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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MARION

State ex rel  
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 GRASSL, 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.

No.: 22CV02609

**PETITION FOR ALTERNATIVE  
WRIT OF MANDAMUS**

Filing Fee: \$281

Pursuant to ORS 21.135(1), (2)(f)

1 **STATEMENT OF THE CASE**

2 1.

3 This is a Petition for an Alternative Writ of Mandamus to be issued as to Defendants in  
4 which Plaintiffs-Relators, listed in the caption above (hereinafter “Petitioners”) seek Mandamus  
5 to order suspension of illegal sentence reductions which are being carried out under the Governor’s  
6 asserted clemency power, but which violate the clemency requirements of the Oregon Constitution  
7 and Oregon laws, as specifically explained below. This Petition is supported by the legal  
8 arguments below, the attached Exhibits, and this Petition.

9  
10 **BACKGROUND**

11 2.

12 Oregon has adopted a comprehensive system designed to ensure public safety, and to  
13 protect and respect the rights of crime victims, ranging from the initiation of a criminal proceeding  
14 through appellate and post-conviction and parole proceedings, as well as proceedings in which the  
15 Governor may grant clemency upon application by a convicted person for a pardon, commutation,  
16 or reprieve.

17 3.

18 This comprehensive system includes requirements for victim involvement in any  
19 application by a convicted person for a pardon, commutation, or reprieve (hereinafter collectively  
20 referred to as “clemency”).

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4.

The system recognizes the right of crime victims and district attorneys, on behalf of the public, to challenge violations of the process, via a mandamus proceeding, when no other remedy is readily available.

5.

Beginning in March 2020, Oregon Governor Kate Brown has systematically violated the constitutional and statutory clemency process, as it applies to convicted felons, in nearly 1,000 cases, and has caused most of these convicted felons to be released early from the custody of the Department of Corrections (hereinafter sometimes referred to as “DOC”), in violation of the sentences of imprisonment duly imposed by Oregon courts under Oregon law, thereby violating established laws that ensure public safety. The Governor has also contacted the Oregon Youth Authority (hereinafter sometimes referred to as “OYA”) with similar instructions regarding these matters. The Governor has publicly stated that she will continue this process. The Governor has also referred 73 clemency cases to the Board of Parole and Post-Prison Supervision (hereinafter referred to as “Parole Board”) for sentence reductions, as to sentences over which the Board has no jurisdiction, in an illegal delegation of the Governor’s clemency power.

**PARTIES**

6.

Petitioners are District Attorneys for the counties of Lane and Linn. These District Attorneys are law officers of the State and properly maintain this proceeding on behalf of the public and on behalf of crime victims. Or Const, Art VII, § 17.

///

1 7.

2 Petitioner Randy Tennant is the surviving son of Donna Irene Tennant. Donna was  
3 murdered by her 17-year-old grandson, Andrew Johnson. Commutee Johnson stabbed his  
4 grandmother to death with a kitchen knife, in her bed, around 2:30am. Commutee Johnson had  
5 imagined the ‘thrill’ of killing someone for some time. He stabbed his grandmother over 10 times  
6 in the neck and head, while she screamed, until she died. Commutee Johnson then washed his  
7 hands and went back to bed until later in the morning. When he awoke, he got high and then went  
8 shopping with the \$2,000 he stole from his grandmother. Commutee Johnson has served seven  
9 years of a minimum 25-year life sentence.

10 8.

11 Petitioner Samuel Williams is the surviving father of Jessica Williams, a developmentally  
12 disabled black teenager who was savagely stabbed to death under Portland’s Steel Bridge by three  
13 teenagers who then mutilated Jessica’s body and set Jessica’s body on fire. Commutee Carl  
14 Richard Alsup, a white man, killed Jessica Williams approximately one week before he turned 18  
15 years old. He was convicted of aggravated murder for her premeditated death and has served  
16 approximately 16 years of a minimum 25-year life sentence.

17 9.

18 Petitioner Amy Jones is the surviving sister of Jessica Williams.

19 10.

20 Petitioner Melissa Grassl found her life partner, Austin French, dead in their bedroom on  
21 Halloween, 2006. He was shot in the head, three times, by his 17-year-old brother, commutee  
22 Cayce French. Commutee French has served approximately 14 years of his minimum 25-year life  
23 sentence.

1 **RELIEF SOUGHT**

2 11.

3 Petitioners seek issuance of an Alternative Writ of Mandamus to Governor Brown, in her  
4 official capacity; the Oregon Department of Corrections Director, Colette Peters, in her official  
5 capacity; the Oregon Department of Corrections; the Oregon Youth Authority Director, Joe  
6 O’Leary, in his official capacity; the Oregon Youth Authority; the Board of Parole and Post-Prison  
7 Supervision Executive Director, Dylan Arthur, in his official capacity; the Board of Parole and  
8 Post-Prison Supervision Chairperson, Michael Hsu, in his official capacity; and the Board of  
9 Parole and Post-Prison Supervision, requiring each to show cause why a Permanent Writ of  
10 Mandamus should not be issued, requiring these persons and agencies to honor and follow all  
11 procedural and substantive provisions of Oregon law as to any proposed criminal sentence  
12 reduction or pardon, mandating that they report to this Court the manner in which they will comply  
13 with the law, and agreeing not to implement any sentence reduction, early release, or pardon (any  
14 pending or contemplated clemency order by the Governor) absent confirmation by this Court that  
15 it is satisfied that such clemency implementation is authorized by law and complies with the law.

16 12.

17 Petitioners ask that this Writ apply as to all persons incarcerated in Oregon for felony  
18 crimes, from the date of the Writ, forward.

19 13.

20 Petitioners also ask this Court to issue a Temporary Writ of Mandamus, pending  
21 adjudication of the Alternative Writ of Mandamus. The temporary restrictions should be  
22 immediately in effect, based on the clear violations of public laws which have already occurred,  
23 and which will likely continue.

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14.

This Temporary Writ should, pending full adjudication of this case, prohibit the Department of Corrections, the Oregon Youth Authority, and the Board of Parole and Post-Prison Supervision from carrying out any early release of felons under any clemency order from the Governor, absent an order from this Court allowing such release.

