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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON

5 FOR THE COUNTY OF MARION

6 DOUGLAS R. MARTEENY, District Attorney for Linn County, Oregon, and PATRICIA W. PERLOW, District Attorney for Lane County, Oregon, on behalf of all Oregonians, AND RANDY TENNANT, an individual victim, SAMUEL WILLIAMS, an individual victim, AMY JONES, an individual victim MELISSA GRASSI, an individual victim, Plaintiffs-Relators, v. KATHERINE BROWN, Governor of the State of Oregon; COLETTE PETERS, Director of Oregon Department of Corrections; OREGON DEPARTMENT OF CORRECTIONS; DYLAN ARTHUR, Executive Director of Oregon Parole Board and Post-Prison Supervision; MICHAEL HSU, Chairperson of Oregon Parole Board and Post-Prison Supervision, OREGON PAROLE BOARD AND POST-PRISON SUPERVISION; JOE O'LEARY, Director of Oregon Youth Authority; OREGON YOUTH AUTHORITY, Defendants-Respondents.	Case No. 22CV02609 Honorable David E. Leith **MOTION TO DISMISS PETITION FOR WRIT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION** **ORS 20.140 - State fees deferred at filing**

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MOTION

State Defendants move the court for an Order dismissing the Petition, without leave to re-plead, for failure to state a claim upon which relief can be granted and for lack of standing on the part of relators. ORCP 21A(1), (8).

UTCR 5.100 CERTIFICATION

Conferral is not required for motions to dismiss for failure to state a claim under ORCP 21 A(8). As to the question of relators' standing, which is also a motion under ORCP 21A(1), conferral is also not required. Regardless, the parties conferred by e-mail on January 25 and 26, and discussed the matter in open court during the status conference on January 28, 2021, and were unable to agree, requiring this Court to resolve the matter.

MEMORANDUM OF LAW
INTRODUCTION

> "The key to Measure 11 is an absolute standard of justice based on the violent crime itself. The crime itself defines the appropriate minimum level of punishment.
>
> "There is an escape clause: the Governor has the constitutional power to pardon anyone convicted of a crime. If the Governor determines that a pardon is not appropriate he or she also has the constitutional power to issue a grant of clemency, and reduce the mandatory minimum sentence. This pardon and clemency power has existed since Oregon Constitution was adopted in 1857. The whole idea is that tough criminal laws might, on rare occasion, lead to an aberration, and executive clemency is available."

Kevin Mannix, *Oregon Future* 15 (Fall 1998)

This case is about the relators' desire for this Court to impose new restrictions on the Governor's power of clemency — restrictions that do not appear in statute or in the Oregon Constitution or in any other source of law. The Court should decline to do so.

The Oregon Constitution grants to the State's Governor the power of clemency[1] — a power that the Oregon Supreme Court has described as "plenary." The Governor may exercise

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[1] "Clemency" is a catch-all term that includes pardons, commutation of sentences, reprieve and remission of fines and forfeitures. A pardon is a complete and ultimate removal of a conviction. A commutation modifies a sentence to a lesser sentence or reduces the term of a sentence (for example, enabling someone to have the opportunity for parole or releasing someone early from

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1 this authority by responding to individual applications, or the Governor may proactively reach
2 out and grant clemency on her own initiative. Governor Brown has done both — responding to
3 individual applications, as well as proactively granting clemencies to individual adults in custody
4 within discrete groups who did not fill out an application (described below as the "COVID-19
5 clemencies," the "firefighter clemencies," and the "15-year parole hearing clemencies").
6 Relators disagree with how Governor Brown has chosen to exercise this plenary power and ask
7 this Court to step in and substitute its judgment for that of the Governor. The Court must
8 decline. The first, and perhaps most fundamental, reason to decline is that the Court simply
9 lacks jurisdiction to step in here. But even if the Court had jurisdiction, the petition would still
10 fail on the merits. The Governor's acts of clemency —in response to the extraordinary
11 circumstances that have faced the State over the past two years and otherwise— fit squarely
12 within her authority. Relators' petition must be dismissed.

13 Relators, the district attorneys of Linn and Lane Counties and four citizens who are
14 relatives of persons who were murdered,[2] allege that the Governor, the Oregon Department of
15 Corrections ("ODOC"), the Oregon Youth Authority ("OYA") and the Oregon Board of Parole
16 and Post-Prison Supervision ("the Board") are improperly reducing the sentences of persons in
17 custody and violating the Governor's clemency power. They ask that a writ be issued enjoining
18 the Governor from exercising her clemency powers, and enjoining ODOC, OYA, and the Board
19 from performing acts related to the exercise of her clemency powers (even though the
20 commutations have already occurred). However, relators misapprehend the laws relating to
21 clemency and misstate the requirement of the clemency process.

22 The petition must be dismissed both because the Court has no jurisdiction to grant the
23 petition, and also because relators' case simply fails on the merits.

24 ________________________

25 prison). A reprieve is a temporary suspension of a sentence. Remission is the removal of court-imposed fines or fees.

26 [2] Plaintiff Tennant Williams Jones and Grassi are, respectively, the son, father, sister and life partner of murder victims.

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1 As a threshold issue, Section I of the Argument below explains that neither the district
2 attorneys nor the individuals have standing to seek a writ of mandamus, as they lack a specific
3 injury related to the Governor's clemency action or legally recognized interest in the matter at
4 hand. As a result, this Court lacks jurisdiction, and the Court must dismiss the entire petition on
5 this basis alone.
6 But, even if the Court had jurisdiction, the entire petition would fail on the merits,
7 because the Governor's actions are lawful, as discussed in Sections II-IV of the Argument.
8 While the petition is not entirely clear, the claims appear to fall into three general groups, all of
9 which fail as a matter of law.
10 Petitioners first contend that when the Governor has proactively granted clemency they
11 have not received notice they contend is required. As a matter of law, the obligations relators
12 assert does not exist. The Court must dismiss claims based on any alleged failure to provide
13 notice.
14 Relators' second contention is that clemency only lasts during a Governor's term and its
15 effects cannot outlast the term. But this argument misapprehends both the law and the facts, as
16 explained in Section III below. As a legal matter, the decision in *Haugen v. Kitzhaber*, 353 Or.
17 715 (2013), does not support relators' contention that clemency only lasts during a Governor's
18 term; if this were the case, no Governor could issue a pardon or a commutation. Indeed, as the
19 Oregon Supreme Court has noted, except in cases of treason, the Governor's clemency powers
20 are plenary. *Haugen v. Kitzhaber*, 353 Or. 715, 727 (2013).
21 Relators also challenge a specific subset of the Governor's commutations, which granted
22 certain juvenile offenders —offenders who committed crimes before turning 18— an opportunity
23 for a future parole hearing, like any other juvenile offender would be entitled to after the
24 legislature passed Senate Bill 1008 in 2019. Relators contend, incorrectly, that the Governor is
25 unlawfully applying SB 1008 "retroactively" and that the Governor has unlawfully delegated her
26 clemency power to the Board. However, as explained in Section III below, the Governor has

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properly exercised her clemency powers and the Board is acting pursuant to its own statutory authority. The Court must dismiss all claims based on relators' objection to clemencies that result in a commutation of a sentence to allow future eligibility for parole (as opposed to immediate release).

Each of these issues is a matter of law, not of fact. As to each, the relators are incorrect in their legal analysis. Accordingly, this matter is suitable for disposition on a motion to dismiss and should be dismissed with prejudice and without right to re-plead.

FACTS

On a motion to dismiss, the Court must accept the allegations in the petition as true.[3] None of the factual allegations should deter this Court from dismissing this action.

As noted above, relators Marteeny and Perlow are, respectively, the district attorneys of Linn and Lane Counties. Petition ¶ 6. Relators Tennant, Williams, Jones and Grassi are relatives of crime victims. Petition ¶¶ 7-10.

Governor Brown has exercised her constitutional authority to grant clemency and has properly reported her clemency actions to the Legislative Assembly on a regular basis. Petition ¶¶ 23, 37, 38, 42, Exhs. 2, 4, 5, 13, 14, 15, 16, 17.

