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**State of Minnesota  
In Supreme Court**

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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.

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**REQUEST OF AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA FOR  
LEAVE TO FILE BRIEF OF *AMICUS CURIAE***

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## **IDENTIFICATION OF AMICUS CURIAE**

The American Civil Liberties Union of Minnesota ("ACLU-MN") is a private, non-profit, nonpartisan organization supported by approximately 39,000 members in the State of Minnesota.<sup>1</sup> It is the statewide affiliate of the American Civil Liberties Union ("ACLU"). Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the United States and Minnesota Constitutions. Ensuring fairness and protecting civil liberties in the criminal justice system are core tenets of the ACLU-MN's mission. The ACLU-MN works to reform the criminal justice system and make the promise of fair treatment a reality for all people.

In 2019, the ACLU launched the Redemption Campaign – Embracing Clemency, a nationwide effort to liberate 50,000 people from state prisons by executing state-level campaigns that encourage governors to use their existing clemency powers in new and transformational ways, forcefully confronting mass incarceration and racial injustice by granting categorical commutations to release large groups of people who are unjustifiably imprisoned.

## **INTRODUCTION**

Minn. Stat. §§ 638.01 and 638.02 effectively deprive the Minnesota Governor of powers granted by the State Constitution by adding a requirement that each member of the Board consent to any pardon decision by the Governor. The Minnesota Constitution vests the power to grant pardons and reprieves in the "governor in conjunction with the

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person or entity made a monetary contribution to the preparation of submission of this brief other than the ACLU-MN, its members, and counsel.



board of pardons." Minn. Const. Art. V, § 7. Sections 638.01 and 638.02, therefore, grants each member of the Board of Pardons with the ability to veto the Governor's decisions and violates the separation of powers. While the Board doubtless has a proper, constitutional role, §§ 638.01 and 638.02 expand the Board's power to an unreasonable and unconstitutional degree. The Minnesota Supreme Court must support the executive's important and well-founded "check" on the justice system.

The factual elements of this case present a troubling disregard of structural protections contained in the Minnesota Constitution. Those structural protections were designed to interpose checks and balances between the State's three branches of government. The diminishment of clemency's vital role in correcting unjust or unduly harsh results in criminal proceedings creates a constitutional imbalance that is particularly alarming in cases, like this one, involving a systemically unfair application of criminal law. In this case, the statutory veto power imported by Minn. Stat. §§ 638.01 and 638.02 did, in fact, divest the Governor of his historic authority to provide a final "check" on the power of the State's judicial branch. But for the novel veto power bestowed by these relatively new Minnesota Statutes, the Governor would have granted Plaintiff Amreya Rahmeto Shefa's pardon application.

The independent judgment of Minnesota's executive branch must be given effect in this important case. Executive branch clemency has played a vital role in the State of Minnesota and throughout the country since the founding of our Republic. Given the prevailing clemency practices at the time that Minnesota's Constitution was drafted, it is impossible to imagine that the authors of Minnesota's Constitution contemplated a veto

power for each member of the Board when they empowered the Governor to issue pardons and reprieves "in conjunction with" a board of pardons. Minnesota's requirement of a unanimous vote remains literally unique among the States. Sections 638.01 and 638.02 thus diminish the clemency power of the State's executive branch unjustifiably. For these reasons, and others stated below, ACLU-MN respectfully requests that the Minnesota Supreme Court uphold the District Court's ruling, strike down the unconstitutional statutory barriers imported by Minn. Stat. §§ 638.01 and 638.02, and restore the Governor's Constitutional authority (consistent with corollary practices throughout the country) to grant pardons and reprieves.

### **ARGUMENT**

#### **I. Throughout U.S. History, Presidents and Governors Have Had the Power of Clemency.**

Minnesota's Constitution was not drafted in a vacuum. At the time of its creation, prevailing clemency practices throughout the country, both at the State and federal levels, contemplated that the head of the executive would make final decisions with respect to pardons, reprieves, and the commutation of criminal sentences. This consistent principle provides critical context for any modern interpretation of Minn. Const. Art. V, § 7.

