parte Tucker*, 973 S.W.2d 950, 950 (Tex. Crim. App. 1998). While the court dismissed Tucker's petition, the

dismissal drew a dissent from Judge Charles Baird where he stated that "due process commands [that death row prisoners] know what criteria is examined in the clemency process, otherwise there can be no meaningful consideration of their commutation requests." *Ex parte Tucker*, 973 S.W.2d at 954. Judge Baird continued:

> This does not seem too much to ask for in a process that is constitutionally guaranteed and statutorily mandated. Indeed, it is this guarantee and this mandate that impose upon us the duty to ensure that commutation requests are meaningfully considered. Is it wrong for the judiciary to insist that such a process be more than a pretext or sham?

Ex parte Tucker, 973 S.W.2d at 954 n.7.

Joseph Stanley Faulder also challenged Texas's clemency process in 1998, alleging that Texas's procedures violated due process. The federal district court found that, between 1993 and 1998, no Board member had ever requested a hearing or teleconference on any of the 76 clemency petitions that were conducted during this time. (App. A-49 n.5.) The court also found it "remarkable" that the Board has the power to "call hearings, conduct investigations, interview petitioners, and request testimony" in connection with a clemency application but had failed to take any of those actions in the 57 clemency applications the Board had considered between 1995 and 1998. (App. A-49.) Testimony presented in the case established that "all pertinent information is not given to all Board members before they vote, and some information is inadvertently never provided to the Board members." (App. A-51.) The court

concluded that Texas's clemency process was "extremely poor" and that "a flip of the coin would be more merciful than [the Board's] votes." (App. A-51 n. 9.)

Criticism of Texas's clemency process over its unfairness and the lack of a meaningful opportunity to be heard also came from beyond the courts. In the late 1990s and early 2000s, the media also focused on these shortcomings. One article summarized the attitudes toward the Board and the clemency process: "A federal judge termed their methods 'appalling,' a state court judge labeled them lawbreakers and a prominent American Bar Association official called their activities 'a farce.' One state legislator suggested disbanding them, and another introduced a bill that would reform their ways." (App. A-57.) Another article observed that the national perception of Texas's clemency process was that it was "unfair and merciless." (App. A-63.)

In response, the Board announced in 1999 that it would change the filing deadline to give more time for a meaningful review of clemency applications and that it would consider requiring face-to-face interviews with prisoners. (App. A-63.) The criticism also sparked legislative changes. Immediately after the *Tucker* and *Faulder* challenges, the Texas legislature proposed a bill that "would require the board to hold public meetings for the first time, establish criteria for recommending clemency and mandate more-thorough reviews of each case." (App. A-63.)

Subsequently, in 2003, in response to the criticism surrounding the Board and Texas's clemency process, the Texas Legislature acted to make the Board more

impartial by adding membership requirements to section 508.032. That year, the Texas Legislature added a new membership requirement aimed at limiting the number of former employees of TDCJ, the agency that oversees Texas state prisons, who could serve on the Board at one time. The new requirement stated that "[a]t any time not more than three members of the board may be former employees of the [TDCJ]." Tex. Gov't Code § 508.032 (2003). Notably, limiting to three the number of former TDCJ employees who can serve on the Board at any given time ensures that TDCJ-affiliated members are not the majority in the current seven-member Board. That impartiality of the Board was the intent behind this statutory change is evidenced by the stated legislative intent, which was to make the Board a more independent entity and to separate it from TDCJ: "the policy interest is in independence between the pardon and parole board and Texas Department of Criminal Justice . . . ." (App. A-66-67.)

II. The current composition of the Board violates Texas Government Code section 508.032, which is meant to ensure the impartiality of the Board during clemency proceedings.

The Board membership currently consists of seven members, six of whom are either former TDCJ employees, former law-enforcement officers, or both. The seventh Board member is a former State government employee. Out of the seven Board members, six are men and only one is a woman.

At least two Board members—David Gutierrez and Brian Long—are full-fledged former TDCJ employees. Gutierrez was the former chair of the Texas

Correctional Office on Offenders with Medical or Mental Impairments, which is a division within the TDCJ. *See* Texas Department of Criminal Justice, Biennial Report of the Texas Correctional Office on Offenders with Medical or Mental Impairments Fiscal Year 2015-2016 at 5, https://www.tdcj.state.tx.us/documents /rid/TCOOMMI_Biennial_Report_2017.pdf (last visited Nov. 28, 2018). Long was employed in TDCJ's parole division.