While some of the clemencies that Governor Brown has granted have involved traditional clemency applications, she also has exercised her authority by proactively granting clemencies to groups of adults in custody, referred to for convenience as the COVID-19 clemencies, the firefighter clemencies, and the 15-year parole hearing clemencies. The method of developing these lists of individuals eligible to be included in the groups, and the Governor's action with respect to each, is described below.

[3] Respondents may contest some of the allegations later in the litigation, should that be necessary but accept them solely for the purposes of this motion.

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1 **1. COVID-19 Clemencies**

2 Between June 2020 and March 2021, as the world grappled with the COVID-19
3 pandemic, the Governor requested ODOC identify adults in custody "who are vulnerable to the
4 effects of COVID-19" for *possible commutation*, so long as they met specific criteria.[4] None of
5 the letters attached to the Petition as Exhibit 3 do more than request lists of eligible adults in
6 custody. They do not delegate the Governor's decision to grant a pardon, commutation, or
7 reprieve to the Department of Corrections. *Id.* The Governor then granted clemency to most of
8 the individuals on those lists.

9 **2. Firefighter Clemencies**

10 In March 2021, the Governor requested ODOC identify adults in custody "who were
11 deployed to fight the historic wildfires that ravaged the state around Labor Day 2020." Petition
12 Exh. 3 at 8. Such individuals would be eligible for having up to 12 months of their sentences
13 commuted. *Id.* They, too, needed to meet specific criteria just to be considered.[5]

14 As before, the Governor did not delegate the power to grant a commutation to the
15 Department of Corrections. *Id.*

16

17 [4] Those criteria were:
18 • Be particularly vulnerable to COVID-19, as identified by ODOC medical staff;
• Not be serving a sentence for a person crime;
19 • Have served at least 50% of their sentence;
• Have a record of good conduct for the last 12 months;
20 • Have a suitable housing plan; and
• Have their out-of-custody health care needs assessed and adequately addressed.

21 Petition ¶ 34, Exh. 3 at 1.

[5] Those criteria were:
22 • For the duration of their deployment during the 2020 wildfire season, met the criteria for fire crew participation, as outlined by ODOC policy and procedures;
23 • Have a record of good conduct for the last 12 months;
• Have a suitable housing plan prior to the date set for their early release;
24 • Have their out-of-custody health care needs assessed and adequately addressed prior to the date set for their early release; and
25 • Not present an unacceptable safety, security, or compliance risk to the community.

26 Petition ¶ 35, Exh. 3 at 8.

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In June 2021, the Governor reported to the legislature that she had commuted the sentences of 953 adults who met the above-described requirements for COVID-19 or firefighter clemencies. Petition ¶ 43, Exh. 4 at 1-2.

3. 15-year Parole Hearing Clemencies

In September 2021, the Governor requested that ODOC and OYA identify adults and juveniles in custody who were sentenced prior to the effective date of SB 1008 and who did not benefit from Section 25 of that legislation (now codified as ORS 144.397), which allows a juvenile offender who has served a 15-year term of incarceration to have a hearing and a "meaningful opportunity for release on parole or post-prison supervision" upon a showing of maturity and rehabilitation. Upon meeting specific criteria outlined in the letter, those adults and juveniles in custody were "eligible for consideration to have their sentences commuted." There were two groups with slightly different criteria which were (a) youth and adults in the custody of OYA and ODOC eligible for review for a commutation of their sentence after they had served 50 percent of that sentence,[6] and (b) youth and adults in the custody of OYA and ODOC eligible for a commutation that enabled them to pursue a parole hearing, as described and provided for in ORS 144.397 and Section 25 of SB 1008.[7]

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[6] Those criteria were:

- Was a juvenile at the time of committing the offense for which they are in custody;
- Be serving a sentence that was ordered prior to January 1, 2020;
- Not be serving a sentence for which any convictions are for crimes that were committed as an adult; and
- Has served fifty percent of their sentence or will have served fifty percent of their sentence by December 31, 2022.

Petition ¶ 45, Exh. 7 at 2.

[7] Those criteria were:

- Was a juvenile at the time of committing the offense for which they are in custody;
- Be serving a sentence that was ordered prior to January 1, 2020;
- Be serving a sentence of fifteen years or more of imprisonment;
- Not be serving a sentence for which any convictions are for crimes that were committed as an adult; and
- Not be serving a sentence with a current projected release date in 2050 or later.

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1 Again, nothing in the Governor's communication effectuated an act of clemency nor did
2 it give anyone at ODOC or OYA the ability to implement an act of clemency. *Id.* Ultimately the
3 Governor—and no one else—commuted the sentences of the 73 individuals. Petition Exh. 9.
4 Contrary to the conclusory allegation in Paragraph 53 of the Petition, the Governor did
5 not delegate that commutation power to the Board. Relators' delegation claim relies on Exhibit 9
6 of the Petition.[8] But that Exhibit demonstrates the contrary; it states:

7 8 9 10
> I, Kate Brown, Governor of the State of Oregon, hereby commute the sentence of each Commutee, under the respective Judgment of Conviction referenced in Exhibit A, such that each Commutee—after serving 15 years of imprisonment as described in ORS 144.397(1)—has the opportunity to petition the Oregon State Board of Parole and Post-Prison Supervision for future release consideration under the process described in ORS 144.397 and any rules promulgated thereunder by the Board, effective as of the 4th day of December, 2021, immediately upon execution of this order.

11 In other words, the Governor performed the required acts of commutation (*i.e.* changing the
12 punishment imposed by a sentencing court), which are now complete. Petition Exh. 9.

13 **LEGAL BACKGROUND AND STANDARDS**

14 ***Standards on Motion to Dismiss***

15 In considering a motion to dismiss under ORCP 21 A, a trial court accepts all well-
16 pleaded allegations of the complaint as true and gives plaintiff the benefit of all favorable
17 inferences that may be drawn from the facts alleged. This does not relieve plaintiff of the
18 requirement to establish the right to recover damages by providing a "plain and concise
19 statement of the ultimate facts constituting his claim for relief." ORCP 18 A. *Davis v. Tyee*
20 *Industries Inc.,* 295 Or. 467, 479 (1983). The court's task is to determine only whether those

21 ______________________

22 Petition ¶ 45, Exh. 7 at 2.

23 24 25 26
[8] Although the Court in general has to accept the allegations in the Complaint as true, when, as here, the relators attach documents to the pleading that show the allegations to be incorrect or misleading, the Court may properly reject such assertions and rely on the text of the attached documents. *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998); *Ala, Inc. v. CCAir, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994); *Graue Mill Devel. Corp. v. Colonial Bank & Trust Co*., 927 F.2d 988, 991 (7th Cir. 1991); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206-07 (5th Cir. 1975); *see, e.g., Loveland v. Warner*, 204 P. 622, 627 (Or. 1922).

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1 allegations, so construed, are sufficient to constitute a claim. *Babick v. Oregon Arena Co.,*
2 333 Or. 401, 407 (2002). The court may accept all well-pleaded factual allegations, but it should
3 ignore legal conclusions. *Huang v. Claussen,* 147 Or. App. 330, 332 (1997).
4 ***Sources of Clemency***
5 The power of the governor to grant clemency in its various forms is established in Article
6 V, section 14 of the Oregon Constitution, which states:
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> [The Governor] shall have power to grant reprieves, commutations, and pardons, after conviction, for all offences [sic] except treason, subject to such regulations as may be provided by law. Upon conviction for treason [the Governor] shall have power to suspend the execution of the sentence until the case shall be reported to the Legislative Assembly, at its next meeting, when the Legislative Assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a farther [sic] reprieve.—
>
> [The Governor] shall have power to remit fines, and forfeitures, under such regulations as may be prescribed by law; and shall report to the Legislative Assembly at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same; and also the names of all persons in whose favor remission of fines, and forfeitures shall have been made, and the several amounts remitted[.]