Historically, executive clemency refers to the authority held by the president and most governors to modify the terms of an individual's criminal justice system involvement. Leah Sakala *et al.*, *How Governors Can Use Categorical Clemency as a Corrective Tool* (Nov. 2020), <https://www.aclu.org/report/how-governors-can-use-categorical-clemency-corrective-tool>. *See also Schick v. Reed*, 419 U.S. 256, 266 (1974)

(the President has "plenary" constitutional authority under the pardon provision "to 'forgive'" an accused or convicted person "in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable."). Clemency can come in the form of a pardon, which legally undoes a criminal conviction, or in the form of a commutation, which reduces or ends incarceration. *Embracing Clemency*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/report/aclus-redemption-campaign-embracing-clemency-report> (last visited Dec. 4, 2020). "In each form, the core legal and moral concepts underpinning clemency remain the same: Chief executives have the power to correct systemic injustices and end imprisonment that is unjust or no longer necessary." *Id.*

Further, clemency was not a notion first conceived by the framers of the Constitution. It is deeply rooted in the Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993). In England, the clemency power was vested in the Crown and can be traced back to the Eighth Century. *Id.* The U.S. Constitution adopts the British model and gives to the President the "Power to grant Reprieves and Pardons for Offences against the United States." *Id.* (citing Art. II, § 2, cl. 1). The framers included a power to pardon because they understood that legislative punishments tend to be harsh and courts are strict about imposing them. Alexander Hamilton reasoned that there must be some power in the executive to make "exceptions in favor of unfortunate guilt" lest justice "wear a countenance too sanguinary and cruel." Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President*

*Can Learn from the States*, 9 U. St. Thomas L.J. 730, 731-32 (2012) (quoting The Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

At the time the federal Constitution was drafted, the Founders envisioned the pardon serving both as a political means of ameliorating dissent and as a moral expression of just deserts. Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. Crim. L. & Criminology 593, 595-96 (2012). As to the latter, the Founders' conception of criminal liability was linked to some form of moral blameworthiness. Therefore, in instances where criminal intent was lacking, a means for mitigating punishment was deemed necessary. *Id.*

The clemency power also acts as an Executive check on both the Legislative and the Judicial branches. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 Tex. L. Rev. 561, 593 (2001). Congress and state legislatures enact laws that define crimes and fix related punishments and the courts apply those laws in overseeing individual trials and imposing sentences on those who are convicted or plead guilty. *Id.* "[C]lemency encompasses the power to mitigate, and in some cases eliminate entirely, the punishment mandated by Congress and imposed by the courts." *Id.* The explicit assignment of the pardon power to the Executive "does not violate the constitutional scheme of separated powers but is rather an integral part of that scheme." *Executive Revision of Judicial Decisions*, 109 Harv. L. Rev. 2020, 2034 (1996) (citing *Biddle v. Perovich*, 274 U.S. 480, 486 (1927)). The U.S. Supreme Court has recognized the necessity of the pardon power as a check on judicial decision-making: "It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the

deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it." *Id.* (quoting *Ex parte Grossman*, 267 U.S. 87, 121 (1925)).

Throughout our nation's history, presidents (as well as state governors under their own constitutions) have routinely used the power of pardon to correct unjust results of the legal system, thereby supplementing (or curbing) the power of other actors in the justice system. Love, *Reinvigorating the Federal Pardon Process*, 9 U. St. Thomas L.J. at 732. Early presidents used the pardon power to benefit ordinary people for whom the results of a criminal prosecution were considered unduly harsh or unfair. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. Crim. L. & Criminology 1169, 1175 (2010). In fact, presidents granted clemency to a high percentage of those who sought it, halting prosecutions, cutting short or remitting prison sentences, forgiving fines and forfeitures, and occasionally restoring citizenship rights. *Id.* Historical records reveal that the pardon was a regular aspect of the criminal justice system in early American history.<sup>2</sup> Rosenzweig, 102 J. Crim. L. & Criminology at 602. At the start of the Twentieth Century, presidents regularly granted between 100 and 200 pardons every year.<sup>3</sup> *Id.*

There has never been a greater need for the pardon power in the American criminal justice system. Stark racial and ethnic disparities are present at all major stages of U.S. criminal justice processing. At the end of 2017, the U.S. imprisonment rate for

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<sup>2</sup> Thomas Jefferson signed at least 119 pardon statements; James Madison, at least 196; James Monroe, 419; and John Quincy Adams, 183. Rosenzweig, 102 J. Crim. L. & Criminology at 602.

