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No. A21-0830

State of Minnesota
In Supreme Court

AMREYA RAHMETO SHEFA,

Respondent/Cross-Appellant,

VS.

ATTORNEY GENERAL KEITH ELLISON, IN HIS OFFICIAL CAPACITY,

Appellant/Cross-Respondent,

GOVERNOR TIM WALZ, IN HIS OFFICIAL CAPACITY,

Respondent/Cross-Appellant,

AND

CHIEF JUSTICE LORIE GILDEA, IN HER OFFICIAL CAPACITY,

Appellant/Cross-Respondent.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT GOVERNOR TIM WALZ, IN HIS OFFICIAL CAPACITY

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INTRODUCTION

The district court correctly held that the Statutes are unconstitutional because they directly conflict with the Pardon Provision.[1] The Court should affirm on this basis alone. The Court may also affirm because the Statutes violate the doctrine of separation-of-powers enshrined in the Minnesota Constitution. Under the Constitution, the Legislature may not infringe on the Governor's constitutional powers, and a judicial officer may not exercise executive power except when it is "expressly" provided. Minn. Const. art. III, § 1. The Statutes run afoul of both these limitations and should be found unconstitutional. Additionally, because the Governor has already acted in conjunction with the Board with respect to Shefa's pardon, the Court should hold that the Governor has the power to grant her pardon.

ARGUMENT

I. Appellants' separation-of-powers arguments conflict with the Constitution and this Court's precedent

The Statutes violate the separation-of-powers principle in two ways: (1) the Legislature has encroached on the Governor's constitutional power; and (2) the Statutes purport to allow the Chief Justice to exercise executive pardon power that is not expressly provided in the Constitution. Appellants' counterarguments rely on fundamental misunderstandings of the constitutional roles of the Legislature, the Governor, and the Chief Justice in the pardon process, and should be rejected.

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[1] The Governor incorporates the defined terms from his principal brief.

A. The Legislature does not have "broad" authority to regulate the Governor's pardon power

In their reply briefs, Appellants advance a startlingly broad view of the Legislature's role in carrying out the Pardon Provision. Under Appellants' interpretation, because the Legislature may regulate the "powers and duties" of the Board, the Legislature may also determine when a pardon may be granted. This position is belied by the plain text of the Constitution. The Constitution gives the Governor the power to grant pardons when he or she acts "in conjunction with" the Board. Minn. Const. art. V, § 7. Because the Legislature has overstepped its authority by passing Statutes that restrict the Governor's constitutional authority to grant pardons, the Statutes violate the Constitution's separation-of-powers doctrine.

1. Under this Court's precedent, the Legislature's authority to regulate the Board must be construed narrowly—not "broad[ly]"

Appellants' mistaken separation-of-powers arguments spring from the flawed premise that the Legislature's authority to regulate the powers and duties of the Board is "broad"—so broad, in fact, that it supposedly grants the Legislature unfettered discretion to control when the Governor may exercise his or her constitutional power to grant a pardon. (CJ Reply at 15; *see also* AG Principal Br. at 13 (claiming the Amendment granted "significant discretion to the Legislature").) It is impossible to square Appellants' broad interpretation of the Legislature's power to regulate pardons with this Court's precedent. In *Inter Faculty Organization v. Carlson*, 478 N.W.2d 192 (Minn. 1991), this Court explained that when a power of one branch is listed in the article of the Constitution pertaining to another branch, the power must be construed narrowly "to prevent an

unwarranted usurpation by the [former] of powers granted the [latter] in the first instance." 478 N.W.2d at 194; *see also Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 617 (Minn. 2017) (same). In this case, the Legislature's authority to define the powers and duties of the Board is contained within Article V—the Article of the Constitution pertaining to the Executive. Under *Inter Faculty Organization*, the Legislature's authority must be "narrowly construed" so as not to infringe on the executive's pardon power. (*See* Gov. Principal Br. at 32.)

Appellants ignore this bedrock principle of constitutional law, and instead claim, without any citation, that the Constitution "gives the legislature a broad grant of authority" with respect to pardons. (CJ Reply at 15; *see also* AG Principal Br. at 13.) If, as Appellants suggest, the Legislature has boundless authority to determine the conditions under which pardons may be issued, the implications would be alarming. Under Appellants' logic, the Legislature could decide that the Board may not grant a pardon without first securing the approval of the President of the Senate. Or the Legislature could pass a statute providing that the Attorney General is the only member of the Board entitled to vote on a pardon application. According to Appellants' reasoning, neither of these examples would violate the Constitution's separation-of-powers doctrine.