15.

These remedies are based on ample public records documented and presented to this Court as Exhibits to this Petition.

**STANDING**

16.

This proceeding involves questions of public right and is therefore brought by law officers of the State of Oregon. Or Const, Art VII, § 17. Petitioners are the District Attorneys for the counties of Lane and Linn. These District Attorneys are law officers of the State and properly appear before the court to maintain this proceeding on behalf of the public and on behalf of crime victims.

17.

Petitioners include surviving victims who have been denied their right to participate in the full criminal justice process as to the Governor’s clemency actions.

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1 **JURISDICTION AND VENUE**

2 18.

3 Marion County Circuit Court has jurisdiction and is the appropriate venue to bring this  
4 Petition. ORS 34.120 provides, in pertinent part, that “the circuit court or judge thereof of the  
5 county wherein the defendant, if a public officer or body, exercises functions . . . shall have  
6 exclusive jurisdiction of mandamus proceedings. . . .” The Governor, the Board, the DOC, and  
7 OYA all exercise their functions in Marion County.

8 19.

9 ORS 34.110 provides that a writ of mandamus may be issued to “any inferior court,  
10 corporation, board, officer or person, to compel the performance of an act which the law specially  
11 enjoins, as a duty resulting from an office, trust or station. . . .”

12 20.

13 ORS 34.110 also provides that the Writ shall not be issued in “any case where there is a  
14 plain, speedy and adequate remedy in the ordinary course of the law.” Here, Petitioners have no  
15 other available remedy. The unlawful early release of convicted felons has already occurred, and  
16 additional releases are in process and imminent; once ordered, such releases cannot be undone.  
17 This proceeding is necessary, appropriate, and valid under Oregon law.

18  
19 **UNDERLYING LEGAL FACTORS AS TO CLEMENCY**

20 **I. Constitutional Rights and Limitations**

21 21.

22 The Oregon Constitution provides: “Laws for the punishment of crime shall be founded on  
23 these principles: protection of society, personal responsibility, accountability for one’s actions and

1 reformation.” Or Const, Art I, § 15. The language is clear and there is no exception. Clemency  
2 laws and regulations, which are part of the body of laws for the punishment of crime, must be  
3 founded on these four principles. Acts of clemency are not immune to the requirements of the  
4 Constitution. Further, the Constitution provides that, in the administration of justice, “no court  
5 shall be secret, but justice shall be administered, openly and without purchase, completely and  
6 without delay, and every man shall have remedy by due course of law for injury done him in his  
7 person, property, or reputation.” Or Const, Art I, § 10. This codifies Oregonians’ commitment to  
8 transparency, communication, and accountability.

9 22.

10 The Oregon Constitution preserves and protects the right of crime victims to justice, to  
11 ensure crime victims a meaningful role in the criminal and juvenile justice systems, to accord crime  
12 victims due dignity and respect, and to ensure that criminal and juvenile court delinquency  
13 proceedings are conducted to seek the truth as to the defendant’s innocence or guilt, and also to  
14 ensure that a fair balance is struck between the rights of crime victims and the rights of criminal  
15 defendants in the course and conduct of criminal and juvenile court delinquency proceedings. Or  
16 Const, Art I, § 42.

17 23.

18 Executive clemency power is derived from the Oregon Constitution and bestows upon the  
19 Governor the “power to grant reprieves, commutations, and pardons, after conviction, for all  
20 offences except treason, subject to such regulations as may be provided by law.” Or Const, Art V,  
21 § 14.

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24.

The Governor's ability to grant clemency is a direct and complete check on specific actions of the judicial branch that is entrusted to the chief executive. *Haugen v. Kitzhaber*, 353 Or 715, 726, 306 P3d 592 (2013).

25.

Clemency powers of the Governor cannot be given to others. *Application of Fredericks*, 211 Or 312, 320, 315 P2d 1010 (1957). The legislature cannot give a little of the Governor's pardon power to any other officer. *Id.*

26.

The Oregon Supreme Court, in 1937, said of Article V, Section 14, "It will thus be seen from a mere reading of this provision of the Constitution that the whole power to grant reprieves, commutations, and pardons after conviction for all offenses except treason, subject to such regulations as may be provided by law, is committed to the Governor. *Fehl v. Martin*, 155 Or 455, 457-58, 64 P2d 631 (1937). Essentially, the Governor has clemency power, but cannot delegate this power to others.

27.

In 1957 the Oregon Supreme Court observed, "There do not appear to be any legislative regulations attempting to limit the substantive power." *Fredericks*, 211 Or at 325. However, statutes were later enacted, pursuant to the constitution, regulating procedures and administrative processes of the Governor's clemency power.

28.

The Oregon Supreme Court has not applied the regulations relating to the clemency power, but the Court has recognized that such regulatory restrictions are authorized by the Oregon

1 Constitution. *Haugen*, 353 Or at 720; *Lipscomb v. State Bd. of Higher Ed.*, 305 Or 472, 478–79,  
2 753 P2d 939 (1988).

3 29.

4 The Governor’s clemency power is not delegable, and her power may not continue or be  
5 paid forward beyond her term of office. *Haugen*, 353 Or at 728; *Fredericks*, 211 Or at 320; *Fehl*,  
6 155 Or at 457-58. In *Haugen*, the Court noted that a reprieve of the death penalty, granted by  
7 Governor Kitzhaber, could not extend beyond his term of office. *Haugen*, 353 Or at 728. So too  
8 must Governor Brown’s clemency power cease upon her departure from office.

9  
10 **II. Statutory Limitations**

11 30.

12 The Legislature has enacted specific procedural regulations as to the Governor’s exercise  
13 of her clemency power.

14 ORS 144.649 provides:

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

19  
20 ORS 144.650 provides:

21 (1) When an application for a pardon, commutation or remission is made to the  
22 Governor, a copy of the application, signed by the person applying and stating fully  
23 the grounds of the application, shall be served upon:

24  
25 (a) The district attorney of the county where the conviction occurred;

26  
27 (b) If the person applying is housed in a correctional facility within the State of  
28 Oregon, the district attorney of the county in which the correctional facility is  
29 located;

30  
31 (c) The State Board of Parole and Post-Prison Supervision; and

1  
2 (d) The Director of the Department of Corrections.