<sup>3</sup> Data regarding petitions for pardon and commutation received and granted by U.S. Presidents between 1900 and the present is available from the Office of the Pardon Attorney, U.S. Dep't of Just., Clemency Statistics, <http://www.justice.gov/pardon/statistics.htm> (last visited Dec. 11, 2020).

Black persons (1,549 per 100,000) was 5.6 times that of white persons (272 per 100,000). Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>. In a report examining the rise in criminal punishment since the 1970s, the National Research Council attributes such extreme disparities to "small but systematic racial differences in case processing, from arrest through parole release, that have a substantial cumulative effect," as well as pervasive bias, and changes in sentencing and policing. National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, DC: The National Academies Press (2014), p. 103. Although disparities in criminal behavior and arrest explain some portion of disparities in punishment, the Council concludes that they cannot fully account for the race gap in punishment, particularly since the 1990s. *Id.*, at p. 93. Based on their examination of the research literature and national data, the Council notes that "even though participation of blacks in serious violent crimes has declined significantly, disparities in imprisonment between blacks and whites have not fallen by much." *Id.*, at p. 60.

Relative to other states and the nation as a whole, racial disparities in criminal justice are particularly high in Minnesota. Between 1982 and 2007, the incarceration rates for Black persons in Minnesota have been at least 11 times those for white persons. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 *Crime & Just.* 201, 280 (2009). In 2018, there were 102 arrests per 1,000 Black Minnesotans and 108 arrests per 1,000 American Indian Minnesotans. *Minnesota Uniform Crime Report-2018*, DEPT. OF PUBLIC SAFETY BUREAU

OF CRIMINAL APPREHENSION, (July 3, 2019), <https://dps.mn.gov/divisions/bca/bca-divisions/mnjis/Documents/2018-Minnesota-Uniform-Crime-Report.pdf>. White persons, in contrast, experienced approximately 20 arrests per 1,000 residents. *Id.* Black and American Indian residents of Minnesota are thus arrested at a rate five times higher than white Minnesotans. *Id.*

In recent years, governors across the country have responded to the justice system's renewed, intensifying need for pardon and clemency. Some have used clemency to ease overcrowding in their prison systems. Love, *Twilight of the Pardon Power*, 100 *J. Crim. L. & Criminology* at FN 5. Others have used their power to respond to concerns over offense-specific sentencing policies.<sup>4</sup> Sakala, *How Governors Can Use Categorical Clemency as a Corrective Tool* (Nov. 2020). And some have granted clemency based on mitigating personal characteristics, factors, or experiences that may not have been accounted for earlier in the justice system process.<sup>5</sup> *Id.*, at 4. Just as the Founders envisioned, governors use executive clemency to afford relief from undue harshness and brutal excess in the operation or enforcement of criminal laws. *See Grossman*, 267 U.S. at 120.

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<sup>4</sup> While the Pennsylvania state legislature considers broad reform to the state's felony murder laws, Governor Tom Wolf is using executive clemency to provide relief to some individuals who would otherwise face life in prison. As of January 2020, Governor Wolf had commuted life sentences for 19 people, including several sentenced under the state's felony murder laws. Sakala, *How Governors Can Use Categorical Clemency as a Corrective Tool* (Nov. 2020).

<sup>5</sup> In 2007, Colorado governor Bill Ritter established the Juvenile Clemency Advisory Board to review clemency requests from people tried and sentenced as adults when they were minors. In the subsequent years, Colorado governors have granted commutation and pardons to several people convicted as minors. Sakala, *How Governors Can Use Categorical Clemency as a Corrective Tool* (Nov. 2020).

## **II. Executive Clemency Provides a Critical Second Chance for Fairness and Justice.**

The transformative impact of clemency on an individual's life is profound. As described by clemency recipient Jason Hernandez, "it meant my freedom. It meant I would not die in prison. Clemency is a gift that is as close to divine intervention as one could get on this earth." *Embracing Clemency*, AM. CIV. LIBERTIES UNION. In discussing the pardon power, former Supreme Court Justice Anthony Kennedy extolled the power of mercy—not only on the recipient, but also on the society in which it is extended:

A people confident in its laws and institutions should not be ashamed of mercy. The greatest of poets remind us that mercy is 'mightiest in the mightiest. It becomes the throned monarch better than his crown.' I hope more lawyers say to chief executives, 'Mr. President,' or 'Your Excellency, the Governor, this young man has not served his full sentence, but he has served long enough. Give him what only you can give him. Give him another chance. Give him a priceless gift. Give him Liberty.'

Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), [https://www.supremecourt.gov/publicinfo/speeches/sp\\_08-09-03.html](https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html).

As Justice Kennedy recognized, executives use clemency to address the entirety of a convicted person's history and circumstances. This is something that the criminal legal system is not always equipped to address. Clemency thus provides not just freedom, but a second, more thorough chance for fundamental fairness and comprehensive justice. As Cyntoia Brown-Long, herself a recipient of executive clemency, has recognized, "To seal someone's fate without leaving an avenue to reconsider their punishment, in light of rehabilitation efforts and an evolved understanding of the circumstances surrounding



their offense, is not only reckless, but it reeks of inhumanity." *Embracing Clemency*, AM. CIV. LIBERTIES UNION.

**A. Jason Hernandez was sentenced to life in prison when he was 21 years old. Sixteen years into his sentence, he received clemency and a chance at redemption.**

In 1998, at the age of 21, Jason Hernandez was sentenced to life without parole plus 320 years for drug-related offenses that were committed mostly in his teens. Sixteen years into his sentence, Mr. Hernandez wrote a letter to President Obama "asking for forgiveness, asking for mercy, asking for understanding that I wasn't a bad kid, just a kid who made a bad decision. That I wasn't that person who roamed those streets long ago . . . and as a result I shouldn't die in prison." Jason Hernandez, *Clemency, Redemption, and Justice: A Personal Story* (Aug. 5, 2020), <https://www.aclu.org/news/smart-justice/clemency-redemption-and-justice-a-personal-story/>. President Obama agreed and commuted his sentence. *Id.*

Today, Mr. Hernandez is integrally involved in the ACLU's Redemption Campaign—a nationwide effort to liberate 50,000 people from state prisons by executing state-level campaigns that encourage governors to use their existing clemency powers in new and transformational ways. He says he is just one among thousands of people who, after years or even decades in prison, have matured and changed, but there are no judicial remedies to acknowledge the transformation of these individuals. *Id.* According to Mr. Hernandez, his release granted him more than freedom. It was a chance at redemption. "I know personally that when the gift of clemency is given to a person, it reverberates throughout our souls that we are not only a nation of opportunity, but also of second

chances, of mercy and hope — even for those who may have done wrong — even for those in prison." *Id.*

**B. Cyntoia Brown-Long was granted clemency after spending 15 years in prison, and hopes that sharing her story can help other young women in similar situations.**

Cyntoia Brown-Long was convicted of first-degree murder for killing a 43-year-old man who solicited her for sex when she was only 16 years old. Michelle Cho & Kim Cornett, *Cyntoia Brown-Long to Lester Holt on her release from prison: "There's nothing special about me"*, NBC NEWS, (Oct. 14, 2019, 2:19 PM), <https://www.nbcnews.com/news/us-news/cyntoia-brown-long-lester-holt-her-release-prison-there-s-n1065296>. She had been forced into prostitution and repeatedly raped by different men for weeks. *Id.* On the night in question, a man picked her up for sex and drove her to his house. While in bed, the man reached for what Ms. Brown-Long believed was a gun. She shot him with her handgun, which she claimed was in self-defense. *Id.*

Ms. Brown-Long was tried as an adult, convicted of first-degree murder, and sentenced to life in prison. In 2018, the Tennessee Supreme Court ruled that she must serve 51 years before she would be eligible for parole. *Id.* The decision sparked public outrage and brought national attention to her case. In January 2019, the governor of Tennessee commuted her sentence, reasoning that "imposing a life sentence on a juvenile that would require her to serve at least 51 years before even being eligible for parole consideration is too harsh, especially in light of the extraordinary steps Ms. Brown has taken to rebuild her life." *Id.*