14 Clemency is the governor's power to perform a check on the actions of the judicial branch.
15 *Haugen v. Kitzhaber*, 353 Or. 715, 726 (2013). The Governor is the sole repository of clemency
16 power. *Eacret v. Holmes*, 215 Or. 121, 126 (1958). This power has been legislatively
17 confirmed. ORS 144.649 ("Upon such conditions and with such restrictions and limitations as
18 the Governor thinks proper, the Governor may grant reprieves, commutations and pardons, after
19 convictions, for all crimes and may remit, after judgment therefor, all penalties and forfeitures.")
20 ***Mandamus***
21 ORS 34.110 authorizes a writ of mandamus "to any inferior court, corporation, board,
22 officer or person, to compel the performance of an act which the law specially enjoins, as a duty
23 resulting from an office, trust or station[.]" However, the writ "shall not be issued in any case
24 where there is a plain, speedy and adequate remedy in the ordinary course of the law." *Id.*
25 Examples of "plain, speedy and adequate remedies" include a direct appeal of an adverse
26 judgment, *State ex rel. LeVasseur v. Merten*, 297 Or. 577, 582 (1984), and judicial review of an

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1 administrative hearing, *Phillips v. Layman*, 15 Or. App. 107, 109 (1973).[9] Even if mandamus is

2 not precluded as a matter of law, this court has the discretion not to intervene. *See* ORS 34.110

3 ("A writ of mandamus *may* be issued to any inferior court, corporation, board, officer, person

4 * * *.") (emphasis added).

5 **ARGUMENT**

6 **I. The relators do not have standing to bring this litigation.**

7 "A party who seeks judicial review of a governmental action must establish that that

8 party has standing to invoke judicial review." *Kellas v. Dep't of Corrections*, 341 Or. 471, 477

9 (2006). The requirements for standing are determined by looking to "the statute that confers

10 standing in the particular proceeding that the party has initiated." *Id.* Here, the relators have not

11 established that they have the necessary standing.

12 ORS 34.105 defines a "relator" for the purposes of a writ of mandamus, as "the

13 beneficially interested party on whose relation a mandamus proceeding is brought." "That

14 interest must be more than just an interest in common with the public generally." *State ex rel.*

15 *Young v. Keys*, 98 Or. App. 69, 72 (1989). Because there is little case law interpreting that

16 provision or setting forth the standing requirements for a writ of mandamus, it is helpful to

17 examine Oregon law as it relates to standing for other writs as well as that for declaratory

18 judgments.

19 The relators have the burden of proving facts that establish standing. *Duddles v. City*

20 *Council of West Linn*, 21 Or. App. 310, 330 (1975). *See also Bowles*, 175 Or. at 106 (a petition

21 for mandamus must "show the special interest of the relator and must negative any facts under

22 which the statute relied upon might defeat his right to maintain the action.").

23

24 [9] Although a declaratory judgment is a "plain, speedy adequate remedy" that would normally preclude a writ of mandamus in this case, defendants do not make that argument here. As argued
25 in more detail below, relators do not have standing to bring a declaratory judgment. *See* *Dewberry v. Kulongoski*, 346 Or. 260, 270-74 (although a plain and adequate remedy need not
26 be "meritorious for relator," a declaratory judgment is neither a plain nor adequate remedy where it may be defeated on jurisdictional grounds).

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For any plaintiff to establish standing, first that plaintiff must demonstrate "some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." *Kellas,* 341 Or. at 477 (citation omitted); *see also Gortmaker v. Seaton*, 252 Or. 440, 444 (1969) ("Mere difference of opinion as to the constitutionality of an act" is not sufficient). A relator must be adversely affected or aggrieved. *See Conte v. City of Eugene*, 292 Or. App. 625, 635 (2018) (discussing standing to bring a writ of review); *see also State ex rel. Bowles v. Olson*, 175 Or. 98, 106 (1944) (in a petition for a writ of mandamus, a relator must "show at least prima facie a clear right existing in the relator to have the thing done which he seeks to enforce.").

Second, the plaintiff must establish an injury that is "real or probable, not hypothetical or speculative * * * [and] must involve a dispute based on present facts rather than on contingent or hypothetical events." *Morgan v. Sisters Sch. Dist. No. 6*, 353 Or. 189, 195-96 (2013) (citation omitted).

Finally, the plaintiff must show that the court's decision would "have a practical effect on the rights that the plaintiff is seeking to vindicate. * * * That is to say, a connection must exist between the rights that a plaintiff seeks to vindicate and the relief requested. The relief that the plaintiff seeks, if granted, must redress the injury that is the subject of the declaratory judgment action." *Id*. at 197 (citation omitted); *Gortmaker*, 252 Or. at 443 (plaintiff district attorney lacked standing under Declaratory Judgments Act to seek interpretation of criminal statute because a decision would not affect his rights).

Defendants note that only one of the relators need to show standing in order to confer jurisdiction on this Court. *MacPherson v. Dept. of Admin. Servs*., 340 Or. 117, 123-24 (2006). But none have adequately alleged standing here.

A. The district attorneys lack standing.

Relator Marteeny is the elected district attorney of Linn County. Relator Perlow is the elected district attorney of Lane County. They assert that they have standing to represent the

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1 public and crime victims under Article VII, section 17 of the Oregon Constitution. Petition ¶ 6.
2 However, the Supreme Court has rejected the proposition that a district attorney had standing to
3 seek a judgment regarding criminal statutes. *Gortmaker*, 252 Or. at 442 ("The district attorney is
4 not a party whose rights, within the meaning of ORS 28.020, could be affected by judicial
5 construction of [a criminal statute]."). *See also Foote v. State*, 364 Or. 558, 571 (2018) ("Foote's
6 asserted interest in certainty about his prosecutorial duties with respect to the effect of a criminal
7 statute is not an interest that can confer standing under ORS 28.020."); *Gaffey v. Babb*, 50 Or.
8 App. 617, 622-23 (1981) (describing "the general rule prohibiting the use of a declaratory
9 judgment action to challenge a criminal statute"); *Nelson v. Knight*, 254 Or. 370, 372–73 (1969)
10 (rejecting as improper an effort by criminal defendant to get a declaratory judgment against
11 district attorney regarding law applicable to his pending criminal proceeding).
12 Although each of these cases took place in the context of a declaratory judgment action
13 rather than a writ, there is no basis to distinguish them on that ground. The language in *Kellas*
14 suggests that the standards are the same. Indeed, were there to be a different rule, all parties
15 could evade legislative intent as to who can access the courts for redress merely by filing for
16 writs instead of declarations.
17 In *Gortmaker*, the Marion County District Attorney sought a declaratory judgment
18 regarding "the meaning of various statutes and regulations designed * * * to restrict the sale of
19 * * * LSD." *Gortmaker*, 252 Or. at 442. In support of standing, the district attorney argued that
20 (1) "if he actually prosecutes under the statutes as he understands them, he could be sued for
21 damages" and (2) "if he erroneously fails to prosecute, he, himself, can be prosecuted by the
22 state." *Id*. at 443. The court flatly rejected these asserted bases for standing:
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> Any district attorney in the state can make the same assertion about any criminal law on the books. These allegations are mere conclusions, highly speculative, hypothetical, and, as statements of law, open to serious question. We hold that the district attorney has stated no facts giving him standing to sue in this case.

26 *Id*.

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1 In *Foote,* the Clackamas County District Attorney expressed uncertainty about how to
2 proceed with sentencing given a legislative change to sentences for certain property crimes. The
3 Oregon Supreme Court reviewed the state of the law and concluded that "*Gortmaker* remains
4 good law and it controls the resolution of relators' claim that Foote has standing to bring this
5 action in his capacity as the district attorney for Clackamas County. Foote lacks standing * * *."
6 *Foote*, 364 Or. at 571. *Gortmaker* and *Foote* remain good law on the question of standing. *See,*
7 *e.g., Morgan*, 353 Or. at 198. They should control here.
8 Relators Marteeny and Perlow assert that they have standing "on behalf of the public and
9 on behalf of crime victims." Petition ¶ 16. But that argument is even weaker than the arguments
10 rejected by *Gortmaker* and *Foote*. In those cases, the district attorneys asserted that they were
11 uncertain about how to proceed with their duties with respect to a criminal statute. But, as the
12 Court announced in *Gortmaker*, it is the district attorney's responsibility to "initially decide the
13 meaning of a criminal law;" and the fact that he must do so in the face of uncertainty is not an
14 injury to a legally recognized interest. *Id*. at 445. Here, by contrast, relators do not provide any
15 explanation for their theory that they have representational standing based on their official
16 capacity – indeed, representational standing is the exception, not the rule in Oregon, and should
17 not be allowed here.
18 Relators may argue that they have standing under *Brown v. Oregon State Bar*, 293 Or.
19 446, 448 (1982), where the Court allowed the Attorney General to obtain a declaration regarding
20 his "responsibilities under state law and the [attorney] disciplinary rules." But the differences
21 between this case and *Brown* highlight why relators lack standing.
22 In *Brown*, following a bar complaint against the Attorney General, the legal ethics
23 committee of the Oregon State Bar issued an opinion, approved by the Board of Governors,
24 stating that the Attorney General's act of providing *ex parte* advice to an agency director and
25 hearings officer regarding a pending contested case violated several rules of professional
26 responsibility. 293 Or. at 448. The Attorney General disagreed with this opinion, asserting that