3  
4 (2) Proof by affidavit of the service shall be presented to the Governor.

5  
6 (3) Upon receiving a copy of the application, the district attorney of the county  
7 where the conviction occurred shall:

8  
9 (a) Notify the victim of the crime concerning the application and the victim's right  
10 to provide the Governor with any information relevant to the Governor's decision;

11  
12 (b) Provide the Governor with any information relevant to the Governor's decision  
13 that the victim wishes to have provided; and

14  
15 (c) Provide the Governor with copies of the following documents:

16  
17 (A) Police and other investigative reports;

18  
19 (B) The charging instrument;

20  
21 (C) The plea petition, if applicable;

22  
23 (D) The judgment of conviction and sentence;

24  
25 (E) Any victim impact statements submitted or filed; and

26  
27 (F) Any documents evidencing the applying person's payment or nonpayment of  
28 restitution or compensatory fines ordered by the court.

29  
30 (4) In addition to providing the documents described in subsection (3) of this  
31 section, upon receiving a copy of the application for pardon, commutation or  
32 remission, any person or agency named in subsection (1) of this section shall  
33 provide to the Governor as soon as practicable such information and records  
34 relating to the case as the Governor may request and shall provide further  
35 information and records relating to the case that the person or agency considers  
36 relevant to the issue of pardon, commutation or remission, including but not limited  
37 to:

38  
39 (a) Statements by the victim of the crime or any member of the victim's immediate  
40 family, as defined in ORS 163.730.

41  
42 (b) A statement by the district attorney of the county where the conviction occurred;  
43 and

44  
45 (c) Photos of the victim and the autopsy report, if applicable.

1  
2 (5) Following receipt by the Governor of an application for pardon, commutation  
3 or remission, the Governor shall not grant the application for at least 30 days. Upon  
4 the expiration of 180 days, if the Governor has not granted the pardon, commutation  
5 or remission applied for, the application shall lapse. Any further proceedings for  
6 pardon, commutation or remission in the case shall be pursuant only to further  
7 application and notice.

8 31.

9 The Governor is required to report her clemency actions to the Legislature. ORS 144.660  
10 states, in full:

11 The Governor shall report to the Legislative Assembly in the manner provided in  
12 ORS 192.245 each reprieve, commutation or pardon granted since the previous  
13 report to the Legislative Assembly required by this section. The report shall  
14 include, but not be limited to the reason for granting the reprieve, commutation or  
15 pardon, the name of the applicant, the crime of which the applicant was convicted,  
16 the sentence and its date, statements by the victim of the crime or any member of  
17 the victim's immediate family, as defined in ORS 163.730, a statement by the  
18 district attorney where the conviction was had, photos of the victim, the autopsy  
19 report, if applicable, and the date of the commutation, pardon or reprieve. The  
20 Governor shall communicate a like statement of particulars in relation to each case  
21 of remission of a penalty or forfeiture, with the amount remitted.

22  
23 This reporting requirement reinforces the statutory obligation to follow the procedures of  
24 ORS 144.650.

25  
26 **III. Administrative Limitations**

27 32.

28 Convicted criminals must initiate the process to seek forgiveness and state their case by  
29 demonstrating remorse, rehabilitation, and a desire and capability to responsibly re-enter society.

30 The application for clemency forms provided by the Governor's office make it clear that clemency  
31 is rarely granted unless all other avenues of appeal have been exhausted. Exhibit 1, Clemency  
32 Application Packet received from Governor's office via email on August 13, 2021. The

1 Governor's staff maintains a standardized clemency application and affidavit template that is  
2 available upon written request. *Id.* An application is the first step in the clemency process. *Id.* If  
3 an application is not properly submitted as required, proper notice or compliance with the  
4 applicable statutes fails. *Id.*; ORS 144.650.

5

6

## FACTS OF THE CASE

7

33.

8

On March 9, 2020, Governor Brown reported to the legislative assembly that she had,

9

between June 29, 2019, to March 9, 2020, granted 14 pardons and two conditional commutations.

10

Exhibit 2, Governor Kate Brown's Report to Legislature, March 9, 2020.

11

34.

12

On June 12, 2020, August 25, 2020, and December 2, 2020, Governor Brown requested

13

that Director Colette Peters, Department of Corrections, "perform a case-by-case analysis of adults

14

in custody who are vulnerable to the effects of COVID-19, for possible conditional commutation

15

on a rolling basis." Exhibit 3, Letters from Governor Kate Brown to Department of Corrections,

16

June 12, 2020; August 25, 2020; December 2, 2020; March 5, 2021. Governor Brown established

17

certain qualifying criteria for identifying the candidates for early release leaving the case-by-case

18

review to the DOC.

19

35.

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On March 5, 2021, Governor Brown directed that DOC Director Peters continue to provide

21

her with a list of felons in custody, on a rolling basis, who were within six months of release from

22

state custody, consistent with her previous instructions dated August 25, 2020, and who also met

23

additional criteria, stating that any felons who met those criteria would have the remainder of their

1 sentences commuted. Exhibit 3, Letters from Governor Kate Brown to Department of Corrections,  
2 June 12, 2020; August 25, 2020; December 2, 2020; March 5, 2021.

3 36.

4 Also on March 5, 2021, Governor Brown directed DOC Director Peters to identify and  
5 perform a case-by-case analysis of each candidate meeting certain criteria, which would make  
6 them eligible to have “up to 12 months of their sentences commuted.” This additional batch was  
7 to represent those felons “who were deployed to fight the historic wildfires that ravaged the state  
8 around Labor Day 2020.” *Id.*

9 37.