Ms. Brown-Long has called the grant of clemency a "great opportunity." She shares her experiences in hope that her story will bring more understanding about how the criminal justice system treats young girls in the same situation that she once was. *Id.* "There's nothing special about me," she told one interviewer. "I can't tell you how many Cyntoia Browns [are] still in prison." *Id.* Earlier this year, Brown-Long spoke out in support of one such woman, who fatally shot her abuser at 17 and is now facing life in prison. Elena Nicolaou, *Cyntoia Brown-Long Has Been Thriving Since Her Prison Release*, OPRAH MAGAZINE, (April 29, 2020), <https://www.oprahmag.com/entertainment/a32288695/where-is-cyntoia-brown-now/>. She is also in the process of starting a non-profit organization. *Id.*

### **III. Clemency Offers a Last Resort for Victims of Domestic Violence and Sex Trafficking Who Are Criminalized and Incarcerated for Harming their Abusers.**

It is particularly concerning that the Governor's authority to grant pardons and correct unjust results of the legal system has been improperly limited in the case of Ms. Shefa, who is a victim herself. Her prosecution was not an aberration; in fact, survivors of human trafficking and gender-based violence often face criminalization and incarceration. Vaidya Gullapalli, *Women in Jail and the Criminalization of Survivors*, THE APPEAL, (Oct. 30, 2019), <https://theappeal.org/women-in-jail-and-the-criminalization-of-survivors/>.

So many incarcerated women have histories of violence and trauma that, in recent years, advocates have described a "sexual abuse-to-prison pipeline." *Id.* According to a 2016 report from the Vera Institute of Justice, 86 percent of women in jail have a history

of abuse and 77 percent have a history of intimate partner violence. Elizabeth Swavola, *Overlooked: Women and Jails in an Era of Reform*, VERA INS. OF JUSTICE (Aug. 2016), <https://www.vera.org/publications/overlooked-women-and-jails-report>. Similarly, nearly 60 percent of people in women's prison nationwide, and as many as 94 percent of some women's prison populations, have a history of physical or sexual abuse before being incarcerated. *Georgetown and ACLU Comment: Proposed Rule, National Standards to Prevent, Detect, and Respond to Prison Rape* (April 4, 2011), <https://www.aclu.org/other/prison-rape-elimination-act-2003-prea?redirect=prisoners-rights-womens-rights/prison-rape-elimination-act-2003-prea>. Women who are violent offenders are even more likely to have been abused and to be incarcerated for responding to that abuse violently. *Id.*

As many as 90 percent of the women in prison today for killing men had previously been battered by those men. *Id.* Women receive harsher sentences for killing their male partners than men receive for killing their female partners. *Id.* The average prison sentence of men who kill their female partners is 2 to 6 years. Women who kill their partners are sentenced on average to 15 years, despite the fact that most women who kill their partners do so to protect themselves from violence initiated by their partners. *Id.*

Women who have experienced abuse as children or in adulthood — including assault and intimate partner violence — are more likely to be incarcerated than women who have not. Melissa E. Dichter, *Women's Experiences of Abuse as a Risk Factor for Incarceration: A Research Update*, National Online Resource Center on Violence Against Women (July 2015), <http://vawnet.org/sites/default/files/materials/files/2016->

08/AR\_IncarcerationUpdate%20%281%29.pdf. Persons who are vulnerable to sexual violence are also vulnerable to prosecution and criminalization, as it is more likely that they'll be in a position in which they have to violate the law for their own survival. Char Adams, *These women survived abuse and assault. Now they're behind bars. Should they be?*, VOX, (Aug. 30, 2019, 11:36 AM), <https://www.vox.com/the-highlight/2019/8/23/20828367/cyntoia-brown-sexual-domestic-abuse-prison-pipeline>. "Most battered women who kill in self-defense end up in prison," said Rita Smith, the executive director of the National Coalition Against Domestic Violence. "There is a well-documented bias against women [in these cases]." Kristen Powers, *Angela Corey's Overzealous Prosecution of Marissa Alexander*, THE DAILY BEAST, (July 11, 2017, 9:34 PM), <https://www.thedailybeast.com/angela-coreys-overzealous-prosecution-of-marissa-alexander>. Racial bias also plays a pernicious role. In 1991, the ratio of Black women to white women convicted of killing their abusive husbands was nearly two to one. Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA Women's L.J. 191, 207 (1991).