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1 he had the statutory duty to provide such *ex parte* advice in appropriate circumstances. Rather
2 than go ahead and engage in such activity in violation of a published ethics opinion, however, the
3 Attorney General sought a declaratory judgment regarding his statutory duties. The Oregon
4 Supreme Court found that the controversy was justiciable, noting that the controversy involved
5 "present facts, the plaintiff's existing statutory duty" and noting the outstanding State Bar ethics
6 opinion as part of the source of the controversy. *Id*. at 450.

7 In *Brown*, unlike in this case, the Attorney General faced a real and concrete injury, in the
8 form of a realistic threat of bar discipline (from the defendant Oregon State Bar) if he acted as he
9 believed the law allowed. Relators have alleged no comparable threat of injury from the state
10 here.

11 There is a second problem with relators' standing. District attorneys have no authority to
12 hire outside counsel. District attorneys are employees of the State of Oregon. *State v. Coleman*,
13 131 Or. App. 386, 390-91 (1994) (describing district attorney as acting as state officer in context
14 of criminal prosecution). As such, they have no right to hire counsel to represent them in their
15 official capacity other than the Oregon Department of Justice. ORS 180.220(2).[10]

16 Relators may rely on ORS 180.070(4), which states that "The power conferred by this
17 section, ORS 180.060, 180.220 or 180.240 does not deprive the district attorneys of any of their
18 authority or relieve them from any of their duties to prosecute criminal violations of law and
19 advise the officers of the counties composing their districts." But this suit is neither the
20 prosecution of a criminal violation of the law nor is it advising the officers of the counties
21 composing their districts. It is a civil suit against the state. The powers of district attorneys are
22 defined in ORS 8.630 as "those subject to the restrictions provided by the Constitution."
23 Nowhere in the law, including the Oregon Constitution, Article VII, section 17, are district
24 attorneys given such powers. Indeed, that section only says that district attorneys "shall perform

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[10] Nor is such a right conferred by any of the statutory authority governing district attorneys. ORS 8.610-8.852. While the Attorney General may, in some circumstances, authorize outside counsel, relators have made no such request, and no such authorization has been extended.

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1 such duties pertaining to the administration of Law, and general police as the Legislative
2 Assembly may direct." Relators cannot identify any "direction" from the Legislative Assembly
3 that allows them to hire private counsel and bring suit against the Governor as part of their
4 duties.

5 Moreover, the only exception to the requirement to use the office of the Attorney General
6 for legal services is set forth on ORS 180.235. *See also Frohnmayer v. SAIF*, 294 Or. 570, 587
7 (1983) (holding that "an agency must invoke ORS 180.235(1) by requesting authorization
8 [before] employ[ing] separate counsel"). That statute requires authorization by the Attorney
9 General herself. No such authorization has been sought or granted here.

10 **B. The crime victims also do not have standing.**

11 The allegations that relators or their family members have been victims of crimes are not
12 sufficient for standing. The Oregon Supreme Court has rejected crime victim standing to bring
13 actions regarding clemency. In *Eacret v. Holmes*, 215 Or. 121, 124-25 (1958), parents whose
14 son had been murdered attempted to obtain a declaration setting forth limits on the Governor's
15 power to commute the death sentence of their child's murderer. The court dismissed for lack of
16 standing, holding that "Punishment for crime is not a matter of private vengeance, but of public
17 policy." *Id.* at 124-125. The court held that "[a]ny violation of constitutional rights which might
18 be supposed to flow from what is asserted to be an 'unconstitutional' exercise by the executive of
19 the pardoning power would affect equally all the people of the state, rather than the relators in a
20 different and special way." *Id.* at 125.

21 While every victim's experience is unique, as a legal matter, in mounting this challenge
22 to the Governor's clemency powers, the family relators are not raising an issue recognized as
23 legally unique to them. Relators' experiences as crime victims do not give them a legally
24 recognized interest in obtaining court declarations regarding criminal sentencing laws or the
25 Governor's constitutional clemency powers.

26

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In sum, every one of the relators lacks standing to seek the writ in this case, and this Court should dismiss the petition.[11] Even though mandamus is intended to provide relief where there is no "plain, speedy and adequate remedy," it is nonetheless an "extraordinary remedy" and was not intended to provide relief here. That is so, because, as argued below, the Governor's clemency power is plenary and is not subject to the kind of judicial review that relators invite here.

II. The Governor's grants of clemency were procedurally proper.

The grants of clemency challenged by relators were all properly granted by the Governor. That is because, as the legislature has acknowledged, the Constitution generally vests in the Governor the incredibly broad power to grant clemency "[u]pon such conditions and with such restrictions and limitations as the Governor thinks proper." ORS 144.649; *see Ex parte Houghton*, 49 Or. 232, 234 (1907) (so holding for predecessor to ORS 144.649). The Governor's clemency power is not limited to acting on application; while the statutorily established application route provides one avenue to grant clemency, the Governor may also act proactively, without an application. *See, e.g.*, *Haugen*, 353 Or. at 718 (governor proactively granted a reprieve). Because the clemency power is not limited to application-based clemency, relators' procedural arguments fail. The regulations related to clemency applications, such as those involving the Governor's receipt and reporting of victims' and district attorneys' statements, are inapplicable when the Governor acts proactively and issues clemency decisions outside of the application process (as she did with the COVID-19 clemencies, the firefighter clemencies, and the 15-year parole hearing clemencies). Mandamus is therefore inappropriate, and this Court should dismiss the petition.

[11] For the same reasons that relators lack standing to seek a writ of mandamus, they also lack standing to seek a declaratory judgment.

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1 **A. The Oregon Constitution vests the Governor with broad clemency powers, subject only to regulations provided by law.**

2 Article V, section 14, of the Oregon Constitution vests the Governor with broad powers
3 to grant clemency and, except for cases of treason, imposes no direct limits on those powers.
4 The description of the Governor's clemency power is straightforward: "[The Governor] shall
5 have power to grant reprieves, commutations, and pardons, after conviction, for all offences
6 except treason, subject to such regulations as may be provided by law." *Id.* As the Oregon
7 Supreme Court has held, those words evidence the framers' intent to "make the Governor the
8 sole repository of the [clemency] power." *Eacret*, 215 Or. at 126; *see id.* (discussing pardon
9 power specifically).

10 In the more than 150 years since this State's adoption of that provision, no Oregon
11 appellate court has held otherwise. Most recently, in *Haugen*, the Oregon Supreme Court
12 conducted a thorough review of the text, context, and history of Article V, section 14, and
13 concluded that the only limits envisioned by the framers were the "fundamental limit" imposed
14 through the polls (via the voters) and "the legislature's authority to establish regulations
15 regarding the Governor's power." *Haugen*, 353 Or. at 742-43; *see id.* at 722-42 (discussing text,
16 context, and history). It further noted, "The express limitation in the constitution on the
17 Governor's clemency power in cases of treason supports the Governor's argument that, in all
18 other cases, [the Governor's] power is plenary." *Id.* at 727; *cf. id.* at 729 (declining to interpret
19 "grant" in art. V, § 14, to require that the "intended recipient must acquiesce in [a] reprieve,"
20 because "interpreting 'grant' that way would deprive the word 'power' of much of its meaning").
21 Indeed, the court recognized that the constitution's broad grant of clemency power was "an
22 important part of the constitutional scheme envisioned by the framers" and "is one of the
23 Governor's only checks on another branch of government." *Id.* at 742.