10 On June 25, 2021, Governor Kate Brown submitted a report to Senate President Peter  
11 Courtney and Speaker of the House Tina Kotek that partially complied with the requirements of  
12 ORS 144.660 (which requires a report to the Legislative Assembly, at its regular session, each  
13 reprieve, commutation, pardon, and remission of penalty or forfeiture granted since the end of the  
14 previous legislative session). Exhibit 4, Governor Kate Brown’s Report to Legislature, June 25,  
15 2021. Statutorily required information, for nearly every act of clemency, was missing from the  
16 report. *Id.* No victim information was included in the report and very few clemency actions  
17 reported mentioned any statement from relevant district attorneys. *Id.*

18 38.

19 Governor Brown reported that between March 9, 2020, and June 25, 2021, she granted 33  
20 pardons, 32 conditional commutations, and one reprieve, and no remissions of penalty or  
21 forfeiture. Exhibit 4, Governor Brown’s Report to Legislature, June 25, 2021.

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39.

The June 25, 2021 report also set forth her unprecedented and illegal executive actions regarding the early release of the additional 953 convicted felons identified by the process set out in her letters to Director Peters on June 12, 2020, August 25, 2020, and December 2, 2020, and March 5, 2021. Exhibit 4, Governor Brown’s Report to Legislature, June 25, 2021.

40.

The 912 felons selected, on a rolling basis, for early release due to “COVID vulnerability” and other criteria, were identified by lists at Exhibits A and B to the report and most information required by statute was not included. Exhibit 4, Governor Brown’s Report to Legislature, June 25, 2021.

41.

The Governor’s Exhibit C to the June 25, 2021 Report to the Legislature listed 41 felons who were identified by DOC, at Governor Brown’s request that DOC identify and perform a case-by-case analysis of each candidate, for a “possible one-time 12-month conditional commutation of their sentence” on the basis that the felon was “deployed to fight the historic wildfires that ravaged the state around Labor Day 2020.” Exhibit 4, Governor Brown’s Report to Legislature, June 25, 2021.

42.

General Counsel Dustin Buehler, in his Executive Summary of Executive Clemencies to the Members of the Legislative Assembly, dated June 26, 2021, reported a distinction between the Governor’s clemency actions versus the DOC en masse early releases, summarizing the 52- page report into one page by reciting Governor Brown’s clemency actions as: 33 pardons, 32

1 conditional commutations, and one reprieve, “in addition to the Department of Corrections early  
2 releases.” Exhibit 5, Governor Kate Brown’s Summary of Report to Legislature, June 26, 2021.

3 43.

4 The en masse early releases prompted comprehensive public records requests in June 2021  
5 and, over the subsequent three months, despite multiple requests, no clemency applications for any  
6 of the 953 released felons identified in Exhibit A, B, and C, were identified or released to records  
7 requestors. This fact was confirmed by DOC in response to our public records requests regarding  
8 DOC records for the subject batches of released felons, and was also later confirmed by Mr. Kevin  
9 Gleim, an attorney in the Governor’s office, via email. Exhibit 6, Letters from Department of  
10 Corrections to Common Sense for Oregon in response to public records requests, October 7, 2021;  
11 October 14, 2021; October 18, 2021; November 5, 2021; Exhibit 12, Emails between Governor  
12 Brown’s office to Common Sense for Oregon attorney Monique DeSpain in response to public  
13 records requests, September 22 – November 22, 2021. DOC reported they do not have the  
14 clemency applications requested despite the requirements of ORS 144.650 (1) (a)-(d). *Id.*

15 44.

16 Most, if not all, 953 convicted felons were released from their sentences early, without any  
17 clemency application for such relief. There is no written record of a request, presented and signed  
18 by the felon, “stating fully the grounds of the application” as required by ORS 144.650. As such,  
19 the required service upon district attorneys and the DOC as described above, did not occur.

20 45.

21 On September 28, 2021, Governor Brown, in a letter to DOC Director Peters, requested  
22 that DOC and OYA provide her with lists of convicted felons in custody, who were sentenced  
23 prior to the effective date of SB 1008, and did not benefit from its changes to the juvenile justice



1 system, and who met several baseline criteria the Governor established in her letter. Exhibit 7,  
2 Letter from Governor Brown to Department of Corrections, September 28, 2021. The Governor  
3 requested the lists be provided to her by October 8, 2021, and explained in her letter certain criteria  
4 that, if met, would make inmates in the custody of OYA and DOC eligible for a commutation that  
5 enables them to pursue a parole hearing, as described and provided for in ORS 144.397 and Section  
6 25 of SB 1008. *Id.*

7 46.

8 Governor Brown’s letter explained to Director Peters that “executive clemency power has  
9 traditionally been used in extraordinary circumstances. . . .” This letter related that SB 1008 was  
10 passed by the legislature with an effective date of January 1, 2020, and that “SB 1008 did not apply  
11 retroactively to those youth sentenced prior to 2020.” *Id.* The letter stated that those “who—  
12 unfairly—did not benefit from the effects of SB 1008. . . may be worthy of a commutation that is  
13 commensurate with the disproportionate impact of SB 1008.” *Id.*

14 47.

15 By October 8, 2021, The Department of Corrections produced a list of approximately 250  
16 felons eligible for Governor Brown’s intended clemency actions under her new criteria, and the  
17 criteria of SB 1008. Exhibit 8, List provided by Department of Corrections to Governor Brown in  
18 response to September 28, 2021 letter.

19 48.

20 On October 20, 2021, Governor Brown “commuted” the sentences of 73 felons convicted  
21 of violent crimes while juveniles. Exhibit 9, Governor Kate Brown’s Commutation Order, October  
22 20, 2021. Those 73 felons are now “able to petition the [Parole] Board for release on parole or

1 post prison supervision under the process described in ORS 144.397.” Exhibit 9, Governor  
2 Brown’s Commutation Order, October 20, 2021.

3 49.

4 As indicated in the October 20, 2021, “Commutation” Order, Governor Brown will have  
5 no subsequent part in the “process” she has established. Exhibit 9, Governor Brown’s  
6 Commutation Order, October 20, 2021. The “commutation” is complete, as to the Governor.  
7 Reductions in sentences are now delegated to the Parole Board.

8 50.