Several high-profile cases have moved the plight of abuse survivors imprisoned for fighting back against their abusers into the national spotlight, sparking a national reconsideration of the ways the criminal justice system deals with survivors of abuse. "Women in Jail." Some states are considering or have passed reforms, but clemency is the only hope for survivors of abuse who have already been criminalized. In recent years, several governors have used their clemency powers to pardon women incarcerated for crimes related to their experiences with physical and sexual violence. For example, in

January 2019, the governor of Tennessee commuted Cyntoia Brown-Long's life sentence (*see Section II supra*), and the governor of Ohio granted clemency to Thomia Hunter, another Black women who spent 15 years in prison for killing her abuser. Aaron Morrison, *'I Was in Constant Fear': Immigrant Faces Deportation After Prison for Domestic Dispute*, THE APPEAL, (May 29, 2019), <https://theappeal.org/i-was-in-constant-fear-immigrant-faces-deportation-after-prison-for-domestic-dispute/>. In 2020, Texas governor Greg Abbott went a step further by creating a clemency application for survivors of human trafficking and domestic violence and launching a public awareness campaign to inform survivors that they can apply to receive a full pardon. Sakala, *How Governors Can Use Categorical Clemency as a Corrective Tool* (Nov. 2020). If granted, the pardon allows for release and expungement. *Id.*

The need for clemency is even more urgent in the cases of immigrant women facing deportation as a result of felony convictions for injuring or killing their abusers.<sup>6</sup> Black immigrants, in particular, are more than three times as likely to be deported on criminal grounds than other immigrants. Juliana Morgan-Trostle *et al.*, *The State of Black Immigrants*, Black Alliance for Just Immigration and NYU School of Law Immigrant

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<sup>6</sup> U.S. Public Policy acknowledges the vital importance of protecting the victims of domestic violence and sex trafficking, as demonstrated by the creation of U Visas and T Visas offering federal protection from deportation for survivors of abuse and trafficking. "U and T Visa Certifications," U.S. Department of Labor, <https://www.dol.gov/agencies/whd/immigration/u-t-visa>. However, victims facing criminal charges for harming their abusers often face insurmountable hurdles when applying for status, as both visas require that the applicant assist law enforcement in investigating the crimes committed by abusers or traffickers. *Id.* So, using the U Visa application as an example, a woman convicted of killing her abuser would need the same district attorney, judge, or police officers involved in the criminal proceedings against her to certify that she is a victim of domestic violence. "Constant Fear." When the justice system fails the victims of abuse and trafficking, it is imperative that executive clemency be available as a last resort.

Rights Clinic, (Sept. 2016), <http://stateofblackimmigrants.com/wp-content/uploads/2018/09/sobi-fullreport-jan22.pdf>.

Consider the case of Aylaliya Birru, who has served more than four years in a California prison for assaulting her husband. Morrison, *'I Was in Constant Fear': Immigrant Faces Deportation After Prison for Domestic Dispute* (May 29, 2019). A native and citizen of Ethiopia, Ms. Birru met her U.S. citizen husband when he was working at the American embassy. *Id.* She moved to California with her husband after obtaining a green card. Within months, Ms. Birru said he became physically abusive. He purchased a handgun, and Ms. Birru said he would take it out and look at it when the couple had an especially bad fight. *Id.* One night, Ms. Birru confronted her husband regarding her suspicion that he was being unfaithful. A vicious argument ensued, and Ms. Birru said he shoved her against a wall, pulled her by hair, and hit her in the face and ribs with his fists. *Id.* Ms. Birru said that when the beating stopped, she retrieved her husband's handgun and inserted what she thought was an empty magazine. She pointed the weapon at him—believing that he needed to hear the click of an unloaded gun. When her husband turned away, Ms. Birru pulled the trigger and a bullet struck him in the back. *Id.* Ms. Birru dialed 911, and the responding police officers noted swelling, bruises, and blood on Ms. Ms. Birru's face consistent with domestic battery. *Id.* Nevertheless, the county district attorney filed felony assault charges against her. Birru entered a no contest plea and was sentenced to six years in prison. *Id.* In April 2019, a federal immigration judge ordered her removed from the U.S. She has petitioned California governor Gavin Newsom for a pardon to avoid deportation. *Id.*

