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No. A21-0830

State of Minnesota
In Supreme Court

AMREYA SHEFA,

Respondent / Cross-Appellant,

v.

GOVERNOR TIMOTHY WALZ, IN HIS OFFICIAL CAPACITY,

Respondent / Cross-Appellant,

and

ATTORNEY GENERAL KEITH ELLISON, IN HIS OFFICIAL CAPACITY,
AND CHIEF JUSTICE LORIE GILDEA, IN HER OFFICIAL CAPACITY,

Appellants / Cross-Respondents.

AMREYA SHEFA'S REPLY BRIEF

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No party disputes that judicial officers may exercise executive function only when "expressly provided" by the Constitution itself. *See* Minn. Const. art. III, § 1. The Chief Justice is a judicial officer, and her ability to unilaterally deny any pardon is an executive function (which she concedes). (*See* CJ Br. at 16-17 ("the source of the pardon power lies within the executive department").) So the Court is called to decide this question: Does the Constitution "expressly provide" the Chief Justice authority to exercise executive power and unilaterally deny pardons?

"No" is the resounding answer.

The Constitution does not "expressly provide" that the Chief Justice may deny any pardon for any reason. Indeed, the Constitution does not extend ***any*** pardon power to the Chief Justice—it merely grants her a seat on a Board with powers regulated by law.

The legislature, in turn, may not abrogate the separation of powers doctrine under the guise of regulating the Board. But that is what the legislature did when it required board unanimity for pardons. Under this scheme, the Chief Justice may deny pardons without discussion, or even providing a reason, regardless of the Governor's and Attorney General's wishes. Such exercise of the executive function is not "expressly provided" for by the Constitution and so cannot stand.

ARGUMENT

I. The unanimity requirement violates separation of powers and results in unchecked power in the judiciary.

The challenged legislative unanimity requirement improperly extends executive power to the Chief Justice, producing exactly what the Constitution's framers sought to prevent—unchecked power.

The Chief Justice was directly involved in denying Shefa's request for judicial relief in 2016. (R.Add.1.) Then, through the unanimity requirement, the Chief Justice also enjoyed carte blanche to bar executive relief. (Doc. 13, ¶¶ 35-36.) The Chief Justice was able to alone deny clemency—by way of statute, not the Constitution—even though both executive Board members wanted to grant Shefa a pardon.

The Attorney General and Chief Justice ignore the troubling reality that, through the unanimity requirement, a judicial officer has power to alone block executive relief. But their silence is not surprising. The Constitution does not "expressly provide" this extension of power, so the unanimity requirement cannot be justified.

Chief Justice Knutson recognized this problem 50 years ago. He recommended "the pardoning power rest in the governor alone" because:

> pardoning is really not a judicial function. It is the court's responsibility to determine whether a person has had a fair trial, but after a case has been affirmed by the supreme

> court it becomes somewhat difficult for the chief justice to pass on an application for a pardon or a reprieve.

Minn. Const'l Study Comm'n, *Final Report and Committee Reports*, *Executive Branch Committee Report*, at 21 (1973).

The Attorney General and Chief Justice do not contend Chief Justice Knutson was wrong to indicate "pardoning is really not a judicial function." He wasn't. Nor do they dispute Chief Justice Knutson's concern for blurred lines between governmental departments when a single judicial officer has unilateral power to block executive relief.

That is precisely why ***no other state*** has authorized a member of the judiciary to unilaterally deny any pardon application. (*See*, *e.g.*, ACLU *Amicus* Br. at 3 ("Minnesota's requirement of a unanimous vote remains literally unique among the States.").) Minnesota stands alone because 49 other states and the federal government each respect the separation of powers guaranteed by their constitutions.

This Court should recognize that the unanimity requirement for pardons violates the separation of powers doctrine and, accordingly, declare that statutory requirement unconstitutional.

II. The Attorney General's and Chief Justice's oppositions do not warrant affirmance on this point.

The Attorney General and Chief Justice misconstrue Shefa's claim and, as a result, elide the separation of powers problem raised here.

The Chief Justice answers Shefa's claim by declaring "the Chief Justice's ***membership on the board*** does not violate separation of powers." (CJ Resp. at 15 (emphasis added).) But that is not Shefa's position. Shefa acknowledges that the Constitution expressly authorizes the Chief Justice to serve on the Board. Shefa's claim instead concerns the legislative unanimity requirement, which extends unilateral authority to the Chief Justice beyond what the Constitution authorizes. Because of that requirement, the Chief Justice had the only vote that mattered on Shefa's request for executive relief. (Doc. 13, ¶¶ 35-36.) Instead of engaging with that position, the Chief Justice "artfully props up and then beats down a strawman." *See Carey v. Stadther*, 219 N.W.2d 76, 79 (Minn. 1974).