One other Board member, Federico Rangel, also has close ties to the work that TDCJ does. Rangel was the former director of the Angelina County Community Supervision and Corrections Department, which is funded, trained, and monitored by TDCJ's Community Justice Assistance Division. Community Justice Assistance Division, Texas Dep't of Criminal Justice, https://www.tdcj.state.tx.us/ divisions/cjad/index.html (last visited Nov. 27, 2018). Rangel also served as a probation officer in Montgomery County, as a parole commissioner in the Angleton Board office, and as the Director of Adult Probation in Angelina County—all jobs that are similar to the work done by TDCJ.

Finally, six out of the seven Board members share a law-enforcement background. James LaFavers and Fred Solis were police officers in Amarillo and San Antonio, respectively. Solis was also a police chief in the city of Olmos Park and an investigator for the Bexar County District Attorney's Office. Carmella Jones and

David Gutierrez were sheriffs of Armstrong County and Lubbock County, respectively, and Brian Long worked for the Cherokee County Sheriff's Department.

III. The Proceedings Below

On May 18, 2018, the Dallas County District Attorney's Office moved to schedule an execution date of August 30, 2018, which the 283rd Judicial District Court of Dallas County granted on May 24, 2018. On June 26, 2018, the Dallas County District Attorney's Office moved to modify Garcia's execution date to December 4, 2018, which the court granted on June 27, 2018. On November 8, 2018, Garcia submitted a clemency application to the Texas Board of Pardons and Paroles.

On November 29, 2018, Garcia filed a Complaint Pursuant to 42 U.S.C. § 1983 (App. A-68), and a Motion for Preliminary Injunction (App. A-12), in the United States District Court for the Southern District of Texas. Garcia argued that the Board was in violation of Texas Government Code section 508.032, which seeks to establish an impartial decision-maker by requiring that "Board members must be representative of the general public[,]" by having six members who were former employees of the Texas Department of Criminal Justice, former law enforcement officers, or both. The Board's composition consisting of six males and one female also violated section 508.032. Because the violation of section 508.032 meant that Garcia would not have an impartial or representative decision-maker in his clemency proceeding, Garcia's minimal due process rights—including the right to a meaningful opportunity to be heard—were abridged. Finally, Garcia argued that carrying out his

execution while denied the minimal due process rights to which he was entitled in clemency proceedings would violate the Eighth Amendment's prohibition on cruel and unusual punishment

On November 30, 2018, the district court issued an Order denying Garcia's Motion for Preliminary Injunction and dismissed with prejudice Garcia's Complaint Pursuant to 42 U.S.C. § 1983. (App. A-11.) The district court held that Garcia was not entitled to injunctive relief, declaratory relief, or a stay of execution. Specifically, the district court held—without granting Garcia the benefit of a hearing—that the composition of the current Board has been in place since June 2018 and that there was no valid reason for Garcia to file a complaint pursuant to 42 U.S.C. § 1983 on November 29, 2018. (App. A-9-10.) The district court also misconstrued Garcia's argument as stating that "Texas law creates a liberty interest in the makeup of the Board that reviews clemency applications" and held that Garcia has no right to clemency or to any procedures used to evaluate his clemency application, The district court issued its final judgment the same day. (App. A-6.) On November 30, 2018, Garcia filed a timely Notice of Appeal.

On December 1, 2018, Garcia filed his Plaintiff-Appellant's Brief in the United States Court of Appeals for the Fifth Circuit. Defendants filed their response on December 1, 2018 and Garcia filed his Reply Brief on December 2, 2018. The Fifth Circuit issued its decision on December 2, 2018, affirming the district court's

dismissal of Garcia's § 1983 complaint and dismissing his motion for a stay of execution as moot. (App. A-5.) The Fifth Circuit held that Garcia's claim that the Board's compositions violates Texas law did not reflect the complete lack of process that may violate the minimal due process protections that exist in the clemency context. (App. A-4-5.) The court therefore found that Garcia had not alleged a violation of the Constitution or laws of the United States.

This petition for a writ of certiorari follows

REASONS FOR GRANTING THE WRIT

I. This case presents an important and heretofore unsettled question of federal law over which the Circuit Courts of Appeal disagree.

