NO. 24-563

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA ex rel., GREGORY SPUNG, JEREMY JONAK, and
CIVIC NEBRASKA,
Relators,

v.

ROBERT EVNEN, in his official capacity as Nebraska Secretary of State, BRIAN W. KRUSE, in his official capacity as Douglas County Election Commissioner, and TRACY OVERSTREET, in her official capacity as Hall County Election Commissioner,
Respondents.

ORIGINAL ACTION

RELATORS' REPLY BRIEF

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I. REPLY BRIEF STATEMENT OF THE BASIS OF JURISDICTION, STATEMENT OF THE CASE, GROUNDS FOR MANDAMUS/ASSIGNMENTS OF ERROR, AND STATEMENT OF FACTS

The jurisdictional statement, statement of the case, grounds for mandamus, and statement of facts have been set forth in Relators' opening brief.

II. SUPPLEMENTAL PROPOSITIONS OF LAW

1. As it specifically relates to mandamus actions, the "power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to any other public official." *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 671, 380 N.W.2d 259, 264 (1986).
2. Courts "afford deference and respect to Supreme Court dicta." *New Doe Child #1 v. United States*, 901 F.3d 1015, 1019 n.4 (8th Cir. 2018).
3. The three branches of government can "sometimes overlap in the exercise of their constitutionally delegated powers." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 598, 894 N.W.2d 788, 800 (2017).
4. "[N]o branch may significantly impair the ability of any other in its performance of its essential functions." *State v. Gnewuch*, 316 Neb. 47, 72, 3 N.W.3d 295, 315 (2024).
5. "The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute." *Ash Grove Cement Co. v. Neb. Dep't of Revenue*, 306 Neb. 947, 974, 947 N.W.2d 731, 749 (2020).
6. "[T]he construction of constitutional provisions requires us to apply basic tenets of interpretation." *Conroy v. Keith Cnty. Bd. of Equal.*, 288 Neb. 196, 205, 846 N.W.2d 634, 641 (2014).
7. Statutes have a "strong presumption of constitutionality," *State v. Johnson*, 269 Neb. 507, 515, 695 N.W.2d 165, 172 (2005).

III. REPLY BRIEF ARGUMENT

A. The Re-Enfranchisement Statutes Are Constitutional.

1. The Re-Enfranchisement Statutes Do Not Violate the Separation-of-Powers.

The Secretary of State ("Respondent") argues that the Re-Enfranchisement Statutes violate the separation-of-powers by usurping the executive's pardon power. Respondent's argument fails for at least two reasons. First, the Re-Enfranchisement Statutes (as defined Relators' Br. 9) do not constitute pardons. Second, the Re-Enfranchisement Statutes do not impermissibly interfere with any executive power.

This Court has already held that the Legislature does not usurp the Executive's pardon power so long as a statute "does not nullify *all* of the legal consequences of the crime committed." *State v. Spady*, 264 Neb. 99, 105, 645 N.W.2d 539, 543 (2002) (emphasis added). As the Board of Pardons outlines on its website, some of the rights restored through a pardon are the rights to vote, serve on a jury, hold office, bear arms, among others. *See* Nebraska Board of Pardons, *FAQ*, https://pardons.nebraska.gov/faq (last visited Aug. 24, 2024); Relators' Brief, Friedman Aff. ¶ 2, Ex. 1. Because the Re-Enfranchisement Statutes do not nullify *all* such legal consequences, the statutes do not amount to a pardon. *See Spady*, 264 Neb. at 105 (finding statute was not a pardon "because certain civil disabilities enumerated…are not restored, as occurs when a pardon is granted").

Respondent has no sound basis to seek overturning *Spady* based only on the "usual practice" of the Board of Pardons. Resp't Br. 40. This Court should not conclude that any legislation that "nullifies *a* legal consequence" of a crime, but not all, arises to a pardon just because the Board of Pardons opts not to exercise the full extent of its power.

