IN THE NEBRASKA SUPREME COURT

Case No. S 24-0563

State of Nebraska *ex rel.*, Spung et al.
Relators,

v.

Robert Evnen et al.,
Respondents.

ORIGINAL ACTION

Brief of *Amici Curiae* Sen. Justin Wayne, Former Sen. DiAnna Schimek, and Former Secretary of State John Gale in Support of Relators

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INTEREST OF AMICI

John Gale served as Nebraska's Secretary of State from 2000 to 2019. During that time, he administered four presidential elections and five midterm elections. He was also responsible for implementing L.B. 53 and served on the Board of Pardons. Justin Wayne is a Nebraska State Senator. He introduced L.B. 20 (2024), which passed the Legislature with overwhelming bipartisan support. DiAnna Schimek is a former Nebraska State Senator. She introduced L.B. 53 (2005), which likewise passed the Legislature with overwhelming bipartisan support. *Amici* are committed to ensuring that Nebraska's elections are conducted fairly and in a manner consistent with the law as enacted by the Legislature.

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS CITED

STATUTES CITED

STATEMENT OF THE CASE

Amici adopt the Relators' Statement of the Case.

PROPOSITIONS OF LAW

1. "Unless restricted by some provision of the state or federal Constitution, the Legislature may enact laws … for the accomplishment of any public purpose." *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595 (1996).

2. The "Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution." *City of N. Platte v. Tilgner*, 282 Neb. 328, 345 (2011).

3. "No person shall be qualified to vote who . . . has been convicted of . . . [a] felony under the laws of the state or of the United States, unless restored to civil rights." Neb. Const. art. VI, § 2.

4. "[T]he restoration referred to in Neb. Const. art. VI, § 2, is the restoration of the right to vote. Restoration of the right to vote is implemented through statute." *Ways v. Shively*, 264 Neb. 250, 255 (2002).

5. "The three branches sometimes overlap in the exercise of their constitutionally delegated powers," and such overlap raises

issues only if "one branch is prevented from accomplishing its constitutionally assigned functions." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 598 (2017).

6. The Legislature exclusively governs the rights of persons, *Terry Carpenter, Inc., v. Neb. Liquor Control Comm'n*, 175 Neb. 26, 36 (1963), which includes the right to vote. *See e.g., Reynolds v. Sims*, 377 U.S. 533, 561–2 (1964).

7. When interpreting the Constitution, "a court may not supply any supposed omission, or add words to or take words from the provision as framed." *State ex. rel Johnson v. Gale*, 273 Neb. 889, 905 (2007).

8. Provisions of the Constitution "must be construed and harmonized, if possible, . . . as well as to [give effect] to the whole instrument." *Id.* at 905.

SUMMARY OF ARGUMENT

The Nebraska Legislature may legislate upon any subject not inhibited by the Constitution. The Legislature also has broad power to legislate as long as it does not encroach on the powers of another branch of government. Nowhere does the Constitution limit or deny the Legislature's authority to legislate on the restoration of voting rights. Nor does the Constitution assign the power to restore voting rights to the Board of Pardons. Under the Constitution, the Board of Pardons has power to "grant respites, reprieves, pardons, or commutations." By only restoring the right to vote to Nebraskans who have completed their felony sentences, L.B. 53 and L.B. 20 do not infringe upon the narrow and well-defined role of the Board and are consistent with separation of powers principles. To hold otherwise would require the impermissible addition of words to Neb. Const. art. VI, § 2, would be inconsistent with a wholistic reading of the relevant provisions, would be inconsistent with this Court's precedent interpretating those provisions, and would be contrary to the practices of every other state with the same or similar language in their constitutions. What's more, Respondent Evnen's attempt to effectively invalidate L.B. 53 and L.B. 20 on the eve of the general election has and will continue to sow confusion among voters and local election officials. Only this Court can prevent chaos this November by granting Relators' requests for relief.

ARGUMENT

The Legislature has constitutional authority to enact legislation like L.B. 53 and L.B. 20. To hold otherwise would require disregarding standard principles of constitutional interpretation and this Court's precedents. In *Amicus* Secretary Gale's experience serving on the Board of Pardons both before and after its enactment, L.B. 53 in no way interfered with the Board's powers. Invalidating L.B. 53 and L.B. 20 would lead to disorder in this year's general election.

I. The Legislature has constitutional authority to enact voting rights restoration statutes like L.B. 53 and L.B. 20.

a. Nothing in the Constitution limits or denies the Legislature's authority to legislate on the issue of restoring voting rights.