Twenty years ago this Court, in *Ohio Adult Parole Authority v. Woodard*, confronted the question of "whether an inmate has a protected life or liberty interest in clemency proceedings[.]" 523 U.S. 272, 276 (1998) (plurality). Under Ohio law, the Governor retained "the power to grant clemency upon such conditions as he thinks proper[,]" while the legislature "regulate[d] the application and investigation process." *Id.* Ohio law also required the Ohio Adult Parole Authority (hereafter, "Parole Authority") to "conduct a clemency hearing within 45 days of [a] scheduled execution[,]" prior to which a death-sentenced prisoner could "request an interview with one or more parole board members," which his counsel was not allowed to attend. *Id.* at 276-77.

Woodard sued the Parole Authority under 42 U.S.C. § 1983 alleging that "the short notice of the interview" that preceded his clemency hearing, and his counsel's mandated absence from that interview, violated his Fourteenth Amendment right to due process. *Id.* at 277. Importantly, Woodard did not allege, as Garcia does here, that the State's failure to provide him with a clemency proceeding that comports with state law violated his due process rights, including the right to a meaningful opportunity to be heard. Rather, Woodard's chief complaint before this Court was that Ohio's clemency procedures, while adhered to, were inadequate under the Fourteenth Amendment because of "the short notice" of the clemency interview and because "counsel could [not] attend and participate in the interview and hearing." *Id.* This Court rejected Woodard's attempt to prescribe "the procedural protections" that Ohio should establish for clemency proceedings in order to comply with the Fourteenth Amendment, *id.* at 281, and simply held that "Ohio's clemency procedures do not violate due process[,]" *id.* at 282, 288.

Justice O'Connor, in her concurring opinion, recognized that "[a] prisoner under a death sentence remains a living person and consequently has an interest in his life." *Id.* at 188 (O'Connor, J., concurring in part and in judgment). In light of this, she framed the question before this Court as follows: "[W]hat process is constitutionally necessary to protect that interest in the context of Ohio's clemency procedures." *Id.* Without answering this question, however, Justice O'Connor

concluded only that "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* Critical to Justice O'Connor's determination that Woodard's due process rights were not transgressed by the actions of the Parole Authority was the fact that it had complied with the requirements for clemency proceedings set forth under Ohio law. *Id.* at 289 ("The Ohio Death Penalty Clemency Procedure provides that, if a stay has not yet issued, the parole board must schedule a clemency hearing 45 days before an execution for a date approximately 21 days in advance of the execution. The board must also advise the prisoner that he is entitled to a prehearing interview with one or more parole board members, . . . the Ohio Adult Parole Authority complied with those instructions here[.]"). She thus rejected Woodard's contention that the Fourteenth Amendment required more process in clemency proceedings beyond what Ohio law provided. *Id.* at 289-90 ("The process [Woodard] received, . . . *comports with Ohio's regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings*." (emphasis added)).

After *Woodard*, the question that Garcia has presented to this Court remains unanswered—that is, whether the State's failure to provide a death-sentenced prisoner with a clemency proceeding that comports with state law violates the minimal due process rights to which the Fourteenth Amendment entitles him. In the twenty years since this Court decided *Woodard*, the Circuit Courts of Appeal that have considered this question have answered it in divergent ways.

In *Gissendaner v. Comm'r. Ga. Dep't Corrs.*, the Eleventh Circuit held that "the Due Process clause does not require the States to comply with state-created procedural rules." 794 F.3d 1327, 1330 (11th Cir. 2015). "Instead, it requires them to adhere to a certain minimal level of process when seeking to deprive an individual of a substantive interest protected by the Clause—namely, 'life, liberty, or property.'" *Id.* The Eighth Circuit, sitting en banc in *Lee v. Hutchinson*, explicitly agreed with and adopted the Eleventh Circuit's view. 854 F.3d 978, 981 (8th Cir. 2017), *cert. denied* 137 S. Ct. 1623 (2017). There, death-sentenced prisoners alleged that "the violations of Arkansas law, regulations, and policy during the clemency process violated the Due Process Clause of the Fourteenth Amendment." *Id.* The Eighth Circuit held that "to the extent the inmates argue that these irregularities *themselves* constitute a violation of their due process rights, this argument fails under well-established law." *Id.* (emphasis in original). Citing *Gissendaner*, the Court said that "[w]e agree with the Eleventh Circuit . . . [t]hus, even if the inmates are correct that the Board failed to comply with Arkansas law, regulations, and policy, this in and of itself is insufficient to demonstrate a significant possibility of success on the merits" of their due process claim. *Id.*