9 Most, if not all, of the 73 felons commuted on October 20, 2021, did not apply for clemency  
10 before Governor Brown granted them relief.

11 51.

12 As to the 73 felons, the district attorneys and victims learned of the “commutations” in the  
13 news or other non-governmental sources. Affidavit of Douglas R. Marteeny; Affidavit of Patricia  
14 W. Perlow. The process and timelines for the “commuted” felons to petition and meet the Parole  
15 Board, and probable outcomes, are unknown to the district attorneys and to the victims as well.  
16 *Id.*

17 52.

18 Between October 15 and 20, 2021, the Governor arranged for letters of invitation to be sent  
19 by DOC to all “qualified” convicted felons, inviting their application for a commutation of their  
20 sentences, either through the standard clemency application to the Governor, and/or a written  
21 request for a Parole Board hearing, along with a 15-page package containing an “abbreviated”  
22 version of the Governor’s clemency application. Exhibit 11, Letters from Department of  
23 Corrections to select inmates, October 15, 2021; October 20, 2021.

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53.

On October 20, 2021, Governor Brown delegated the sentences of 73 felons convicted of violent crimes while juveniles to the Board of Parole and Post-Prison Supervision. Exhibit 9, Governor Brown’s Commutation Order, October 20, 2021. Those 73 felons, after completing 15 years of imprisonment, are now “able to petition the Board for release on parole or post prison supervision under the process described in ORS 144.397.” *Id.* Most, if not all, of the 73 felons “commuted” on October 20, 2021, did not submit an application for clemency to Governor Brown before she granted them relief. Exhibit 6, Letters from Department of Corrections to Common Sense for Oregon in response to public records requests, Oct. 7, 2021; October 14, 2021; October 18, 2021; November 5, 2021; Exhibit 12, Emails between Governor Kate Brown’s office to Common Sense for Oregon attorney Monique DeSpain in response to public records requests, September 22 – November 22, 2021.

54.

All Petitioners to this action learned of Governor Brown’s October 20, 2021, commutation order after she issued it. No Petitioner was notified prior to Governor Brown’s decision to grant clemency to the perpetrators of the heinous crimes described herein. Because district attorneys were not notified, they were unable to notify victims of the felons allegedly commuted by the October 20, 2021 order, as required by ORS 144.650. Because of the Governor’s actions, no victims participated in the clemency process, including the Petitioners to this action. Petitioners’ objections to the early release of these violent criminals were not invited nor heard by Governor Brown, as is required by law. ORS 144.650.

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55.

As indicated in the October 20, 2021, Commutation Order, Governor Brown will have no subsequent part in the “process” she has established by her order, a process that ignores established clemency statutes. Exhibit 9, Governor Brown’s Commutation Order, October 20, 2021; ORS 144.650; ORS 144.660; ORS 144.670. The commutation is complete, as to the Governor. Reductions in sentences are now left to the Board. This is an inappropriate delegation of the Governor’s clemency powers and a gross overreach of her clemency power into the terms of future governors. Furthermore, the Board has no jurisdiction to grant parole as to 68 of these 73 “commuted” felons because the 68 were sentenced for offenses committed post November 1, 1989. ORS 144.050.

56.

District attorneys and citizens across the state are voicing their shock and outrage at this sweeping and reckless action by the Governor, fully outside the parameters of Oregon’s established clemency process, denying district attorneys and victims the opportunity to participate as required by law. Exhibit 19, List of Articles in the News in Response to Governor Brown’s Unlawful Clemency Actions. The district attorneys and victims learned of the 73 commuted felons, convicted as juveniles, in the news and other non-governmental sources. Affidavit of Douglas R. Marteeny; Affidavit of Patricia W. Perlow; Exhibit 19, List of Articles in the News in Response to Governor Brown’s Unlawful Clemency Actions. The new process and timelines for the commuted felons to petition and meet the Board, and probable outcomes, remain a mystery to the district attorneys and, tragically, to the victims as well.

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57.

The Governor ordered letters of invitation be sent by DOC, on September 20, 2021, to all “qualified” convicted felons inviting their application for an additional commutation of their sentences, either through a standard clemency application to the Governor, and/or a written request for a parole board hearing, along with a 15-page package containing an “abbreviated” version of the Governor’s clemency application. Exhibit 11, Letters from Department of Corrections to select inmates, October 15, 2021; October 20, 2021.

58.

In December, 2021, the DOC and the Parole Board began executing the illegally contrived process of sending the Governor’s “commuted” felons to the Parole Board to consider the early release of felons over whom they have no jurisdiction. Exhibit 10, Letter to District Attorney Patricia Perlow from DOC Post-Sentence Report Writer, Jean Bergen, dated December 28, 2021.

**SUMMARY OF ARGUMENT**

59.

As the public records cited below demonstrate, the Governor has failed to follow the procedural requirements of Oregon law as to the exercise of her clemency power, and has sought to illegally delegate her clemency powers by the following inaction or actions, inter alia:

1. Failing to require applications for clemency, which also require notice to the district attorney of the county of conviction and notice to the district attorney of the county where the convicted felon is housed in a correctional facility.
2. Failing to require proof by affidavit of service as to the agencies to be notified.

1           3. As a result of the above, causing the failure of district attorneys to notify victims  
2           and to provide the Governor with listed records and with any other information,  
3           relevant to the Governor’s decision, that the victim wishes to have provided.

4           4. Failing to accumulate the required information, and then failing to follow a 30-  
5           day waiting period before making a clemency decision.

6           5. Authorizing the DOC to reduce sentences of incarceration for categories of  
7           felony offenders, and to then release such felons, thereby illegally delegating her  
8           clemency powers to DOC administrators.

9           6. Authorizing the OYA to reduce sentences of incarceration for categories of  
10          felony offenders, and to then release such felons, thereby illegally delegating her  
11          clemency powers to OYA administrators.

12          7. Referring cases of 73 incarcerated felony offenders, 68 of whose prison  
13          sentences imposed for offenses which occurred after November 1, 1989, to the  
14          Parole Board for consideration of sentence reduction. This is an illegal delegation  
15          of clemency power and exceeds the jurisdiction of the Parole Board, which has no  
16          jurisdiction as to crimes committed after November 1, 1989, except where  
17          specifically authorized by the Legislature. No such authorization exists as to the  
18          68 cases.