If the Constitution granted this overarching authority to the Legislature, then the pardon power would effectively belong to the Legislature—not the Executive. That result is not a reasonable reading—much less a "narrow" one—of the Constitution's grant to the Legislature of authority to determine the "powers and duties" of the Board. It is also directly contrary to the purpose of the Pardon Provision, which is to act as a check on the

authority of criminal laws passed by the Legislature. (Gov. Principal Br. at 27–32); *see also State v. Meyer*, 37 N.W.2d 3, 13 (Minn. 1949) (purpose of pardons is the "exercise of the sovereign's prerogative of mercy").[2]

2. The Legislature cannot interfere with the Governor's power to pardon when he or she acts in conjunction with the Board

The Constitution should be interpreted to mean what it says. The Governor "has power" to grant pardons and may exercise that power when he or she acts "in conjunction with" the Board. (Gov. Principal Br. at 14–26.) Because that power is constitutionally conferred on the Governor, the Legislature may not interfere with it without violating the Constitution's separation-of-powers principle. (*Id.* at 41–42.)

i. The Governor "has power" to grant pardons when he or she acts "in conjunction with" the Board and the Legislature cannot usurp this power

As the Attorney General admits, when the Governor and another member of the Board vote in favor of a pardon application to form a majority of the Board, the Governor has acted "in conjunction with" the Board as that term is used in the Constitution. (AG Reply at 2 ("[T]he definition [of "in conjunction with"] encompasses . . . action by the

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[2] Appellants have not challenged Respondents' explanation of the purpose of the Pardon Provision and how the Statutes frustrate that purpose, which is further explained in the briefs of Amici Curiae Great North Innocence Project; Violence Free Minnesota, Minnesota Coalition Against Sexual Assault, and Standpoint; Pardon Recipients; and ACLU of Minnesota. Instead, the Chief Justice dismisses the relevance of the Pardon Provision's purpose without any explanation or citation to authority. (CJ Reply at 11 n.2.) The Attorney General acknowledges the relevance of the Pardon Provision's purpose but wrongly suggests—without citing any authority—that the amendment gives the Legislature the role of weighing the purpose of "offering a relief valve for harsh results" against the goal of "curbing potential abuse of the pardon power." (AG Reply at 8–9.)

Governor plus one other member.").) This concession highlights the Statutes' violation of the separation-of-powers principle. The Statutes purport to restrict the power that the Governor "has" *even when* he or she has acted in conjunction with the Board, as the Governor did in this case. (Gov. Principal Br. at 41–42.)

The Chief Justice incorrectly suggests that because the Governor may not grant a pardon unless he or she acts "in conjunction with" the Board, the Governor must disagree with the district court's conclusion that "the Governor has some pardon power or duty separate from or apart from the Board of Pardons." (CJ Reply at 1.) There is no inconsistency between the Governor's position and the district court's well-reasoned decision. The Governor has power that the Board itself does not: he or she "has power" to grant a pardon when the constitutional requirement that the Governor must act "in conjunction with the board" is met. Minn. Const. art. V, § 7.

By contrast, in disputing that the Legislature has interfered with the Governor's constitutional power, Appellants continue to read the phrase "the Governor in conjunction with the board" in the Pardon Provision to mean "the board has power." (*See* R.Add.26:8–14 (Appellants' counsel admitting that their position is that "the governor in conjunction with" in the Pardon Provision is surplusage).) As the district court recognized, that is not a reasonable reading of the Pardon Provision because it renders the phrase "the governor in conjunction with" meaningless, violating the canon against surplusage. (Gov. Principal Br. at 16–21.) Appellants' response to the reality that their interpretation effectively deletes words from the Constitution is merely to continue to suggest, without authority, that this Court should ignore the canon against surplusage. Even in the *statutory* context, this Court

regularly rejects litigants' attempts to wave away the surplusage canon. *See, e.g.*, *State v. Friese*, 959 N.W.2d 205, 211 (Minn. 2021) (rejecting an argument that the canon against surplusage should not apply). In the *constitutional* context, the canon against surplusage carries especially great weight. *Rhodes v. Walsh*, 57 N.W. 212, 214 (Minn. 1893); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (applying the canon against surplusage to the U.S. Constitution).