The Sixth Circuit, meanwhile, has suggested that because there is no constitutional right to clemency proceedings in the first instance, there can be no due process violation attendant to clemency proceedings short of the flipping of a coin to

determine the outcome, or arbitrarily denying a prisoner access to an otherwise available process altogether. *Workman*, 111 F. App'x at 371. The Fifth Circuit, both in Garcia's case below and in *Faulder v. Johnson*, 178 F.3d 343 (5th Cir. 1999), likewise read *Woodard*, and the minimal due process protections applicable to clemency proceedings that it recognized, as prohibiting only "an arbitrary clemency proceeding akin to the flip of a coin or a complete denial of access to the clemency process." (A-4); *Faulder*, 178 F.3d at 344.

In *Newman v. Beard*, the Third Circuit assumed, without deciding, that the minimal due process protections that extend to clemency and parole proceedings may require states to adhere to state laws governing those proceedings. 617 F.3d 775, 783-84 (3d Cir. 2010). Newman argued that Pennsylvania's parole board violated his due process rights by failing to give his application for parole fair consideration—which was a requirement under Pennsylvania law. *Id.* The Third Circuit concluded that "to the extent that Newman has a state law right to have his application fairly considered, the Parole Board gave his application all the consideration it was due." *Id.* at 783 (internal quotations omitted). "This is therefore *not a case in which the Parole Board considered factors that were foreign to the parole statute*," the Court emphasized. *Id.* at 784 (emphasis added) (citing *Block v. Potter*, 631 F.2d 233, 240 (3d Cir. 1980) ("[T]he Board applied standards that are divorced from the policy and purpose of parole, . . . violating [the inmate's] right to due process of law."). "Nor is this a case in which the Parole Board arbitrarily denied parole based on race, religion,

political beliefs, or another impermissible factor." *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[T]here are some reasons upon which the government may not rely.")). Similarly, the Seventh Circuit determined in *Bowens v. Quinn*, that due process does not entitle clemency petitioners to impose time limitations on the Governor's consideration of a clemency application where state law imposed no such time requirement. 561 F.3d 671, 675-76 (7th Cir. 2009).

Much like the Third Circuit in *Newman*, the Ninth Circuit endorsed the view that a prisoner's minimal due process rights may be transgressed where clemency decisions are made on the basis of discrimination, are wholly arbitrary, and/or fail to comport with state law. *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) ("[O]n the assumption that there might be a ground . . . for the denial of clemency—as suggested by Justice O'Connor in *Woodard*—that would offend the Constitution, . . . Anderson does not present us with any suggestion that race, religion, political affiliation, gender, nationality, etc. are involved in this case. He has not alleged that the Governor's procedures are 'infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence.'" (quoting *Woodard*, 523 U.S. at 290-91 (Stevens, J., concurring and dissenting in part)).

In *Duvall v. Keating*, meanwhile, the Tenth Circuit answered the question left open by *Woodard*, and which Garcia now asks this Court to resolve, affirmatively. There, the Court held that "[b]ecause clemency proceedings involve acts of mercy that

are not constitutionally required, *the 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, by flipping a coin." 162 F.3d 1058, 1061 (10th Cir. 1998) (emphasis added).

As the foregoing makes evident, there is significant divergence among the Circuit Courts of Appeal on the important question left open by *Woodard* and which Garcia has presented here—that is: whether the State's failure to provide a death-sentenced prisoner with a clemency proceeding that comports with state law violates the minimal due process rights to which the Fourteenth Amendment entitles him. The breadth of that divergence on this important, and as yet unanswered, federal constitutional question counsels in favor of this Court granting Garcia's petition for a writ of certiorari. *See* Sup. Ct. R. 10(a). For reasons set forth more fully *infra*, Garcia asks that this Court resolve the extant disagreement among the lower courts by answering it affirmatively.

II. A writ of certiorari should be granted because death-sentenced prisoners retain a life interest in clemency proceedings and must be afforded the minimal due process protections that this Court recognized in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), which Texas is violating by failing to comport with its own laws governing clemency proceedings.