19          8. Failing to meet the obligations of ORS 144.660 to report to the Legislature, in  
20          each case, the reason for granting clemency; the crime for which the applicant was  
21          convicted; the sentence and its date; statements by the victim of the crime or any  
22          member of the victim’s immediate family; a statement by the district attorney where

1 the conviction was had; photos of the victim; and the date of the commutation,  
2 pardon, or reprieve.

3 9. Failing to release to the public all documents the Governor received pertaining  
4 to any clemency application within 10 days of granting a commutation, pardon, or  
5 reprieve or remitting a fine or forfeiture, as required by ORS 144.660.

6 10. Failing to honor the 30-day waiting period required by ORS 144.650(5).  
7

8 **ARGUMENT**

9 60.

10 This is a case of first impression as to the Governor's failure to adhere to the clemency  
11 statutes, as to the general delegation of her exclusively gubernatorial clemency power, and as to  
12 her effort to exercise her clemency power, by delegation, beyond her term of office. It is also a  
13 case of first impression as to the Governor's attempt to grant the Parole Board jurisdiction where  
14 the law makes it clear no such jurisdiction exists.  
15

16 **I. The Governor's clemency power is broad, but that power is *subject to regulations as***  
17 ***provided by law*, and Governor Brown has abandoned all clemency process and procedure**  
18 **required by law.**

19 61.

20 Multiple provisions in the Oregon Constitution were violated when the Governor  
21 exercised her clemency powers from early 2020, to the present and, as indicated, violations will  
22 continue without immediate intervention by this Court. The Oregon Supreme Court has long  
23 recognized the substantive clemency power of the Governor and has acknowledged that, while

1 clemency power is the exclusive substantive prerogative of the Governor, limited only by the  
2 Constitution, that power is subject to regulations as provided by law. *Haugen v. Kitzhaber*, 353  
3 Or 715, 306 P3d 592 (2013); Or Const, Art V, § 14.

4 62.

5 The Legislative Assembly has enacted procedural and administrative limits on clemency  
6 power as codified in various sections of ORS Chapter 144. Yet these legal requirements, that  
7 ensure to district attorneys, and victims, access to participation in the clemency process, are  
8 presently completely abandoned by Governor Brown. ORS 144.650; ORS 144.660; ORS  
9 144.670.

10 63.

11 The Governor did not include in her June 25, 2021, report to the legislature all the  
12 particulars required by statute. ORS 144.66. Exhibit 4, Governor Kate Brown’s Report to  
13 Legislature, June 25, 2021. In fact, she did not consider or report specific statutorily required  
14 criteria in her final determination regarding the early release of at least 953 convicted felons.  
15 Glaringly absent from her report to the legislative assembly were the statements of the victims.  
16 Governor Brown did not consider the statements of the victims *before* she granted commutations  
17 of duly secured sentences that those victims are entitled to rely upon. Exhibit 4, Governor Kate  
18 Brown’s Report to Legislature, June 25, 2021. We know this betrayal is real because the  
19 Governor’s commutation orders were signed and acknowledged, most recently on October 20,  
20 2021, without appropriate prior engagement with the district attorneys or the victims. Affidavit  
21 of Douglas R. Marteeny; Affidavit of Patricia W. Perlow.

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64.

Regardless of her reasons for granting clemency, in the case of the en masse early releases, and the present 73 commutations, the Governor violates the law because the constitutional and statutory limitations on the Governor’s clemency power require her adherence to all applicable regulations. Or Const, Art V, § 14; ORS 144.650; ORS 144.660; ORS 144.670; ORS 144.050.

**II. The Governor is not authorized to delegate her exclusive executive clemency power.**

65.

Nothing in the history of clemency power in Oregon, nor the plain language of the constitution, provides for the delegation of executive clemency power. Or Const, Art V, § 14. To the contrary, the Oregon Supreme Court has affirmed the framers’ intent that the Governor’s substantive clemency power is hers alone. *Haugen*, 353 Or at 726; *Fehl*, 155 Or at 457; *Fredericks*, 211 Or at 317.

66.

Governor Brown, in the case of en masse reduction of sentences listed in her exhibits A - C of her June 25, 2021 Report, unlawfully delegated the obligations of her clemency power to the DOC. Exhibit 7, Letter from Governor Brown to Department of Corrections, September 28, 2021; Exhibit 9, Governor Brown’s Commutation Order, October 20, 2021. Governor Brown failed to perform a case-by-case analysis of each felon before she granted clemency; rather, she left that analysis and discretion to the DOC and simply relied on DOC to provide her with a list of felons DOC identified within the Governor’s generic criteria. Exhibit 7, Letter from Governor Brown to Department of Corrections, September 28, 2021; Exhibit 8, List provided by Department of Corrections to Governor Brown in response to September 28, 2021 letter.

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67.

This complete departure from the required administrative process for clemency actions resulted in a failure to adhere to the statutory requirements of ORS 144.650 which are triggered by an application for clemency. The appropriate district attorneys and the victims were not properly notified, in many cases not notified at all, and the right to participate in the clemency process was not honored. Affidavit of Douglas R. Marteeny; Affidavit of Patricia W. Perlow.

68.

Governor Brown simply granted commutation of sentences to every felon on lists produced by DOC with one sweeping clemency order. Exhibit 9, Governor Brown’s Commutation Order, October 20, 2021; Exhibit 18, Governor Brown’s 2020-2021 Clemency Orders.

69.

For many felons listed in the exhibits to the Governor’s report, the relevant district attorneys and victims discovered clemency was granted after the fact. Affidavit of Douglas R. Marteeny; Affidavit of Patricia W. Perlow.

70.