Even if the Re-Enfranchisement Statutes nullify *some* legal consequences of a conviction, they do not negate the Executive's pardon power. Respondent does not dispute that "[t]he Legislature may

legislate upon any subject not inhibited by the Constitution." *See* Relators' Br. at 22 (quoting *Pony Lake Sch. Dist. 30 v. State Comm. For Reorganization of Sch. Dists.*, 271 Neb. 173, 181, 710 N.W.2d 609, 618 (2006)); *see also State v. Gnewuch*, 316 Neb. 47, 70, 3 N.W.3d 295, 314 (2024) ("We have recognized that the Legislature is in many ways the strongest of the three departments, being restrained only by the Constitution..."). Nor does Respondent dispute that nothing in the Constitution expressly restricts the Legislature from restoring voting rights or confers that power exclusively to the Board of Pardons. *See id.*

As this Court has acknowledged, the three branches of government can "sometimes overlap in the exercise of their constitutionally delegated powers." *State ex rel. Veskrna v. Steel*, 296 Neb. 581, 598, 894 N.W.2d 788, 800 (2017). And further stated, "no branch may *significantly* impair the ability of any other in its performance of its essential functions." *Gnewuch*, 316 Neb. at 72 (emphasis added); *see also Polikov v. Neth*, 270 Neb. 29, 39, 699 N.W.2d 802, 810 (2005) (cited by Respondent) (allowing Legislature to mandate pre-trial diversion program even though Executive is empowered with charging decisions). Here, Respondent does not argue that the Re-Enfranchisement Statutes interfere with the essential function of the Board of Pardons. Thus, the Re-Enfranchisement Statutes do not violate the separation-of-powers.

Respondents cite cases where the Legislature violated the separation-of-powers by wholly usurping the Board of Pardons' power to commute sentences, which did not happen here. *See State v. Philipps*, 246 Neb. 610, 616, 521 N.W.2d 913, 917 (1994) (finding unconstitutional law allowing defendants to petition courts for sentence reductions); *State v. Jones*, 248 Neb. 117, 119, 532 N.W.2d 293, 295 (1995) (similar); *State v. Bainbridge*, 249 Neb. 260, 267–68, 543 N.W.2d 154, 160 (1996) (finding unconstitutional legislation allowing courts "to reduce a 15–year license revocation already imposed under § 60–6,196(2)(c) to time served after the defendant has served 5 years of the revocation"). The Re-Enfranchisement Statutes

do not violate the separation-of-powers because they do not come close to fully supplanting the pardon power. *See Spady*, 264 Neb. at 105.

Respondent cites *Kocontes v. McQuaid* for the proposition that a pardon is the nullification of any legal consequences. Resp't Br. 26. (citing 279 Neb. 335, 778 N.W.2d 410 (2010)). But *Kocontes* was about whether "the Board of Pardons is a quasi-judicial body such that absolute privilege applies to communications relating to its proceedings." 279 Neb. at 337. *Kocontes* has no bearing on the issues in this case as it said nothing about the Board of Pardons having exclusive power to nullify any particular legal consequence, let alone voting rights restoration.

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Because the Re-Enfranchisement Statutes do not constitute a pardon or interfere with essential functions of the Board of Pardons, the Re-Enfranchisement Statutes do not violate the separation-of-powers.

2. Legislation Can Restore Voting Rights.

Respondent's argument that the Re-Enfranchisement Statutes "unconstitutionally attempt[] to restore one civil right alone," rather than multiple "civil rights" as documented in Article VI, sec. 2 of the Nebraska Constitution, Br. 41, is meritless. This Court has already determined that "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." *Ways v. Shively*, 264 Neb. 250, 255, 646 N.W.2d 621, 626 (2002). Respondent's response to this Court's unambiguous language is that *Ways* cannot possibly mean what it says—yet it cites nothing from *Ways* or this Court to give any indication otherwise. Respondent says this plain language interpretation of *Ways* "adds the word 'alone,'" to the sentence. Resp't Br. 48. Yet there is no need for this Court to have included the word "alone" when referring to a right, and indeed, the Court refers to "the restoration of *the* right to vote," *Ways*, 264 at 255 (emphasis added), rather than any other potential rights.