"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 *Woodard*, the holding was provided by Justice O'Connor's concurring opinion. *See Wellons v. Comm'r, Ga. Dep't of Corrs.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014). There, this Court rejected the idea that "because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards." *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring). Instead, this Court recognized that "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* at 289.

A. During clemency proceedings, when a state violates its own statute that is meant to guarantee a fundamental due process right, such as the meaningful opportunity to be heard, the due process owed to a death-sentenced prisoner is violated.

In *Woodard*, Justice O'Connor highlighted the type of process the petitioner received—namely "notice of the hearing and an opportunity to participate in an interview"—in determining that there was no due process violation. *Woodard*, 523 U.S. at 290 (O'Connor, J., concurring). In other words, Justice O'Connor's language strongly suggests that, had Ohio's clemency process not provided notice or an opportunity to be heard, Ohio's process would not have satisfied the minimal due process requirement. Moreover, notice and an opportunity to be heard have been recognized as fundamental due process rights. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (internal quotations omitted)); *see also Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Therefore, the minimal

due process protections required in clemency proceedings must encompass the fundamental and basic due process rights of notice and a meaningful opportunity to be heard.

Other courts have also concluded that due process entails at least notice and an opportunity to be heard, even in cases in which no recognized life, liberty, or property interest exists. For example, in immigration proceedings, aliens have no liberty or property interest, but those proceedings must nonetheless afford "minimal procedural due process rights" that include "an opportunity to be heard at a meaningful time and in a meaningful manner." *Arambula-Medina v. Holder*, 572 F.3d 824, 828 (10th Cir. 2009) (internal quotations omitted). Similarly, proceedings in the penal system, where an individual no longer retains a liberty interest, *see Meachum v. Fano*, 427 U.S. 215, 224 (1976), require minimal due process, *see King v. Higgins*, 370 F. Supp. 1023, 1029 (D. Mass. 1974) (requiring "basic due process safeguards of notice and confrontation" in a prison disciplinary action and defining those safeguards as "prior notice . . . as well as a hearing which provides him with a reasonable opportunity to meet the charges against him").

Furthermore, a meaningful opportunity to be heard requires an impartial decision-maker. *See Wolff v. McDonnell*, 418 U.S. 539, 559 (1974) (holding that in a parole revocation hearing, minimal due process imposed certain minimal procedural requirements that included a "neutral and detached hearing body . . . ." (internal quotations omitted)); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding

that citizen enemy combatants are afforded some due process, which includes "a neutral decisionmaker"). This is obvious; without a neutral decision-maker, there is no meaningful opportunity to be heard.

Here, Texas has twice created requirements for Board membership designed to ensure a neutral decision-maker and, thus, a meaningful opportunity to be heard—a fundamental due process right—during clemency proceedings. Taken together, the membership requirements added in 1997 and in 2003 promote the same objective: the Board must have a degree of impartiality as the decision-maker in order to ensure a fair clemency process and a meaningful opportunity for clemency applicants to be heard in Texas's clemency process. In the judicial context, the "broad representative character of the jury" is partly a way to assure the impartiality of the jury. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946). Here, where the decision-maker is the Board, the requirement that the Board be representative of the general public is a way to assure the impartiality of the Board during a clemency proceeding. As the legislative changes to the Board membership imply, only through this impartiality can the opportunity to be heard be meaningful. Consequently, when Texas violates Texas Government Code section 508.032, the fundamental due process right of a meaningful opportunity to be heard during the clemency process has been abridged. *Cf. Woodard* 523 U.S. at 288 (O'Connor, J., concurring).

The current make-up of the Board—six members with law-enforcement background; and six men and only one woman—is not "representative of the general public," especially when considered in conjunction with the statute's prohibition against a majority of the Board having prior TDCJ work experience. Eighty-five percent of the Board members, then, are either former employees of TDCJ, or law-enforcement officers, or both. Approximately 0.4% of the Texas population are law-enforcement officers and 0.15% are TDCJ employees.[1]

The Board is also approximately 85% male—a distribution that differs vastly from the 50% of the Texas's population that is female. *See QuickFacts: Texas*, U.S. Census Bureau (July 1, 2017), https://www.census.gov/quickfacts/tx. The distribution of the gender of Board members is also a way to assure that the Board be representative of the general public, which in turn assures the Board's impartiality. *See Ballard v. United States*, 329 U.S. 187, 193 (1946) ("But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?").