Those across-the-board delegations and early releases conflict with the law and Governor Brown’s own established and published policies regarding her criteria that she only considers unique and extraordinary cases, on an individual basis, whereby she carefully considers all circumstances and evidence presented by the individual (by application). Governor Brown’s own past pattern and practices, upon which district attorneys and victims have relied since 2015, demonstrate her understanding and prior adherence to the extraordinary and exceptional use of her purely gubernatorial power, within the parameters of the statutes. Affidavit of Douglas R. Marteeny; Affidavit of Patricia W. Perlow; Exhibit 13, Governor Brown’s past Clemency Reports

1 to Legislature, March 3, 2016; Exhibit 14, Governor Brown’s Clemency Report to Legislature,  
2 June 6, 2017; Exhibit 15, Governor Brown’s Clemency Report to Legislature, March 3, 2018;  
3 Exhibit 16, Governor Brown’s Clemency Report to Legislature, June 28, 2019; Exhibit 17,  
4 Governor Brown’s Clemency Report to Legislature, March 9, 2020; Or Const, Art V, § 14.

5 71.

6 Additionally, in May 2019, Governor Brown’s General Counsel responded to concerns  
7 that Governor Brown, or any Oregon governor, may abuse his or her clemency power, especially  
8 in the case of murderers, rapists, and other serious offenders, and emphasized careful  
9 consideration of each individual case. The following is from a transcription of the testimony of  
10 Governor Brown’s General Counsel:

11 “With respect to your structural concern that we might someday have a governor  
12 who might abuse the pardon power, I mean, it’s worth pausing to consider what  
13 structural checks are already in place. I’ve already talked to you about the sort of  
14 political accountability that the governor has with the public. There also, by statute,  
15 the Governor is required every legislative session to report any pardons the  
16 governor has given within the last year since the prior legislative session. Y’all will  
17 get a report like that from me within the next month. If the Governor pardons  
18 somebody in an extraordinary case, like you’re describing, and it was an abuse of  
19 the pardon power, there would be a hue and cry in the public. Because of the report  
20 to the legislature, it would have to be public, it couldn’t be done in secret. There’d  
21 be a hue and cry in the public, it’d be all over the internet, all over the newspapers  
22 that the Governor did that.

23  
24 *Hearing on S.B. 388A Before the H. Comm. on Judiciary, May 6, 2019, 80<sup>th</sup> Leg. Assembly, Reg.*  
25 *Sess., (statement of Misha Isaak, General Counsel, Office of Oregon Governor).*

26 72.

27 In the present instance of the 73 incarcerated felons who received commutations on  
28 October 20, 2021, Governor Brown has ignored the statutory process and she has delegated the  
29 weighty decision to reduce 73 criminal sentences to the Board. Exhibit 9, Governor Kate Brown’s

1 Commutation Order, October 20, 2021. Indeed, as predicted by General Counsel Isaak, the  
2 Governor’s abuse of her clemency power has caused a “hue and cry in the public.” Exhibit 19,  
3 List of Articles in the News in Response to Governor Brown’s Unlawful Clemency Actions.  
4

5 **III. The Governor’s commutation is complete. The individual analysis and the executive**  
6 **power to further reduce sentences has been unlawfully delegated to the Board.**

7 73.

8 A commutation is generally defined as “a change of punishment to which a person has been  
9 condemned to one less severe.” *See Fehl*, 155 Or at 459. Granting an opportunity to meet a Parole  
10 Board empowered to reduce one’s criminal sentence, after serving a requisite amount of time, is  
11 certainly less severe than no opportunity to have one’s sentence reduced at all. Though Governor  
12 Brown’s “clemency action” is complete, as stated in her order, she obviously has an end goal  
13 beyond granting mere access to a parole board hearing. The more meaningful substance of her  
14 constitutionally dictated sovereign clemency duties, assessing a convicted felon for early release  
15 and actual release, is delegated unlawfully to the Board. Exhibit 9, Governor Kate Brown’s  
16 Commutation Order, October 20, 2021.

17 74.

18 The Governor makes clear she has no intention to revisit the 73 cases “commuted” to the  
19 Board and, she pronounces in her order, that her Board of Parole and Post-prison Supervision shall  
20 perform a case-by-case analysis to determine if a reduction in sentence is warranted. *Id.* The  
21 Governor orders that, “Upon the Board’s determination that a Commutee has demonstrated  
22 maturity and rehabilitation, it shall release that Commutee. . . .” *Id.* This is a clear unlawful  
23 delegation as to the statutorily required clemency process and the case-by-case consideration by

1 the Governor, with the weighing of essential district attorney and victim input. ORS 144.650;  
2 ORS 144.660; ORS 144.670.

3 75.

4 It is also a clear violation of ORS 144.050 which provides that the Parole Board has no  
5 jurisdiction as to crimes committed after November 1, 1989. All but five of these 73 clemency  
6 delegations relate to crimes committed after November 1, 1989.

7 76.

8 The delegation is complete and unlawful. Notably, at the time of the filing of this petition,  
9 the administrative rules by which the Board would purportedly assess the subject commutes for  
10 early release make no mention of victim input as specific criteria to be applied to the Board's  
11 analysis and decision. ORS 144.397; Exhibit 20, Letter from the Oregon District Attorney  
12 Association to the Board of Parole and Post-Prison Supervision, November 24, 2021. This  
13 omission is yet another assault on the rights of victims of crime.

14  
15 **IV. Governor Brown's delegation to the Board unlawfully extends her clemency power**  
16 **beyond her term of office. Governor Brown's clemency power ends when her term ends.**

17 77.

18 The Governor's commutation order dated October 20, 2021, confers upon the 73 felons  
19 she lists at Exhibit A to her order, eligibility to pursue parole once they have served 15 years of  
20 their duly secured sentences. Exhibit 9, Governor Brown's Commutation Order, October 20, 2021.  
21 Of the 73 on her list, only 34 have served 15 years. The remaining 39 felons will not be eligible  
22 to seek parole and enjoy the benefit of Governor Brown's clemency power (albeit delegated) until  
23 after Governor Brown is no longer the Governor.

1 78.

2 Essentially, the Governor has transferred her clemency power to the parole board for it to  
3 exercise almost a decade after she has left office, at a point where she has no clemency power.  
4 Even if she were authorized to delegate her clemency power, she can only delegate power that she  
5 possesses. Her power ends the moment she leaves office.