The Attorney General's bare assertion that "courts do not expect that drafters of . . . constitutional texts are exemplars of precision who use as few words as possible," (AG Reply at 6), is directly contrary to *Rhodes*, which explains that "constitutions are framed in the most concise language possible," 57 N.W. at 214. In fact, the Attorney General ignores *Rhodes* entirely. (*Cf* AG Reply.) The Chief Justice attempts to brush *Rhodes* aside by claiming that it is limited to "a general statement that constitutions *generally* are written concisely." (CJ Reply at 8 (emphasis added).) But *Rhodes* goes much further, referring to surplusage in a state constitution as "a transaction unheard of in any other instance." 57 N.W. at 214. Nor does it help Appellants that this Court once referred to the state constitutional convention as "somewhat of a mess." (CJ Reply at 8 (quoting *State v. Lessley*, 779 N.W.2d 825, 838 (Minn. 2010).) The "in conjunction with" phrase was not drafted at the convention; it was drafted by the Legislature in 1895. And there is no authority for the proposition that a messy constitutional convention frees the courts to pick and choose the language of the Minnesota Constitution that they will enforce.

The only new argument that Appellants have raised on reply to explain why the Constitution states "the governor in conjunction with" in the Pardon Provision is the

Attorney General's claim that this "may have been an effort to reference the historical context." (AG Reply at 5.) That explanation is as strained as Appellants' argument before the district court that the choice of language was just "the simplest means to accomplish the amendment's purpose without significantly reorganizing the relevant portion of the constitution." (Doc. 30 at 6.) If, as Appellants suggest, the amendment was intended to *change* historical practice by giving the Governor no role in the pardon process outside of participation as an equal member of the Board, then the logical way to convey that would be by *not* singling out the Governor as having the power to grant pardons when he or she acts together with the Board.

Appellants also refer vaguely to "context," (AG Reply at 6; CJ Principal Br. at 15), to claim that the cannon against surplusage in a constitution should not be followed here. But Appellants provide no explanation for what "context" would support the argument that the words "the governor in conjunction with" are intentionally redundant. There must be an extremely compelling reason to depart from the canon against surplusage in the constitutional context. *See Rhodes*, 57 N.W. at 214. There is no such reason here, making Appellants reading of the Pardon Provision unreasonable and undermining their separation-of-powers arguments.

ii. The Constitution does not "authorize" the Legislature to interfere with the Governor's pardon power by enacting a unanimous voting requirement

Because the Governor "has power" to grant pardons when he or she acts "in conjunction with" the Board, the Legislature is not permitted to regulate the Governor's power to pardon under the guise of regulating the powers and duties of the Board. (Gov.

Principal Br. at 23–26.)[3] It is not the Legislature's role in Minnesota's system of divided government to dictate the conditions under which the Governor may exercise the power he or she has under the Constitution. That is already provided for in the Constitution: when the Governor acts "in conjunction with" the Board, the Governor "has power" to grant pardons. Minn. Const. art V, § 7.

Contrary to the Attorney General's argument, the Legislature cannot determine the "power relationship" between the Governor and the other members of the Board with respect to granting pardons, (AG Principal Br. at 12), because that relationship is already defined by the Constitution's plain text. The power given to the Legislature in the Constitution is to determine the power and duties *of the Board*, not to define the meaning of "in conjunction with" or to limit the power of the Governor to grant pardons to exclude certain circumstances in which he or she acts in conjunction with the Board. Indeed, doing so contravenes this Court's precedent. *See Meyer*, 37 N.W.2d at 13 (the Legislature cannot "prevent the governor" from granting pardons with a law that "abrogates, restricts, or removes" the executive pardon power).

In attempting to distinguish the separation-of-powers cases cited in the Governor's principal brief, (CJ Reply 15–18), the Chief Justice entirely ignores the nature of the

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[3] The Attorney General's claim that the word "has" in the Pardon Provision is singular because it refers to the governor and the Board together flies in the face of elementary grammar. (AG Reply at 6–7.) "Has" is singular and agrees with the singular subject in the third sentence of the Pardon Provision, "the governor." When two singular nouns are joined together as the subject of a sentence, only a plural form of the verb can agree. For example: "Mom and Dad are my parents," not "Mom and Dad is my parents." If the constitutional language was intended to join the governor and the board together to form a plural subject, the Constitution would have used the plural verb "have."