24 Relators acknowledge the Governor's broad clemency power under the constitution.
25 Petition ¶ 60. They argue, however, that the legislature has imposed —through ORS sections
26 144.650, 144.660, and 144.670— procedural requirements on the Governor's decisions to grant

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clemency here. Petition ¶¶ 62, 64, 67, 80-83. Namely, relators argue that those statutes provide that the Governor (1) may act only on application, (2) must provide for victims' participation in all clemency decisions, and (3) must consider victims' and district attorneys' statements before granting clemency. Regardless of the advantages or disadvantages of realtors' arguments as a matter of policy or discretion, a plain reading of the statutes on which relators rely shows that relators are incorrect as a matter of statutory interpretation, especially in light of *Haugen*, which confirms that the application process is not exclusive. And it is not the role of the judicial branch to direct matters of policy or discretion when it comes to clemency.

B. No law limits the Governor's clemency power to acting only on application by a person seeking clemency.

The Governor's clemency power is not limited to granting a convicted person's application for clemency. Relators argue otherwise, but they cite only ORS 144.650 as their source of authority. Petition ¶¶ 2, 43–44, 59, 67, 82, 87. Nothing in that statute narrows the constitution's broad grant of clemency power to the single narrow circumstance when a convicted person applies for clemency.

Proper construction of ORS 144.650 requires this conclusion. Oregon courts construe statutes by examining text and context and considering legislative history. *State v. Gaines*, 346 Or. 160, 171-72 (2009) (*citing* ORS 174.020). "[T]ext and context remain primary, and must be given primary weight in the analysis." *Id.* at 171.

Nothing in the text of ORS 144.650 purports to limit the Governor's clemency power to approval of an application for clemency. The only provision of that statute that purports to regulate the Governor's clemency power is in subsection (5), which requires the Governor to wait "at least 30 days" before granting an application for clemency. But that subsection applies only "[f]ollowing receipt by the Governor of *an application*"—that subsection cannot be reasonably read to also impose a requirement that clemency be granted *only* after receipt of an application. *Id.* (emphasis added).

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As to context, a neighboring statute section confirms that the Legislature did not intend ORS 144.650 to limit the Governor's clemency powers to merely responding to clemency applications. *See Jones v. General Motors Corp.*, 325 Or. 404, 411 (1997) ("As a part of context, this court considers, among other things, other provisions of the same statute, other related statutes, prior versions of the statute, and this court's decisions interpreting the statute."). Namely, ORS 144.649 is "[t]he lone provision" in ORS 144.649–144.670 that "address[es] the scope of the Governor's power," and it "expresses the legislature's intent to defer to the Governor's judgment regarding the exercise of [clemency] power":

> Upon such conditions and with such restrictions and limitations as the Governor thinks proper, the Governor may grant reprieves, commutations and pardons, after convictions, for all crimes and may remit, after judgment therefor, all penalties and forfeitures.

Haugen, 353 Or. at 727 n.7 (first quote); ORS 144.649 (block quote). If the legislature had intended ORS 144.650 to provide the *only* means by which the Governor could grant clemency, it would make no sense for the legislature to also affirm that the Governor may generally grant clemency "[u]pon such conditions and with such restrictions and limitations as the Governor thinks proper." ORS 144.649. The legislature knows how to use words of exclusivity when that is what it means to do—and it did not do so here.

Eacret, in which the Supreme Court interpreted a prior version of ORS 144.650, confirms that construction. *See Jones*, 326 Or. 411 (see *Jones* parenthetical above). In *Eacret*, the Supreme Court examined ORS 143.040, which is the direct predecessor to ORS 144.650.[12] The *Eacret* court noted that ORS 143.040 "[did] not purport to regulate the Governor's power." *Eacret*, 215 Or. at 127 n.2. Rather, it "merely prescribe[d] a procedure to be followed by the

[12] *Former* ORS 143.040 provides: At least 20 days before an application for a pardon, commutation or remission is made to the Governor, written notice of the intention to apply therefor, signed by the person applying, and stating briefly the grounds of the application, shall be served upon the district attorney of the county where the conviction was had and upon the Director of Parole and Probation. Proof by affidavit of the service shall be presented to the Governor.

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1 applicant for 'a pardon, commutation or remission.'" *Id.* Although ORS 144.650 now contains
2 additional procedures to be followed, including procedures to be followed by various State
3 officials, it remains —at most— a regulation of the clemency *application* process, not a
4 limitation on the Governor's clemency power.

5 *Haugen* makes clear that clemency does not require an application to trigger it. In that
6 case, the Governor had proactively granted a reprieve, and the recipient had attempted to reject
7 that reprieve. *Haugen*, 353 Or. at 717. The Supreme Court held that "the reprieve was valid and
8 effective, regardless of [the recipient's] acceptance of the reprieve." *Id.* at 743. In reaching that
9 holding, the *Haugen C*ourt took note of ORS 144.649-144.670, explaining that, except for ORS
10 144.649 (discussed above), those provisions "address[ed] procedural issues, such as the
11 procedure for reporting acts of clemency to the legislature and the procedure for applying for
12 clemency." *Haugen*, 353 Or. at 727 n.7. In other words, the question of whether ORS 144.650
13 —or, for that matter, ORS 144.649, 144.660, and 144.670— proscribes proactive grants of
14 clemency has already come before the Supreme Court. The Supreme Court's answer was "no."
15 There is no meaningful basis to distinguish reprieves from the Governor's other clemency
16 powers.

17 Importantly, construing ORS 144.650 to restrict the Governor's ability to proactively
18 grant clemency would raise serious separation-of-powers questions. The constitution vests the
19 Governor "with the *complete* power" of clemency. *Application of Fredericks*, 211 Or. 312, 319
20 (1957) (emphasis added); *see Haugen*, 353 Or. at 741 (describing *Fredericks* decision). And
21 Article III, section 1, of the Oregon Constitution provides that "no person charged with official
22 duties under [the legislative, executive, or judicial branches], shall exercise any of the functions
23 of another, except as in this Constitution expressly provided." Although Article V, section 14,
24 contemplates that the power would be "subject to regulation" by the legislature, it is doubtful that
25 the framers intended "regulation" to include substantial diminution of the power, such as a law
26 that would relegate the power to only responding to applications for its use.

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In short, the text and context of ORS 144.650 demonstrate that the legislature did not intend that statute to limit the Governor's substantive clemency power to only those cases in which a convicted person applies for clemency. All the legislature did was set forth an avenue that outlines how individuals can apply for clemency, and certain procedures that attend to that process. Neither the legislature nor the courts have ever said that it is an exclusive avenue or that it constrains the Governor when she acts proactively outside of that process. Indeed, ORS 144.649 affirms the legislature's understanding that the Governor's general clemency power is broad and subject only to the conditions, restrictions, and limitations the Governor deems proper. Respondents are unaware of any contrary legislative history. Relators' reliance on ORS 144.650 is flawed and would require this court to insert terms into that statute, which this court is prohibited from doing under ORS 174.010. This Court should reject that basis for mandamus.

C. Regardless of policy considerations, victims' or district attorneys' statements are not a prerequisite to the Governor exercising her clemency power as a matter of law.

Regardless of one's policy preferences, no law requires that the Governor, as a legal prerequisite to proactively exercising clemency power, must first obtain and consider victims' or district attorneys' statements.[13] Arguing otherwise, relators rely on ORS 144.650, 144.660, and 144.670. Petition ¶¶ 63-64, 82. But, as discussed above, ORS 144.650 only relates to the Governor's action on clemency applications. And ORS 144.660 and 144.670 both apply only after a clemency decision has already occurred. Indeed, the statutes themselves foreclose relators' argument.

Turning first to ORS 144.650, as relators concede, its requirements "are triggered by an application for clemency," Petition ¶ 67, and those requirements therefore do not apply to clemency decisions that do not involve a clemency application. *See, e.g.*, ORS 144.650(1) (beginning, before outlining any requirements, with the limiting phrase: "*When* an application for

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[13] Relators do not argue that the Governor has failed to follow the procedure set out in ORS 144.650-144.670 when granting clemency applications.