It is axiomatic that legislatures may legislate on any subject unless constrained through a higher power, such as the Constitution. This bedrock principle has been repeatedly reasserted by this Court, which has noted that "[u]nless restricted by some provision of the state or federal Constitution, the Legislature may enact laws … for the accomplishment of any public purpose," *see State ex rel. Stenberg v. Moore*, 249 Neb. 589, 595 (1996), and that the "Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution." *City of N. Platte v. Tilgner*, 282 Neb. 328, 345 (2011). The Nebraska Constitution provides that "[n]o person shall be qualified to vote who . . . has been convicted of . . . [a] felony under the laws of the state or of the United States, unless restored to civil rights." Neb. Const. art. VI, § 2.

In *Tilgner*, this Court upheld statutorily created municipal initiatives and referendums even though the Constitution only grants statewide voters the power to enact or repeal state law via initiative and referendum. *Tilgner*, 282 Neb. at 345. In so holding, this Court reasoned: "Because the Nebraska Constitution does not restrict the right to petition for municipal ballot measures, the Legislature was free to grant these powers to municipal voters even if the same powers did not exist for statewide voters under the Constitution." *Id.* As in *Tilgner*, nothing in Neb. Const. art. VI, § 2 restricts or denies the Legislature's ability enact legislation like L.B. 53 and L.B 20. Indeed, as acknowledged by this Court in *Ways v. Shively*, "the restoration referred to in Neb. Const. art. VI, § 2, is the restoration of the right to vote. Restoration of the right to vote is implemented through statute." 264 Neb. 250, 255 (2002). Finally, consistent with *Tilgner* and *Ways*, the Legislature has prescribed the mechanisms through which civil rights are restored. *See e.g.* G.S.1873, c 58, § 258, p. 783; Neb. Rev. Stat. § 29-112.

b. L.B. 20 and L.B. 53 are consistent with separations of powers principles.

Under Nebraska's separation of powers doctrine, this Court has been clear that, while "[t]he three branches sometimes overlap in the exercise of their constitutionally delegated powers," such overlap raises issues only if "one branch is prevented from accomplishing its constitutionally assigned functions." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 598 (2017). Additionally, the Court should balance the need of each branch to "promote the objectives within its constitutional authority." *Id.* 598–99.

Neither L.B. 20 nor L.B. 53 invades the Board of Pardons' decision-making process nor influences its discretion to grant a pardon. Indeed, in *Amicus* Secretary Gale's extensive experience implementing L.B. 53

and serving on the Board of Pardons both before and after its enactment, L.B. 53 in no way interfered with the Board's powers. This Court has clearly articulated the circumstances under which a legislative action improperly invades the power of the Board. This occurs when the Legislature—itself or through the courts—commutes a sentence of punishment, *State v. Bainbridge*, 249 Neb. 260 (1996), or grants a pardon, *State v. Spady*, 264 Neb. 99 (2002). The Legislature improperly commutes a sentence when it "substitute[s] a milder punishment for a sentence that has already been imposed." *Bainbridge*, 249 Neb. at 267. The Legislature improperly grants a pardon when it nullifies *all* the legal consequences of a criminal conviction. *Spady*, 264 Neb. at 105. In *Spady*, this Court made clear that even when a law removes some of the civil disabilities associated with a conviction, it does not infringe on the Board of Pardons' power unless it nullifies all consequences of the conviction or substitutes a milder sentence.

Neither L.B. 20 nor L.B. 53 grant a pardon because neither bill nullifies all of a crime's legal consequences. Indeed, the bills leave in place all of a crime's legal consequences except for disenfranchisement. L.B. 20 and L.B. 53 also do not grant a commutation because felony disenfranchisement is not expressly part of the judgment of conviction. Because L.B. 20 and L.B. 53 provide neither pardons nor commutations, they do not infringe upon the power of the Board of Pardons.

Finally, any separation for powers analysis must not discount the Legislature's power to legislate and accomplish its own objectives. In addition to its power to legislate unless constitutionally restricted, the Legislature also has exclusive power to govern the rights of persons, *Terry Carpenter, Inc., v. Neb. Liquor Control Comm'n*, 175 Neb. 26, 36 (1963), which certainly include the right to vote. *See e.g., Reynolds v. Sims*, 377 U.S. 533, 561–2 (1964). Permitting voting rights to be restored only by the Board of Pardons would encroach on the

Legislature's authority both to legislate and to govern the rights of persons. In doing so it would offset the balance of power envisioned by the Constitution. Separation of powers doctrine thus compels the conclusion that voting rights may be restored by either the Board of Pardons or the Legislature.