Having already proposed overruling one Supreme Court case, *see supra*, Respondent proposes defying another, arguing this Court should ignore "*Ways*'s sentence [as] dictum." Resp't Br. 48. As explained in Relators' opening brief (at 20-21), this sentence is essential to the Court's reasoning that Section 29-112 was dispositive in assessing the relator's eligibility. This statement is at least entitled to significant weight because, as is made clear in the federal context, courts "afford deference and respect to Supreme Court dicta." *New Doe Child #1*, 901 F.3d at 1019 n.4.

Ways establishes that the "civil rights" described in the phrase "unless restored to civil rights"—which, as Respondent notes, re-occurs in the Nebraska Constitution—depends on the right being described in the constitutional provision at issue. As *Ways* details, the "civil right" specified in Article VI, sec. 2 is the right to vote. 264 Neb. at 255. Similarly, the "civil right" at issue in Article XV, a constitutional provision about the disqualification and mechanism for restoration of one's right to hold public office, is the right to hold public office itself. Particularly given that the Constitution has separate provisions for these various rights, the plain meaning of "civil rights" more naturally means "the civil right(s) at issue in this provision," rather than the same group of civil rights across all provisions, as Respondent suggests. Resp't Br. 43–45. As such, there is no tension between Article VI, concerning the right to vote, and Article XV, concerning the right to hold public office. *See id*. In each provision, the "civil right" refers to the right in question. The Constitution does not specify what method of restoration is required for each right, and thus the Legislature is free to make those decisions. This is clear from the text of Neb. Rev. Stat. § 29-112, in which the Legislature has selected a specific mechanism for restoration for the right to jury service and to hold elected office that does not exist for the right to vote.

By contrast, Respondent cannot provide which rights must be restored to meet his definition. Respondent claims it is three specific rights—jury service, right to vote, and right to hold elected office—but can only cite to out-of-state authority for this, in addition to an 1873

statute that both predates the Nebraska Constitution and does not actually define the phrase "civil rights." Respondent has no definitive answer; it is just as plausible under Respondent's logic that the Constitution could mean *all* applicable civil rights, including those enumerated by the Board of Pardons. Relators' interpretation of "unless restored to civil rights" provides a clear explanation of which "rights" are specified in *each* constitutional provision, *see supra*. Respondents have no explanation for any provision.

Respondent's interpretation is also adopted by states across the country. Unable to contest that the vast majority of states have both automatic legislative rights restoration alongside executive pardon power, Respondent claims that "[t]his 'restored to civil rights' condition distinguishes our Constitution from other states." Resp't Br. 29. Yet five states use this *exact same* constitutional language and still provide automatic rights restoration provisions alongside executive clemency. Ariz. Const. art. VII, § 2; Minn. Const. art. 7, § 1; Nev. Const. art. 2, § 1; Wis. Const. art. 3, § 2; Wyo. Const. art. 6, § 6; *see also Schroeder v. Simon*, 985 N.W.2d 529, 538 (Minn. 2023) (Minnesota Supreme Court rejecting Respondent's precise argument and interpreting same language to mean rights restored by any "mechanism established by the government."). Two additional states' constitutions use extremely similar language to "unless restored to civil rights" and still maintain statutory automatic rights restoration provisions. *See* N.C. Const. art. 6, §. 2(3) ("No person adjudged guilty of a felony . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law."); Fla. Const. art. 6, § 4 ("No other person convicted of a felony . . . shall be qualified to vote . . . until restoration of civil rights . . ."). All these states using identical or substantially similar language have determined that the "civil rights" at issue in these felony disenfranchisement provisions refer to the right to vote.

Even if this Court agrees that Article VI's reference to "civil rights" must include multiple rights, the right to vote still qualifies. Restoration of the right to vote itself "bundles together" many rights

under Nebraska law. Resp't Br. 45. The right to vote guarantees the rights to, at minimum: (1) register to vote, Neb. Rev. Stat. § 32-311; (2) request an absentee ballot under certain circumstances, *id.* §§ 32-939, 32-939.02; (3) have a correct voter registration form, *id.* § 32-312; (4) have one's voter registration received and acknowledged by first-class mail; (5) sign a petition, *id.* § 32-629; (6) vote early, *id.* § 32-947; (7) a secret ballot, *id.* § 27-507; (8) voter assistance under certain circumstances, *id.* § 32-918. The Re-Enfranchisement Statutes do *not* merely "restore one civil right alone." Resp't Br. 41.