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a pardon, commutation, or remission is made to the Governor* * *." (emphasis added)). Further, the statute imposes requirements on district attorneys and other correctional officials, not the Governor:

> In addition to providing the documents described in subsection (3) of this section, upon receiving a copy of the application for pardon, commutation or remission, *any person or agency named in subsection (1) of this section shall provide to the Governor* as soon as practicable such information and records relating to the case as the Governor may request and shall provide further information and records relating to the case that the person or agency considers relevant to the issue of pardon, commutation or remission, including but not limited to:
>
> (a) Statements by the victim of the crime or any member of the victim's immediate family, as defined in ORS 163.730.
>
> (b) A statement by the district attorney of the county where the conviction occurred; and
>
> (c) Photos of the victim and the autopsy report, if applicable.

ORS 144.650(4) (emphasis added); *see* ORS 144.650(1) (listing district attorney in county where the conviction occurred, district attorney in county where applicant's correctional facility is located, the Board, and the Director of ODOC). Similarly, the statute's victim-notification requirement is a duty imposed on district attorneys, not the Governor. ORS 144.650(3). Relators' reliance on ORS 144.650 is therefore without merit.

Nor can relators rely on either ORS 144.660 or 144.670. Those statutes impose reporting and filing requirements on the Governor that take effect only *after* a grant of clemency. *See* ORS 144.660 ("The Governor shall report to the Legislative Assembly in the manner provided in ORS 192.245 each reprieve, commutation or pardon *granted* since the previous report to the Legislative Assembly required by this section." (Emphasis added.)); ORS 144.670 ("When the Governor grants a reprieve, commutation or pardon or remits a fine or forfeiture, the Governor shall *within 10 days thereafter* file all the papers presented to the Governor in relation thereto * * *." (Emphasis added.)). If the legislature had intended to limit the Governor's clemency

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1 power by requiring the Governor to first obtain victims' and district attorneys' statements, it
2 would have done so expressly, as it did in ORS 144.650(5) ("Following receipt by the Governor
3 of an application for pardon, commutation or remission, the Governor shall not grant the
4 application for at least 30 days.").

5 It makes no difference that ORS 144.660 provides that the Governor "shall include" in
6 the report to the legislature "statements by the victim of the crime or any member of the victim's
7 immediate family [and] a statement by the district attorney where the conviction was had." In
8 1995, the legislature simultaneously amended ORS 144.650 and ORS 144.660, adding to the
9 former the requirement that district attorneys and correctional officials provide those statements
10 to the Governor, and adding to the latter the requirement that the Governor report those
11 statements to the legislature. Or. Laws 1995, ch. 805, § 1 (HB 3379); *see* ORS 144.650(4)
12 (previously subsection (3)). Thus, the Governor's duty to report those statements is necessarily
13 conditioned on the receipt of those statements under ORS 144.650(4).

14 Even if ORS 144.660 were to require the Governor to report those statements for
15 proactive grants of clemency, the absence of those statements from the report would constitute
16 only a technical defect. In that case, the absence of those statements from the report still would
17 not invalidate any grants of clemency, because ORS 144.660 does not impose the duty to report
18 *until* the Governor has already granted clemency.

19 For those reasons, no law provides that the Governor must first obtain victims' and
20 district attorneys' statements as a prerequisite to exercising the Governor's clemency power.
21 Relators cannot show otherwise,[14] and this Court should therefore reject that basis for mandamus
22 as well.

23

[14] To the extent relators contend that defendants other than the Governor, especially the Board,
24 when it conducts 15-year hearings under ORS 144.397, may ignore victim input, they are
incorrect. Crime victims will have an opportunity to be heard in those hearings. In those
25 hearings, victims have the right to notice and the opportunity to be heard. *See* ORS 144.397(11)
(a victim who requests notification will receive notice of 15-year hearings); OAR 255-033-
26 0040(1)(c)(B) (same); ORS 144.750(2)(b) (victims have the right to appear at Board hearings

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1
D. No law requires the Governor to perform a case-by-case analysis for each clemency decision and there has been no unlawful delegation of clemency power.
2
3 Lastly, relators mistakenly assume that the Governor may only grant clemency after a
4 "case-by-case analysis" that meets an undefined and presumably shifting standard imposed by
5 the Court depending on each grantee's personal circumstances. Petition ¶¶ 66, 74, 87. That
6 assumption is without legal basis and without merit. Nothing in Article V, section 14 —nor in
7 any other provision of law cited in relators' petition— requires that kind of procedure for the
8 Governor's exercise of the clemency power.
9 It is true that a case-by-case review through the application process is the usual process,
10 and relators do not appear to challenge any of the grants of clemency that have occurred through
11 that application process. But the clemency decisions challenged here —the COVID-19
12 clemencies, the firefighter clemencies, and the 15-year parole hearing clemencies— were not
13 issued under usual circumstances; instead, the circumstances were a global pandemic with
14 thousands of incarcerated individuals in close and enclosed quarters with each other and with
15 correctional officers, and an unprecedented wildfire season during which a handful of those
16 individuals bravely risked their lives to prevent destruction and loss of life across the state.
17 Petition Exh. 3.
18 The flexibility to fairly meet those unusual circumstances —or, for that matter, any
19 compelling circumstances as determined by the elected governor— is baked into the
20 constitution's broad grant of clemency power. Nothing in the law limits how the Governor
21 obtains lists of names to consider for clemency. Nothing in the law limits what basis she might
22 choose for granting clemency. Nothing in the law limits the Governor from relying on advice
23

24 and "may submit written and oral statements adequately and reasonably expressing any views concerning the crime and the offender"). Victims will receive notification of the 15-year
25 commutations and an opportunity to be heard before any release from custody. *See* Ex 12, p 5, "Victims and their families will receive notifications in accordance with the standard victim
26 notification procedures for commutations, and they will have an opportunity to participate in the hearing process, which is not anticipated to begin until 2022."

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1 from State agencies in evaluating grants of clemency. And nothing in the law requires the
2 undefined and unspecified "case-by-case analysis" relators contend is necessary whenever the
3 Governor proactively grants clemency.
4 The Court must therefore reject relators' argument that the Governor unlawfully
5 delegated "the obligations" of her clemency power by granting commutations based on
6 information she received from ODOC. Petition ¶ 66. Even assuming that the Governor could
7 not delegate aspects of her clemency decisions, which defendants do not concede, there can be
8 no unlawful delegation of the Governor's obligations if those obligations do not exist. Here,
9 because nothing requires the Governor to conduct a case-by-case review before exercising her
10 clemency power, no unlawful delegation of that "obligation" could have occurred.
11
12 **E. Relators' request for mandamus would, if ordered, result in improper and judicially created regulation of the Governor's clemency power.**
13 The Oregon Supreme Court has been clear that there is no role for the courts in regulating
14 the Governor's clemency powers; indeed, it violates the separation of powers for the Court to
15 insert itself into the executive's sphere in that way. As the Court explained in *Eacret*,
16
17
18
> [I]t is not within judicial competency to control, interfere with, or even to advise the Governor when exercising his power to grant reprieves, commutations, and pardons. The principle of the separation of powers written into the constitution by Article III, § 1 forbids it."

19 *See Eacret*, 215 Or. at 125–26. Throughout their petition, relators rely on unfounded
20 assumptions, policy arguments, and the misreading of statutes to ask this court to insert itself, to
21 interfere with, and even to control the Governor's exercise of her constitutional clemency
22 power—a scenario that has been roundly rejected by the Oregon Supreme Court. This Court
23 should follow that precedent, and decline relators' invitation.
24 **III. The Governor's clemency power is not nullified by the end of her term of office.**
25 Relators make a variety of arguments as to why this court should reverse the Governor's
26 decision to allow the 15-year parole hearing group a meaningful opportunity for parole or release

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through the hearing process established in ORS 144.397. In one of those arguments, relators allege that the Governor may not grant clemency that extends past her term of office and argue that the 15-year parole hearing clemencies do that. They are wrong on both counts.

First, the Governor's final clemency action with respect to these individuals has already occurred —the sentences have already been modified through the Governor's clemency power— and so, by definition, those clemencies have taken place solely within her term.