II. Principles of constitutional interpretation and the constitutions of other states with the same or similar language support *Amici's* reading of the Legislature's authority.

a. The Attorney General's interpretation requires the improper addition of words to the Constitution and fails to read the relevant provisions holistically.

When interpreting the Nebraska Constitution, "a court may not supply any supposed omission, or add words to or take words from the provision as framed." *State ex. Rel Johnson v. Gale*, 273 Neb. 889, 905 (2007). Additionally, provisions of the Constitution "must be construed and harmonized, if possible, . . . as well as to [give effect] to the whole instrument." *Id.* at 905. In *Gale*, this Court was tasked with interpreting whether a 2000 constitutional amendment, which prohibited state senators from serving two consecutive legislative terms, should be interpreted to apply to senators first elected in 1998. *See id.* at 903; Neb. Const. art. III, § 12(1). The Secretary of State rejected the senators' 2006 candidate filings contending that the 2000 amendment to Neb. Const. art. III, § 12 prohibited the senators from running a third time. *Id.* This Court rejected the Secretary's argument, on the ground that such a reading of the Constitution would require the addition of the italicized words to Neb. Const. art. III, § 12(1): "No person shall be eligible to serve as a member of the Legislature for four years next after the expiration of *service for more than one-half of each*

of two consecutive terms regardless of the district represented." *Id.* at 903.

Applying *Gale*, the Attorney General's interpretation that voting rights may only be restored by the Board of Pardons requires this Court to add words to art. VI, § 2. Specifically, the Court would have to add the words "*by the Board of Pardons*" to the end of art. VI, § 2. Absent these words, there is no basis for concluding that only the Board may restore voting rights.

The Attorney General's interpretation also fails to read Neb. Const. art. VI, § 2 wholistically. *Both* people convicted of felonies and persons *non compos mentis* are disenfranchised and may have their civil rights restored. Textually, Neb. Const. art. VI, § 2 clearly indicates that disenfranchisement lasts unless a disqualified person is "restored to civil rights." Persons *non compos mentis* are disenfranchised without a conviction, so their civil rights, including the right to vote, cannot be restored by the Board of Pardons, which may only grant "respites, reprieves, pardons, or commutations" in "cases of conviction for offenses against the laws of the state." Neb. Const. art. IV, § 13. Because the Attorney General's interpretation would require the Court to add words to the Constitution and does not read art. VI, § 2 as a whole, it must be rejected.

b. Other states with similar constitutional provisions permit statutory re-enfranchisement like L.B. 20 and L.B. 53.

In addition to finding support in standard principles of constitutional interpretation and this Court's precedents, *amici*'s understanding of the Legislature's constitutional authority to enact legislation like L.B. 53 and L.B. 20 is consistent with the understanding of lawmakers in Alabama, Alaska, Arizona, Minnesota,

Nevada, North Dakota, Washington, and Wyoming—states with constitutional provisions that are the same or similar to Neb. Const. art. VI, § 2. *See* Ala. Const. art. VIII, § 177 ("No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote *until restoration of civil and political rights or removal of disability.*"); Alaska Const. art. V, § 2 ("No person may vote who has been convicted of a felony involving moral turpitude *unless his civil rights have been restored*."); Ariz. Const. art. VII, § 2(C) ("No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election *unless restored to civil rights.*"); Minn. Const. art. VII, § 1 ("The following persons shall not be entitled or permitted to vote at any election in this state ... a person who has been convicted of treason or felony, *unless restored to civil rights*[.]"); Nev. Const. art. II, § 1 ("[N]o person who has been or may be convicted of treason or felony in any state or territory of the United States, *unless restored to civil rights*, . . . shall be entitled to the privilege of an elector."); N.D. Const. art. II, § 2 ("No person convicted of a felony shall be qualified to vote *until his or her civil rights are restored*."); Wa. Const. art VI, § 3 ("All persons convicted of infamous crime *unless restored to their civil rights* . . . are excluded from the elective franchise"); Wyo. Const. art VI, § 6 ("All persons adjudicated to be mentally incompetent or persons convicted of felonies, *unless restored to civil rights*, are excluded from the elective franchise.") (emphasis added).