Legislature's role in the pardon process. The Chief Justice points out that the Legislature has *some* role in the pardon process—to the extent that it is permitted to regulate the powers and duties of the Board. But the authority to regulate the powers and duties of the Board is not the same as the authority to regulate the Governor's pardon power or the relationship between the Governor and the Board, both of which are already defined by the Constitution.[4]

For that reason, contrary to the Chief Justice's suggestion, this case is analogous to *State ex rel. Childs v. Griffen*, 72 N.W. 117, 118 (Minn. 1897), in which this Court invalidated a statute that required the Governor to appoint to the state board of pharmacy only persons who had been selected by a professional association. In that case, the Senate had the right to reject any appointment to the Board of Pharmacy, but that did not mean that the Legislature could pass a law limiting the class of persons who could be appointed. *Id.* As the Chief Justice puts it, the "sole constitutional restriction" on the Governor's appointment power was the requirement to obtain the consent of the Senate to a specific nominee. (CJ Reply at 17.) In the case of the Pardon Provision, however, the "sole constitutional restriction" on the Governor's pardon power is that he or she must act in conjunction with the Board to grant a pardon. The fact that the Legislature has a role in

[4] The Chief Justice argues that the Legislature can regulate the Governor because he is a member of Board of Pardons. (CJ Reply at 15.) This argument is misplaced. The Governor has a unique role in the pardon process in addition to serving as a member of the Board, which is why the Governor is mentioned separately in the third sentence of the Pardon Provision. The Legislature can regulate the Board's powers and duties, but that does not give the Legislature the power to regulate the Governor's constitutional power, which includes the power he or she "has" to "grant reprieves and pardons." Minn. Const. art V, § 7.

regulating the "powers and duties" of the Board does not mean that it can place limitations on the Governor's pardon power beyond that sole constitutional restriction; rather, as this Court's precedent shows, the Legislature's authority to define powers and duties of the Board must facilitate the power the Governor has to grant pardons, not restrict it. *See Meyer*, 37 N.W.2d at 13; (Gov. Principal Br. at 30–32.)

* * *

The Governor acted in conjunction with the Board when he and one other member of the Board voted to grant Shefa's pardon. Because the Legislature, in passing the Statutes, deprived the Governor of the constitutional power to grant her pardon even though the "in conjunction with" requirement was met, the Statutes violate the Constitution's separation-of-powers doctrine and are unconstitutional.

B. The Chief Justice's statutorily conferred unilateral veto over pardons is not expressly provided in the Constitution

The statutorily created unanimity requirement not only oversteps the Legislature's own authority, it also allows the Chief Justice to exercise executive power beyond what he or she is expressly provided in the Constitution. This expansion is an independent basis for holding the Statutes unconstitutional on separation-of-powers grounds.

Respondents and the Chief Justice agree that the pardon power is an executive function. (CJ Principal Br. at 16; CJ Reply at 20; Gov. Principal Br. at 27–29; Shefa Principal Br. at 37.) The Attorney General's assertion that pardons are not "a purely executive function," (AG Reply at 10), conflicts with this Court's repeated holdings to the contrary. *See, e.g.*, *Meyer*, 37 N.W.2d at 13 ("A pardon is the exercise of executive

clemency."); *State v. Wolfer*, 138 N.W. 315, 317 (Minn. 1912) (recognizing "the executive pardon power").

Equally unavailing is the Attorney General's argument that the Statutes do not authorize the Chief Justice to infringe on the unique constitutional functions of the executive branch. (AG Reply at 10.) The Attorney General cites a Court of Appeals decision, *State v. T.M.B.*, 590 N.W.2d 809 (Minn. App. 1999), which states that "separation of powers only comes into play if the statute authorizes the Chief Justice to infringe on 'the unique constitutional functions of' the executive branch." (AG Reply at 10 (quoting *T.M.B.*, 590 N.W.2d at 812).) Setting aside that the decision is not binding on this Court and the language quoted is dicta, the Statutes *do* permit the Chief Justice to infringe on the Governor's "unique constitutional functions." Under the Constitution, only the Governor's vote is indispensable to grant a pardon, but the Statutes unlawfully give the Chief Justice equal power to unilaterally reject any pardon application. (Gov. Principal Br. at 42–44.)