Of the 14 people Governor Newsom has pardoned since taking office in January 2019, three have been refugees in the process of being removed from the country by federal immigration officials. Phil Willon, *She faces deportation after shooting her husband. Now Gov. Newsom could pardon her*, LOS ANGELES TIMES, (Aug. 23, 2019, 5:00 AM), <https://www.latimes.com/california/story/2019-08-22/gavin-newsom-pardons-deportation-threat-trump-liyah-birru>. Governor Newsom has given heightened consideration to pardon requests from people targeted for deportation. *Id.* Advocates hope that he will follow the lead of his predecessor, Jerry Brown, who issued 273 pardons in his final year in office, with at least 19 granted to people who faced or feared deportation. *Id.* Brown also issued a significant number of clemency grants to incarcerated survivors. Morrison, *'I Was in Constant Fear': Immigrant Faces Deportation After Prison for Domestic Dispute* (May 29, 2019).

All too frequently, our justice system criminalizes and incarcerates victims of domestic violence and sex trafficking, causing additional trauma that will reverberate for years to come. In rare cases like Ms. Shefa's where the governor gets involved and wishes to grant clemency, his Constitutional authority to do so must not be impeded or diminished.

#### **IV. The Minnesota Constitution Unequivocally Grants the Governor the Power to Pardon.**

The ACLU-MN stands wholeheartedly behind the positions articulated in Ms. Shefa's and Governor Tim Walz's briefing. Article V of the Constitution assigns the authority to grant reprieves and pardons in "[t]he *governor* in conjunction with the board



of pardons." *See* Minn. Const. art. V, § 7 (emphasis added). The language "in conjunction with" does not create a co-equal power. However, the Statute's requirement under § 638.02, subd. 1 that pardons be unanimously approved by the Board of Pardons creates an unconstitutional obstruction on the Governor's authority.

Ms. Shefa's case illustrates that while the Governor, and even one of the other two members of the Board of Pardons, has approved a pardon, that approval can be effectively vetoed by just one member of the Board of Pardons. The case reflects an unconstitutional intrusion of both the legislature and the judicial branch on a power explicitly assigned to the executive. The separation of powers is articulated in Article III, § 1 of the Constitution: "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." The Minnesota Supreme Court has upheld the principle that "where the constitution commits a matter to one branch of government, the constitution prohibits the other branches from invading that sphere or interfering with the coordinate branch's exercise of its authority." *In re Civil Commitment of Giem*, 742 N.W.2d 422, 429 (Minn. 2007). Here, by enacting the Statute, the legislature crossed that fundamental boundary protecting a power explicitly assigned to the Governor. That the Chief Justice, as in this case, may veto the decision and authority of the Governor, effects a judicial veto power over the exercise of the executive pardon power. Under such circumstances, the Court must uphold the lower

court's determination that the statute "violates separation of powers and is unconstitutional." *Holmberg v. Holmberg*, 588 N.W.2d 720, 726 (Minn. 1999).

### **CONCLUSION**

Since the founding of our Republic and the drafting of Minnesota's Constitution, clemency has played a vital role in correcting unjust results of the legal system and has provided an important Executive check on the powers of the Legislative and Judicial branches. The Minnesota Constitution unambiguously vests the power to grant pardons and reprieves in the "governor in conjunction with the board of pardons." Minn. Const. Art. V, § 7. In direct contravention of this constitutional scheme, §§ 638.01 and 638.02 impermissibly empowers individual members of the Board of Pardons to veto unilaterally the Governor's exercise of his pardon power. These Sections prevented the Governor from granting Ms. Shefa's pardon application, even though another member of the Board of Pardons also favored granting the pardon. More broadly, §§ 638.01 and 638.02 corrupt the intention of clemency by turning an Executive check against Judicial excess into a tool that sits within, or that is significantly limited in its use by the Judiciary. As the District Court found, these statutes are fundamentally unconstitutional. On appeal, this case presents a particularly salient and alarming illustration of how the statutory provisions at issue subvert the Governor's exercise of clemency and undermine the delicate system of checks and balances established in the Constitution.

ACLU-MN respectfully requests the Minnesota Supreme Court affirm the District Court's ruling and hold §§ 638.01 and 638.02 unconstitutional and restore the Governor's

Constitutional authority to grant pardons and reprieves in conjunction with the Board of Pardons—including in Ms. Shefa's case.

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Respectfully submitted,

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