Indeed, lawmakers in each of those states have enacted legislation setting forth the process by which voting rights can be restored. *See* Application for Leave to Commence an Original Action at ¶ 3 (citing relevant Alaska, Minnesota, Nevada, North Dakota, and Washington statutes); *see also* Ala. Code §§ 15-22-36.1, 17-3-30.1; Ariz. Rev. Stat. §§ 13-905, 13-907; Wyo. Stat. Ann. §§ 6-10-106, 7-13-105. And the courts in those states that have considered whether the legislature has constitutional authority to restore voting rights have answered that

question in the affirmative. *See, e.g.*, *Schroeder*, 985 N.W.2d at 545 ("a person convicted of a felony cannot vote in Minnesota unless the person's right to vote is restored by some affirmative act of, or mechanism established by, the government. For instance, that affirmative act could be an absolute pardon that nullifies the felony conviction upon which the constitutional deprivation of the right to vote is based or a legislative act that generally restores the right to vote upon the occurrence of certain events"); *City of Mandan v. Baer*, 578 N.W.2d 559, 563 (N.D. 1998) (approvingly discussing the state legislature's process for restoring voting rights); *Madison v. Washington*, 163 P.3d 757, 773 (Wash. 2007) ("It is the province of the legislature to determine the best policy approach for re-enfranchising Washington's felons."); *Mills v. Campbell Cnty. Canvassing Bd.*, 707 P.2d 747, 751 (Wyo. 1985) ("It is reasonable for our legislature to rule that convicted felons are unfit to vote or hold public office until they have convinced the governor of this state otherwise.").

Given the uniform recognition of legislative restoration in other states with the same or similar constitutional language to Nebraska's, this Court should reaffirm what it previously acknowledged in *Ways*, that voting rights restoration "is implemented through statute." 264 Neb. at 255.

III. Finding L.B. 53 and L.B. 20 unconstitutional would create even more confusion.

By refusing to enforce L.B. 20 and L.B. 53, Respondent Evnen has created conflicting legal requirements and logistical nightmares for local officials, uncertainty and fear among the thousands of Nebraskans refranchised by these laws, and the conditions for chaos at the polls this November.

In April, when Governor Jim Pillen allowed L.B. 20 to take effect without his signature, Nebraskans with felony convictions who completed the terms of their sentences in the past two years learned that they would soon be refranchised. Local election officials also began to prepare to allow these citizens to register. But in July, two days before L.B. 20's effective date, Respondent Evnen announced that he had directed county election officials to stop registering individuals convicted of felonies who have not been pardoned by the Board of Pardons.

Because no court has ruled on L.B. 20 or L.B. 53 and both laws still remain in effect, county election officials currently face the impossible dilemma of being required by law to facilitate registration for Nebraskans with past convictions who have completed their sentences, while also being required to comply with Respondent Evnen's directives. Nebraskans with felony convictions re-enfranchised by L.B. 20 or L.B. 53 face similar uncertainty. Nebraska statute protects their right to vote, but they face criminal liability if they attempt to exercise that right.

Even more concerning, Respondent Evnen has refused to recognize not only L.B. 20 but also L.B. 53—a law that has been in effect for nearly 20 years. Thousands of Nebraskans have registered to vote and voted under L.B. 53, and it would be arbitrary and cruel to suddenly disenfranchise them. *Amicus* Secretary Gale, having served as Secretary of State from 2000 to 2019, can also personally attest that it would be logistically infeasible for election officials to identify and remove each of these voters from the rolls. And even if Respondent Evnen attempted to mitigate the damage by asking the Board of Pardons to restore these individuals' voting rights, such an action would only create new problems. *Amicus* Secretary Gale, who served on the Board while he was Secretary of State, cannot imagine how it would be possible for the Board to identify and communicate the restoration of voting rights to each of these voters in time for the

upcoming election. That is because the Board is not designed to handle the mass restoration of voting rights; its function is to provide careful consideration of individual applications. Even in that limited role, the Board operated with a multi-year backlog while he was a member. As such, only this Court can adequately address the challenges voters and election officials now face and ensure smooth and fair elections by ordering Respondents to comply with L.B. 53 and L.B. 20 as enacted by the Legislature.

CONCLUSION

For the aforementioned reasons, this Court should grant Relators' requested relief.

DATED this 22nd day of August, 2024.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

This is to certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. §§ 6-1505, 2-103(C)(4). This brief contains 3,779 words, and was prepared using Microsoft Word Version 16.78.3.

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