[1] The United States Department of Justice conducted a census of state and local law-enforcement agencies in 2008. The published findings state that Texas has 1,913 state and local law-enforcement agencies with 96,116 total personnel. (App. A-324.) TDCJ counts approximately 38,000 employees in its 2017 annual review. (App. A-381.) The 2010 United States Census lists the population of Texas at 25,145,561. U.S. Census Bureau QuickFacts: Texas, https://www.census.gov/quickfacts/tx (last visited Dec. 3, 2018). These figures were used for the above calculations.

The need for an impartial decision-maker—that is, a Board "representative of the general public"—is especially acute in Garcia's case, where the victim was a police officer and Garcia was not the actual killer of the victim, but was instead convicted under Texas's controversial "law of parties" doctrine. A Board constituted of members with law-enforcement and state-government backgrounds, rather than members who represent Texas as a whole (*e.g.*, those with law-enforcement backgrounds; those without law-enforcement backgrounds; those without criminal-justice-system backgrounds, etc.), cannot provide Garcia with a meaningful opportunity to be heard. Without that fundamental due process right respected, *see Eldridge*, 424 U.S. at 333, Garcia faces the unconstitutional deprivation of his life interest. *See Woodard*, 523 U.S. at 289-90 (O'Connor, J., concurring). The Board's current composition violates the impartiality guaranteed by Texas Government Code section 508.032 and thus Garcia's due process rights.

Texas is violating its statutory clemency scheme by depriving Garcia of that representative and impartial decision-maker to which Texas law, and due process, entitles him. Because the lack of a neutral decision-maker eviscerates the fundamental right to a meaningful opportunity to be heard, *see Wolff*, 418 U.S. at 559, the Board is Garcia's minimal due process rights. *See Woodard*, 523 U.S. at 289-90 (O'Connor, J., concurring).

B. When a state violates its own clemency statutes and procedures, the state does not comport with the minimal due process rights guaranteed by *Woodard*.

Although clemency is considered an "act of grace," *see Herrera v. Collins*, 506 U.S. 390, 413 (1993) (internal quotation omitted), this does not mean that where a state has affirmatively created a process through which clemency will be considered, it is free to arbitrarily deviate from that process. *See Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (remanding for a hearing where a prisoner pled that the state interfered with its own clemency process); *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."); *Allen v. Hickman*, 407 F. Supp. 2d 1098, 1103-04 (N.D. Cal. 2005) ("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."); *Baze v. Thompson*, 302 S.W.3d 57, 60 (Ky. 2010) ("This minimal application requires only that a death row prisoner receive the clemency procedures explicitly set forth by state law.").

In *Woodard*, the fact that Ohio's clemency process comported with Ohio's regulations was a primary reason that Justice O'Connor found no due process violation in that case. *Id.* at 290 (O'Connor, J., concurring). When the state does not comport with its own regulations, then, the state violates the Due Process Clause. *Id.*

at 289. The Court of Appeals for the Tenth Circuit adopted this reasoning and held that

> . . . the 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.

Duvall v. Keating, 162 F.3d 1058, 1061 (10th Cir. 1998); *see also Gardner v. Garner*, 383 Fed. App'x. 722, 726 (10th Cir. 2010) (following *Duvall*). Other courts have followed suit.

Even when it is the case that no independent constitutional right exists, a state's decision to provide certain protections to a class of individuals gives rise to an obligation on the part of the state, under the Due Process Clause, to honor those protections. *See, e.g.*, *Wolff*, 418 U.S. at 557 ("The prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."). This is especially true here, where the statute at issue has been established specifically to protect death-sentenced prisoners in clemency proceedings and where Garcia already has a constitutionally protected life interest. *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring).

Because Texas has affirmatively created a statute governing the composition of the Board—requiring that it be representative of the general public—Texas is not free to arbitrarily deviate from its own statute without violating minimal due process. *See id.* at 290 ("The process respondent received . . . comports with Ohio's regulations and observes whatever limitations the Due Process Clause may impose on clemency proceedings."); *see also United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down."). This is what Texas has done here, in violation of Garcia's minimal due process rights.

CONCLUSION

For the foregoing reasons, Garcia asks that this Court grant his petition for a writ of certiorari.

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