The Chief Justice disputes that her statutory ability to unilaterally block a pardon application is a "veto," preferring to limit the term "veto" to only the Governor's power to veto legislation. (CJ Reply at 18–19.) The Chief Justice's semantic argument is flawed based on the common understanding of the term "veto," confirmed by numerous dictionary definitions, as meaning "[t]he power of one party or entity to forbid the actions or decisions of another party or entity." *See, e.g.*, The American Heritage Dictionary 1928 (5th ed. 2018). In any event, the Chief Justice's position regarding the term "veto" misses the point. Under the Statutes, the Chief Justice, standing alone, can block any pardon application—just as the Senate "may refuse to consent to a gubernatorial appointment." (CJ Reply at

19.) The difference, of course, is that the Senate's power to refuse consent to gubernatorial appointments, unlike the Chief Justice's power to unilaterally block pardons, is "expressly provided" in the Constitution. Minn. Const. art. III, § 1; *see* Minn. Const. art. V, § 3. The Chief Justice is not expressly provided a power to unilaterally deny pardons in the Constitution or authorized to exercise the power that the Statutes purport to give her.

Appellants' remaining arguments are disproved, and apparent confusion dispelled, by what the Constitution's text *does* expressly provide: The Governor in conjunction with the Board has power to grant pardons. For example, the Attorney General states that "Respondents do not argue that the Chief Justice would 'infringe' on the Governor's functions if she were the one in favor of [a] pardon[]" and the Governor opposed it. (AG Reply at 10 n.3.) If the Chief Justice votes for a pardon and the Governor does not, the pardon must be denied precisely because the constitutional requirements have *not* been met: The Governor has not acted in conjunction with the Board. Relatedly, the Chief Justice wrongly argues that the Governor has attempted to "engraft a majority-vote requirement into the Constitution." (CJ Reply at 3–4.) The Pardon Provision does not contemplate (and the Governor has never argued) that any majority of the Board "has power" to grant pardons. Rather, the Pardon Provision expressly provides that the Governor "has power" in conjunction with the Board, meaning the Governor's vote is constitutionally required.

Similarly, it would not violate the separation-of-powers doctrine if both the Chief Justice and Attorney General voted to deny a pardon and the pardon is denied, (AG Reply at 10–11), because the constitutional requirement for the issuance of a pardon have not been met. In such a circumstance, it cannot fairly be said that the Governor has acted "in

conjunction with" the Board, because the majority of the Board voted against the pardon. (*See* Brief of Amicus Curiae Minn. Ass'n of Crim. Def. Laws. at 7–21; Gov. Principal Br. at 21–23.) Moreover, under those circumstances, the Chief Justice is not exercising the power that is conveyed solely to the Governor to *unilaterally* reject a pardon application. The Chief Justice is simply acting as one of the members of the Board, the constitutional role that expressly has been given to the Chief Justice.

II. The Court should declare that the Governor may grant Shefa's pardon *nunc pro tunc*

The Governor acted "in conjunction with" the Board when he voted together with another member of the Board in favor of Shefa's pardon. The Attorney General agrees. The Attorney General has represented that if the Court finds the Statutes unconstitutional, the Court should allow Shefa's pardon to be granted because "two members of the pardon board already voted to grant her pardon," including the Governor. (AG Reply at 11.) Similarly, the Chief Justice does not dispute that if the Court declares the Statutes unconstitutional the Court may declare that the Governor has power to grant Shefa's pardon. (CJ Reply at 20–21.) Rather, the Chief Justice merely restates her argument that she does not think the Governor acted in conjunction with the Board with respect to Shefa's pardon application. (*Id.*) Because the Statutes are unconstitutional for all the reasons set forth in the briefs of the Governor, Shefa, and amicus curiae, the Governor respectfully requests that the Court apply the Constitution's plain language to the facts of this case and allow the Governor to grant Shefa's pardon.

CONCLUSION

The Governor respectfully requests that the district court's conclusion that the Statutes are unconstitutional be affirmed and that the Governor be permitted to grant Shefa's pardon *nunc pro tunc*, effective June 12, 2020.

Dated: September 2, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 132.01, subd. 3

The undersigned certifies that the Reply Brief of Respondent/Cross-Appellant Governor Tim Walz submitted herein contains 3,886 words and complies with the word count, typeface, and volume limitations of Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. This brief was prepared using a proportional spaced font size of 13 point. The word count is stated in reliance on Microsoft Word 365, the word processing system used to prepare this brief.

/s/ Barry M. Landy
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