6 79.

7 The Oregon Supreme Court decision in *Haugen v. Kitzhaber* supports the additional  
8 argument that a Governor’s clemency power ends when the Governor leaves office. In *Haugen*,  
9 Governor Kitzhaber granted a reprieve of the death penalty to Gary Haugen, despite Haugen’s  
10 objections to the reprieve. The reprieve did not have a specified “end date,” which was part of  
11 Haugen’s argument as to why the reprieve was ineffective. The court noted that any reprieve has  
12 a functional end date whether or not the end date is stated – a reprieve ends when the Governor  
13 who grants the reprieve leaves office. *Haugen*, 353 Or at 728.

14  
15 **V. The Board has no authority to grant parole for an offense committed after November 1,**  
16 **1989, pursuant to ORS 144.050.**

17 80.

18 The Oregon Constitution prohibits the suspension of the operation of the laws. Or Const,  
19 Art I, § 22. Only the Legislative assembly has the authority to suspend ORS 144.050 and it has  
20 not done so. The Governor is not authorized to suspend the law or make sweeping changes that  
21 ignore it. Or Const, Art I, § 22. The law does not permit the Board to grant parole for an offense  
22 committed after November 1, 1989, and Governor Brown does not have the authority to suspend  
23 or ignore that fact. ORS 144.050.

Furthermore, Article I, Section 44 of the Oregon Constitution, adopted by the voters in 1999, provides that a term of imprisonment imposed by a judge may not be set aside, or otherwise not carried out, except as authorized by the sentencing court or through appellate relief or the subsequent exercise of the Governor’s clemency powers. Or Const, Art I, § 44(1)(a). The Constitution precludes the Board from modifying sentences of the 73 felons the Governor intends for it to consider for a reduction in terms of imprisonment. *Id.*

**VI. Victims must be afforded a meaningful role in the criminal justice system to ensure that “a fair balance is struck between the rights of crime victims and the rights of criminal defendants . . .” Or. Const. Art I, § 42(1).**

Governor Brown has refused to involve victims in her decision-making process as required by ORS 144.650; it appears the Board, if allowed to be empowered, will do the same. Not once does Governor Brown mention victims in her many letters of instruction to the DOC. Exhibit 2, Governor Brown’s Report to Legislature, March 9, 2020. Each time the Governor reached out to DOC Director Peters and asked her to identify inmates eligible for early release under the Governor’s ever-changing criteria, the necessary application process was ignored. Because there was no application, no required ‘Notice of Intention to Apply for Pardon, Commutation or Remission’ was signed by the inmate and properly served upon the required parties: the relevant district attorneys, the Board, nor the Director of DOC. ORS 144.650(1)(a)-(d). This notification requirement is so important to the lawmakers that proof of service to the parties is required by affidavit of the inmate-applicant. ORS 144.650(2). From the required notification to the district

1 attorneys flows the requirement that the district attorney *shall* notify the victim of the crime  
2 concerning the application and the victim’s right to provide the Governor with any information  
3 relevant to the Governor’s decision. ORS 144.650(3)(a)(b).

4 83.

5 Further underscoring the requirement for thoughtful deliberation and review of all the  
6 information, including district attorney and victim statements, the law requires a waiting period  
7 for the Governor to assess the application of the inmate, upon notification of the inmate’s  
8 application and intent to request clemency. ORS 144.650(2). Following receipt of the application  
9 for clemency, “the Governor *shall not* grant the application for at least 30 days.” ORS 144.650(5).

10

11 **VII. SB 1008 is not retroactive, and the Governor is not authorized to make it so.**

12

84.

13 Governor Brown’s across the board reduction in criminal sentences, and, in particular, the  
14 most recent “commutation” of 73 felons convicted as juveniles (or rather her improper delegation  
15 to the Board of Parole), are not individual acts of mercy. Rather, the Governor is using her  
16 clemency power as a pretext to effect sweeping changes in the law and reform Oregon’s criminal  
17 justice system.

18

85.

19 Governor Brown announced her intentions to continue mass commutations and releases  
20 and to apply SB 1008 retroactively because it is, in her opinion, “unfair” not to. Exhibit 9,  
21 Governor Brown’s Commutation Order, October 20, 2021. Without intervention by this Court,  
22 it is likely Governor Brown will continue to avoid the statutorily required participation of the  
23 district attorneys.



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86.

When Oregon's Legislature passed SB 1008, they repeatedly promised that the new law would only impact future criminals and would not be retroactive. SB 1008 is not retroactive because the legislature did not make it so. Custody of Juvenile Offenders, Oregon Senate Bill 1008, 2019.

**VIII. Past abuse of the Governor’s clemency power illustrates Governor Brown’s willingness to act outside the restrictions on her clemency power.**

87.

Once Governor Brown successfully released 912 felons under the “COVID vulnerability” mass early release, she then released another 41 felons, granting one-year commutations for the sole reason being “firefighter work performed.” Exhibit 18, Governor Brown’s 2020-2021 Clemency Orders. No additional information about these felons has been produced in response to our public records requests. No individual, case-by-case review took place *before* the felons were granted clemency, beyond the sorting by DOC of hundreds of incarcerated people using the Governor’s generic criteria. Exhibit 2, Governor Brown’s Report to Legislature, March 9, 2020. Since March 2020, the Governor has deliberately failed or refused to follow the established clemency process and the specific requirement to receive and properly process an application for clemency, as well as the required reporting to the Legislative Assembly. In failing to adhere to the clemency processes, the Legislature, the Secretary of State, the victims, and the rest of society know nothing of those felons’ levels of remorse, rehabilitation, or ability to re-enter our communities safely.

///

1 **CONCLUSION**

2 88.

3 Without intervention of this Court, the laws requiring the protection of victims' rights,  
4 securing public safety, and the proper execution of clemency power, will continue to be ignored  
5 by Governor Brown and the agencies and officials acting under her clemency orders.

6  
7 DATED this 18<sup>th</sup> day of January, 2022.

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9

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