Second, in any event, there is no legal basis for the court to conclude that acts of clemency must expire at the end of a Governor's term. Relators cite no constitutional or statutory authority for their contention that clemencies essentially expire at the end of a term. Indeed, their sole support is an unwarranted extension of some language in *Haugen*, a case affirming the Governor's authority to proactively issue a particular type of clemency, a reprieve, to an individual on death row. 353 Or. 715. It is true that the Oregon Supreme Court noted that, as a *factual* matter, the particular reprieve in *Haugen* was limited to the Governor's term:

> After this court affirmed Gary Haugen's aggravated murder conviction and death sentence, he decided not to pursue further appeals, and the trial court set an execution date. Governor Kitzhaber subsequently issued a reprieve pursuant to Article V, section 14, suspending Haugen's death sentence for the duration of Kitzhaber's service as Governor.

Haugen, 353 Or. at 717.

However, nothing in that decision limits clemency powers to a Governor's term of office, *as a matter of law*. In fact, the clemency at issue in *Haugen* was only a reprieve, limited by its terms at the outset by Governor Kitzhaber. A reprieve, by its nature, is a temporary suspension on a sentence and must have an end date; it was not a commutation or pardon, which, by their nature, do not need to have an end date and are instead complete on the effective date of such action.

In other words, there was no legal issue about the end of the reprieve in *Haugen* (making the statement dicta), and the suggestion that all grants of clemency are subject to term limits is simply illogical (and inconsistent with how governors have exercised clemency for centuries in

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this state). Were clemency to endure only through a Governor's term, pardons would be of limited duration. If clemency expired at the end of a Governor's term, any adult in custody released through a commutation would have to be returned to incarceration when the next governor was sworn in. There would be no difference between commutation and reprieve; they would both functionally become reprieves. That is not how clemency works, and the Court should reject the relators' invitation to rewrite the Constitution to make clemency work the way they want it to.

IV. The Governor's actions with respect to the 15-year parole hearing group were lawful.

Relators challenge commutations to the 15-year parole hearing group on another basis.[15] Specifically, they argue that the Governor has unlawfully delegated her clemency powers to the Board, and that the Board "has no jurisdiction as to crimes committed after November 1, 1989" and therefore cannot release those individuals. Petition ¶ 59. However, relators mischaracterize the Governor's commutations and misconstrue the Board's authority.

A. Background of SB 1008 and Governor's commutations.

In 2019, the legislature passed SB 1008, which made a number of changes to Oregon's criminal laws for juvenile offenders, with two changes being particularly significant in this case. First, Section 24 of SB 1008 (now codified as ORS 161.740) prohibited courts from imposing a life sentence without the possibility of parole for juvenile offenders. Second, Section 25 of SB 1008 (now codified as ORS 144.397) provided an opportunity for release for a juvenile offender who has served 15 years in prison, provided that the Board, after a hearing, made a required finding that the juvenile offender had demonstrated "maturity and rehabilitation." *See id.* (allowing a juvenile offender who has served 15 years of imprisonment to have a hearing before

[15] Seventy-two of the individuals were proactively granted commutations through the proactive 15-year parole hearing clemency process described above, while one was granted functionally the same 15-year parole hearing commutation through the ordinary application-based clemency. Because the process does not matter, they are collectively referred to in this section as the 15-year parole hearing group for convenience.

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1 the Board and obtain release if the Board finds "that, based on the consideration of the age and
2 immaturity of the person at the time of the offense and the person's behavior thereafter, the
3 person has demonstrated maturity and rehabilitation * * *.").
4 However, those two changes applied prospectively, and only to juvenile offenders
5 sentenced on or after January 1, 2020. Or. Laws 2019, ch. 634, § 32(1), *as amended by* Or. Laws
6 2019, ch, 635, § 3(c) (Senate Bill 1013 (2019)), and Or. Laws 2019, ch. 685, § 4 (Senate Bill
7 1005 (2019)). That is, a juvenile offender who was sentenced before then would not be eligible
8 for a 15-year hearing provided in SB 1008 (ORS 144.397) and never could be eligible for a 15-
9 year hearing as a result of sentencing or re-sentencing by a judge.[16]
10 The Governor recognized that there were individuals who committed crimes as juveniles,
11 and who had the ability to demonstrate maturity and rehabilitation, but who were not eligible for
12 the opportunity for release under ORS 144.397. She determined —within the discretion afforded
13 to her under the Constitution— that it would be appropriate to exercise her clemency power to
14 commute and modify the sentences of some of those offenders, to allow them to be eligible for
15 15-year hearings before the Board under ORS 144.397. Relators' challenge to those
16 commutations is misplaced.
17
18 **B. The Governor's commutations for the 15-year parole hearing group were "commutations" for purposes of Article V, section 14.**
19 Although relators concede (Petition ¶ 73) that the Governor's commutations at issue are
20 "commutations" within the meaning of Article V, section 14, relators argue that the Governor
21 has unlawfully made SB 1008 "retroactive," *i.e.,* that the commutations do not fall within her
22 clemency powers. Petition ¶ 84–85. It is not contended that the Governor has changed any
23
24

25 [16] The legislation provided that a juvenile offender who had been sentenced before January 1,
26 2020, could not become eligible for a 15-year hearing if the juvenile offender was resentenced on or after January 1, 2020. Or. Laws 2019, ch. 634, § 32, as amended by Or. Laws 2019, ch. 635, § 3b (Senate Bill 1013 (2019)), and Or. Laws 2019, ch. 685, § 4 (Senate Bill 2005 (2019)).

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1 statute.[17] Instead, she has exercised her clemency power over sentences, as she has authority to
2 do. Below, respondents explain why, as a matter of law, the 15-year parole hearing
3 commutations were commutations under Article V, section 14.
4 The Oregon Supreme Court has explained that, under Article V, section 14, "a
5 'commutation' is a change of punishment to which a person has been condemned to one less
6 severe." *Fehl v. Martin*, 155 Or. 455 (1937). Thus, the threshold question reduces to whether
7 the Governor's commutations effectuated "a change of punishment * * * to one less severe."
8 Here, the Governor's commutations of the 15-year parole hearing group were
9 "commutations" within the meaning of Article V, section 14. The Governor commuted those
10 juvenile offenders' sentences "such that each Commutee—after serving 15 years of
11 imprisonment as described in ORS 144.397(1)—has the opportunity to petition the [Board] for
12 future release consideration under the process described in ORS 144.397 * * *." The Governor's
13 commutations were a "change of punishment" of those offenders in two ways:
14 (1) Two of the juvenile offenders[18], who were sentenced to life without the possibility of
15 release, now have a possibility for release; and
16 (2) All of the juvenile offenders, after serving 15 years of imprisonment, will receive a
17 hearing with a "meaningful opportunity to be released on parole or post-prison
18 supervision," under the process described in ORS 144.397.
19 The Governor's commutations changed the punishment for each of those juvenile offenders to a
20 less-severe punishment, and for that reason, those commutations fall squarely within her
21 clemency power provided in Article V, section 14.
22

23 [17] In fact, if the Legislative Assembly had applied the statute retroactively, it would have impacted roughly 375 individuals—not the mere 73 at issue here, who were selected and
24 reviewed based on a nuanced set of limiting criteria.
25 [18] Those two offenders, Payne-Rana and Wallace, were convicted of aggravated murder, and identified in Petition Exhibit 9. Although Exhibit 9 briefly identifies the sentence length of their
26 sentences as "no parole," the actual sentence for aggravated murder is "life imprisonment without the possibility of release or parole under [ORS 163.105.]" ORS 163.105(1)(b).

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C. The Governor did not delegate her clemency power to the Board.

In asserting that the Governor has delegated her clemency power to the Board, relators appear to argue that the Board's actions at a future hearing are *also* a "change in punishment":

> Though Governor Brown's 'clemency action' is complete, as stated in her order, she obviously has an end goal beyond granting mere access to a parole board hearing. The more meaningful substance of her constitutionally dictated sovereign clemency duties, assessing a convicted felon for early release and actual release, is delegated unlawfully to the Board.

Petition ¶ 73. In other words, relators argue that because the Governor's commutation authorizes a change in punishment that allows for the possibility that the Board may release the offender at some point, that that commutation is really *two* "commutations" for purposes of Article V, section 14 — one by the Governor, and one by the Board. Relators are mistaken.