3. The Contemporaneous Statutes around 1875 Support Relators' Position.

Respondents argue that historical Nebraska law suggests Article VI, § 2 should be read to prohibit voting "unless [] restored to civil rights [by pardon from the Governor or the Pardon Board]." This argument fails for two reasons. First, the statutes in place around 1875 demonstrate that the mechanism for voting rights restoration is via statute, not exclusively by executive action. Second, the historical statutes show that in drafting the Constitution, the framers knew how to explicitly limit rights restoration to the Executive Branch but chose not to.

Both before and after the adoption of the Nebraska Constitution in 1875, there have been *statutes* outlining when and how voters could have their right to vote restored. Resp't Br. 17–20 (describing rights restoration *legislation*). Both before and after Nebraska adopted its Constitution, it provided by *statute* the mechanism for voter restoration. Neb. Gen. Stats. ch. 58, § 258, p. 783 (1873); Neb. Stat. ch. XXIV § 258 p. 707 (1881). If, as Respondents argue, the intent of the 1875 Constitution was to provide the exclusive mechanism for voter restoration, then the 1881 statutory voter restoration process and all subsequent statutes would have been redundant. As such, Respondents cannot establish that Article VI, § 2 was intended to limit the authority to restore voting rights solely to the Executive.

Additionally, this Court has looked to existing statutes and common law when interpreting Article VI, § 2. In *Gaudy v. State*, this Court interpreted whether something was a felony under Article VI, § 2 based, in part, on whether the statute declared the offense a felony. 10 Neb. 243, 4 N.W. 1019, 1021–22 (1880). This Court did not do what Respondent advocates for here, which would have involved defining felonies exclusively with reference to 1875. Instead, the Court started by looking at the *statute* to see if it declared the offense a felony. *Id.*

Finally, the fact that Article VI, § 2 does not explicitly reference a pardon while contemporaneous statutes do suggest that the framers did not intend voting rights restoration to be so restricted. *See Conroy v. Keith Cnty. Bd. of Equal.*, 288 Neb. 196, 205, 846 N.W.2d 634, 641 (2014) ("As in statutory interpretation, the construction of constitutional provisions requires us to apply basic tenets of interpretation."); *Ash Grove Cement Co. v. Neb. Dep't of Revenue*, 306 Neb. 947, 974, 947 N.W.2d 731, 749 (2020) ("The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute."). The *statutes* at the time explicitly referenced a pardon while *Article VI, § 2* did not, so the plain language indicates that the framers did not intend for a pardon to be the exclusive mechanism for restoring voting rights.

4. Respondent's Other Arguments are Unavailing.

a. The Re-Enfranchisement Statutes Impose a Legal Duty.

Respondent does not contest that if he is wrong that the Re-Enfranchisement Statutes are unconstitutional, he is failing in his clear duty to provide the correct voter registration form under Nebraska law and Relators are entitled to mandamus relief. If this Court determines that Respondent has failed to overcome the Re-Enfranchisement Statutes' "strong presumption of constitutionality," *State v. Johnson*, 269 Neb. 507, 515, 695 N.W.2d 165, 171 (2005),

Respondent thus concedes that mandamus is warranted on Relators' first claim.

Relief on Relators' second claim is necessary to effectuate the Legislature's intent and ensure the Secretary does not continue to flout Nebraska law weeks before a presidential election. Respondent argues he does not have a duty as to Relators' second claim, to effectuate the automatic removal of disqualification for Nebraskans upon completion of sentence. Yet as Relators argue, Relators' Br. 29–30, this clear duty vests on the Secretary, who "shall . . . [e]nforce the Election Act," Neb. Rev. Stat. § 32-202(3), because the Election Act requires this automatic removal of disqualification, *id.* § 32-313(1). The nondiscretionary "act" Relators request is simple: remove disqualification from voters reinstated by the Re-Enfranchisement Statutes to ensure their ability to register and vote. This Court should reject Respondent's unilateral effort to disenfranchise Relators.

b. Relators' Claims Against the County Election Commissioners are Ripe.