At bottom, the Chief Justice asks the Court to believe that because the Constitution authorizes the legislature to regulate the Board, the legislature can enact any regulation it likes. (*See* CJ Resp. at 15 (arguing that "[i]f the governor were to be excluded from the legislature's power to regulate," then "the Constitution would say so.").) By that logic, the legislature could pass a statute naming the Chief Justice chair of the Board, with sole authority to grant applications, while relegating the Governor and Attorney General to advisory roles. That such a statute would be unconstitutional on its face points to an essential truth:

authority to regulate is not an invitation to enact unconstitutional regulations. The legislature must always act "within the limits of the Constitution." *Hassler v. Engberg*, 48 N.W.2d 343, 506 (Minn. 1951).

And that is the problem here: the legislature is already halfway to the above-described scenario. While the legislature has not granted the Chief Justice sole power to grant a pardon, the legislature has given the Chief Justice sole power to deny a pardon—an exercise of executive power not "expressly provided" by the Constitution.

The Attorney General also misunderstands Shefa's position. He wrongly "presume[s]" that in Shefa's eyes, "the constitutional phrase can only mean 'Governor plus one.'" (*See* AG Resp. at 2 n.1, 9.) That is not Shefa's argument and never has been. (*See*, *e.g.*, R.Add.35, at 16-20.)

The Attorney General is also incorrect to argue that "no separation of powers problem" exists if the Court rejects Shefa's plain-text argument. (AG Resp. at 9.) The unanimity requirement may violate separation of powers even if it does not violate the Constitution's plain language. For even if the Court concludes Article V, § 7 is ambiguous and ***implicitly*** allows for a unanimous vote requirement—although it does not—the Court may still find the Constitution does not "***expressly*** provide" the Chief Justice with the power to deny any pardon.

In finale, the Attorney General asserts the power to pardon is not really an executive power at all. (AG Resp. at 10.) This Court, however, has consistently rejected any such view. *See State v. Meyer*, 37 N.W.2d 3, 13 (Minn. 1949) ("A pardon is the exercise of executive clemency."); *State v. Wolfer*, 138 N.W. 315, 317 (Minn. 1912) (recognizing "the executive power of pardon"); *see also Matter of Welfare of L.J.S.*, 539 N.W.2d 408, 411 (Minn. Ct. App. 1995) ("well-established" that clemency is an executive function). Even the Chief Justice recognizes that. (CJ Br. at 16-17.)

The Court should reverse on this point, emphasizing that even if the legislature may regulate the powers and duties of the Board, it may not do so in ways that trample other constitutional requirements. *See State v. Brill*, 111 N.W. 639, 647 (Minn. 1907) ("Any legislation" that "confer[s] upon the judiciary the exercise of powers belonging to either of the other departments, cannot be regarded as valid.").

III. If the challenged statutes are unconstitutional, Shefa's pardon should be granted.

Should this Court find the statutes at issue unconstitutional (as it should), Shefa endorses the Attorney General's and Governor's requests that Shefa's pardon be granted immediately. Shefa should not be forced to submit to the entire pardon process anew.

The Chief Justice suggests that even if the legislative unanimity requirement is unconstitutional, Shefa still should not receive a pardon. (*See* CJ Resp. at 20-21.) The Chief Justice rests this suggestion on the notion that because pardoning is not "a judicial function," the Court cannot enjoin the Governor to reconsider Shefa's application. All of this is wrong: the Court has full authority to enjoin the Governor where action (or inaction) may violate the Constitution and will cause injury to another's rights "for which he has no other adequate remedy." *Cooke v. Iverson*, 122 N.W. 251, 252-53 (Minn. 1909).

CONCLUSION

By requiring a unanimous vote to grant a pardon, Minn. Stat. § 638.02 authorizes the Chief Justice to exercise an executive function. Because that power is not expressly provided for by the Constitution and otherwise violates the separation of powers, the Court should hold Minn. Stat. § 638.02 unconstitutional and let Shefa be pardoned.

September 2, 2021

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CERTIFICATE OF COMPLIANCE WITH MINN. R. APP. P. 131.01, subd. 4(d)(7)(B) and 132.01, subd. 3

The undersigned certifies that Amreya Shefa's Reply Brief contains 1,433 words and complies with the word count, typeface, and volume limitations of Rules 131.01, subd.4 and 132.01, subd. 3 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.

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