In *Application of Fredericks*, the Oregon Supreme Court explained that the Board's statutory parole or releasing power is *not* the exercise of the Governor's clemency power under Article V, section 14:

> We will now consider the analogy of statutes providing for parole of prisoners. Such statutes do not involve any exercise of the pardon power of the governor even when the power of parole is vested in that official. In *Anderson v. Alexander*, 191 Or 409, 229 P.2d 633, 230 P.2d 770 (1951) we upheld and enforced the provisions of our parole law which vests in the parole board the power to parole prisoners without any participation by the governor. To hold that such a parole is an exercise of the pardon power and therefore unconstitutional would be unthinkable and contrary to a multitude of decisions including the *Anderson* case.

211 Or. at 317–18. *Application of Fredericks* applies directly here, as the Board's authority to conduct 15-year hearings under ORS 144.397 is not the exercise of the Governor's clemency power under Article V, section 14.

D. The Board has authority to conduct release hearings under ORS 144.397.

Relators also argue that the Board does not have the authority to conduct ORS 144.397 hearings for the 15-year parole hearing group. Petition ¶ 59(7). Relators rely on ORS 144.050, which provides that the Board may parole offenders who committed crimes before November 1,

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1989,[19] to argue that the Board has no authority over offenders who commit crimes after that date. Petition ¶ 75. Relators are incorrect.

Like other executive branch agencies, the legislature confers power to the Board by statute. *See Ochoco Const. v. DLCD*, 295 Or. 422, 426 (1983) (agencies have power and authority conferred to them by "organic legislation"). Before SB 1008, the Board's authority to parole or release offenders was generally limited to (1) offenders who committed crimes before November 1, 1989, ORS 144.050; (2) offenders convicted of aggravated murder and murder "regardless of the date of the crime," Or. Laws 1989, ch. 790, § 28, *as amended by* Or Laws 1999, ch. 782, § 2; (3) offenders sentenced as "dangerous offenders" under ORS 161.725 to ORS 161.737, ORS 144.228; and (4) offenders, regardless of crime-commission date, who are eligible for compassionate release as provided under ORS 144.122 or ORS 144.126. However, in SB 1008, the legislature greatly expanded the Board's authority over juvenile offenders—including juvenile offenders who committed crimes on or after November 1, 1989—and made the Board the potential releasing authority. Relators' contrary suggestion, that the Board lacks "parole" or release authority over offenders because of a crime-commission date, is incorrect.

Here, the Board has the statutory power and authority to conduct hearings under ORS 144.397. As noted above, that statute provides that a person convicted of an offense committed while a juvenile is eligible for release on parole or post-prison supervision after serving 15 years of imprisonment. ORS 144.397(1) (a). ORS 144.397(3) provides that the Board "shall hold a hearing * * * [and] must provide the person a meaningful opportunity to be released." That power and authority was provided and made operative on January 1, 2020. *See* Or. Laws 2019,

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[19] Relators misunderstand the statutory framework governing the Board and its custodial release mechanisms. It is true that, in essence, ORS 144.050 says that the Board may release adults in custody on parole (governed by one set of laws) if the crime was committed prior to November 1, 1989. However, even now, the Board approves the release plans for adults in custody who will release to post-prison supervision, ORS 144.096, even when the offender committed a crime on November 1, 1989, or later, and in certain circumstances, may advance a release date for an offender who is eligible for compassionate release as provided in ORS 144.126. In any event, as explained below, the Board has authority over the 15-year hearing group under ORS 144.397, which applies to juvenile offenders without regard to crime-commitment date.

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1 ch. 634, § 28 (providing that ORS 144.397 became operative on January 1, 2020). The
2 Governor's commutations of the juvenile offenders at issue, which relators concede were
3 "changes of punishment," were imposed after January 1, 2020. Accordingly, the Board has
4 authority to conduct those 15-year hearings under ORS 144.397.
5 To be sure, when the legislature enacted SB 1008, the legislature provided that ORS
6 144.397 hearings would apply prospectively: "to sentences imposed after January 1, 2020." SB
7 1008, s. 32. However, that provision applies to the exercise of *judicial* power—and not the
8 exercise of the Governor's plenary clemency power (to change the punishment imposed by the
9 sentencing court). It does not limit the Board's authority to conduct hearings for individuals who
10 had their sentences commuted by the Governor. Nothing in the text of SB 1008 suggests that the
11 legislature had any intention to restrict the Governor's authority to make "changes of
12 punishment" pursuant to the Governor's plenary clemency power. And even if the legislature
13 believed it could restrict the Governor's clemency power when it enacted SB 1008, the text of
14 that legislation demonstrates that it chose not to do so.
15 When the legislature intends to restrict judicial officers or agencies from reducing an
16 offender's sentence, it does expressly. For example, in Section 3(2)(b) of SB 1013—legislation
17 that was intended to restrict the imposition of the death penalty and was adopted the same year as
18 SB 1008—the legislature included restrictions on judicial commutations by judicial officers and
19 permitting participation in early release programs by executive officials:
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> (b) The court may sentence the person to life imprisonment without the possibility of parole if the person was at least 18 years of age at the time of committing the murder. The court shall state on the record the reasons for imposing the sentence. A person sentenced to life imprisonment without the possibility of release or parole under this paragraph *shall not have that sentence suspended, deferred or commuted by any judicial officer, and the [Board] may not parole the prisoner nor reduce the period of confinement in any manner whatsoever. The Department of Corrections or any executive official may not permit the prisoner to participate in any sort of release or furlough program.*

25 Or. Laws 2019, ch. 635, § 3(2)(b) (emphasis added). There are several other occurrences of
26 similar language. *See, e.g.,* Or. Laws 2019, ch. 635, § 3a(2)(b) (similar language retained); Or.

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1 Laws 2019, ch. 635, § 3a(2)(b) (same); Or. Laws 2019, ch. 643, § 29 (same). Accordingly, the
2 legislature's omission of any restriction to the Governor's clemency powers in SB 1008
3 demonstrates that the legislature did not intend to curb or restrict the Governor's plenary
4 clemency powers in this legislation—or the Board's authority to conduct any necessary 15-year
5 hearing on or after January 1, 2020.

6 **CONCLUSION**

7 The Governor's clemency power plays an important role in our criminal justice system
8 and is a crucial element in the balance of powers. Not only do relators lack standing to challenge
9 the Governor's exercise of her clemency power, but none of the allegations set forth in the
10 petition before this Court identify cognizable improprieties in the clemency process. To
11 conclude otherwise would require this Court to insert prohibitions or restrictions on the
12 Governor's plenary power that the legislature did not expressly provide, and that are not
13 anywhere to be found in the Oregon Constitution itself. ORS 174.010 prevents the Court from
14 inserting what has been omitted, and Oregon Supreme Court precedent makes clear that it is not
15 the province of the Judicial Branch to impose judge-created limits on the clemency process. This
16 Court should decline relators' request that it independently restrict the Governor's plenary
17 clemency power. *See Eacret*, 215 Or. at 125–26 ("it is not within judicial competency to control,
18 interfere with, or even to advise the Governor when exercising his power to grant reprieves,
19 commutations, and pardons. The principle of the separation of powers written into the
20 constitution by Article III, § 11 forbids it."). As the Oregon Supreme Court concluded in
21 *Haugen*, the framers clearly envisioned that the only party suitable to accept relators' invitation
22 to insert limitations on the scope of the Governor's plenary clemency powers is the voters
23 through the ballot box—not a judge.
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1 Accordingly, for the foregoing reasons, this court should deny relators' petition for
2 mandamus, and it should dismiss the alternative writ.
3
4 DATED February 15, 2022.
5

Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I certify that on February _15_, 2022, I served the foregoing MOTION TO DISMISS

3 PETITION FOR WRIT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION upon

4 the parties hereto by the method indicated below, and addressed to the following:

5 Kevin Mannix
6 Kevin L. Mannix PC
2009 State St.
7 Salem, OR 97301
Of Attorneys for Plaintiffs

___ HAND DELIVERY
_X_ MAIL DELIVERY
___ OVERNIGHT MAIL
_X_ SERVED BY E-FILING
___ EMAIL DELIVERY

8

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