In all filings in this case, Relators argue that writs of mandamus are warranted against the Secretary *and* the two named County Election Commissioners because they are violating their clear legal duty to register electors in their counties, including individual Relators. Relators' Br. 30–33. Respondent does not argue that the County Election Commissioners lack this duty or are otherwise inappropriately named in Relators' mandamus action. Relators maintain all claims against the County Election Commissioners to obtain full relief and ensure full legal compliance with the Re-enfranchisement Statutes.

c. Civic Nebraska Should Not Be Dismissed.

Respondent—citing zero legal authority—argues that Civic Nebraska's claims should be dismissed for submitting an affidavit and exhibits with Relators' opening brief. Resp't Br. 59. Yet Respondent

does not explain why this filing, even if procedurally inappropriate, should result in dismissal. Respondent does not contest Civic Nebraska's standing. And he does not cite any legal authority indicating that dismissal is appropriate grounds for submission of documents beyond the parties' joint stipulations. Dismissal would be unwarranted.

B. Respondent Acted Unconstitutionally.

Respondent argues this Court's pronouncement in *Van Horn v State*, 46 Neb. 62, 84, 64 N.W. 365, 372 (1895) permits the Secretary to disregard whatever laws he feels are unconstitutional and unilaterally invalidate decades-old statutes. Respondent's proposition drastically overreads *Van Horn* and would undermine the separation of powers by giving the Secretary unchecked power to selectively enforce laws and disenfranchise voters without judicial review.

It is axiomatic, and Respondent does not contest, that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Neb. Coal. For Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 546, 731 N.W.2d 164, 176 (2007) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Respondent also does not contest that "an Attorney General's opinion . . . has no controlling authority on the state of the law discussed in it." *State v. Coffman*, 213 Neb. 560, 561, 330 N.W.2d 727, 728 (1983).

Respondent's argument regarding *Van Horn* ignores the Constitution and this Court's holdings. Respondent claims that the Constitution's plain language that only a supermajority of this Court can rule a law unconstitutional, *see* Neb. Const. art. V, § 2, "applies to decisions of this Court alone," and does not apply to the executive. Resp't Br. 56. Such an interpretation of Article V, § 2 grants Respondent unchecked freedom to pass his own judgments upon the constitutionality of acts of the legislature without any regard for the opinions of this Court. Such a holding would read Article V, § 2 and the entire *Coffman* line of cases out of existence.

It also misreads *Van Horn*, which concerns only the most manifestly unconstitutional laws. *Van Horn* acknowledges that "courts themselves will enforce a statute, unless it is clearly repugnant to the constitution," and that government officials "should, of course, exercise the greatest caution on such questions. A doubt as to the validity of a statute would not justify them in disregarding it." 64 N.W at 372. Government officials can consider not enforcing statutes "only in clear cases of unconstitutionality," and they "disregard [statutes] at their peril" because statutory enforcement ensures "[t]he peace of the community, [and] the orderly conduct of government." *Id. Van Horn* is thus best understood as a precursor to the strong presumption of constitutionality this Court has since codified. The Re-Enfranchisement Statutes, which the Executive has enforced without issue for two decades, are not "clearly repugnant to the constitution."

As it specifically relates to mandamus actions, the "power to declare an act of the Legislature unconstitutional is a judicial power reserved solely to the courts and not to *any other public official*." *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 671, 380 N.W.2d 259, 264 (1986) (emphasis added). In *Pepperl*, this Court reaffirmed that *Van Horn* does not grant the state official unfettered discretion to determine the constitutionality of laws, and instead reserved that right for this Court.

IV. CONCLUSION

For the foregoing reasons, the Court should issue peremptory writs of mandamus as requested by Relators in their Verified Petition for Writ of Mandamus.

Respectfully submitted this 26th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

I, Jane Seu, state that I prepared this document using Microsoft 365 and this brief complies with the typeface requirements of Neb. Ct. R. App. P. § 2-103 and contains 4,216 words not including this certificate.

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Certificate of Service

I hereby certify that on Monday, August 26, 2024 I provided a true and correct copy of this *Reply Brief of Relators* to the following:

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