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COURT OF APPEALS

Case No. S-24-0563

IN THE NEBRASKA SUPREME COURT

STATE EX REL. JOHN THOMAS JEFFREY KING, ET AL.,
Relators,

v.

ROBERT EVNEN, IN HIS OFFICIAL CAPACITY AS
NEBRASKA SECRETARY OF STATE, ET AL.,
Respondents.

ORIGINAL ACTION

BRIEF OF *AMICI CURIAE* GOVERNOR JIM PILLEN, UNITED STATES SENATOR PETE RICKETTS, FORMER NEBRASKA GOVERNOR DAVE HEINEMAN, SENATOR JONI ALBRECHT, SENATOR BRUCE BOSTELMAN, SENATOR ROBERT CLEMENTS, AND SENATOR JOHN LOWE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Governor Jim Pillen, United States Senator (and former Nebraska Governor) Pete Ricketts, Former Nebraska Governor Dave Heineman, Senator Joni Albrecht, Senator Bruce Bostelman, Senator Robert Clements, and Senator John Lowe (collectively "Amici Curiae" or "Amici") are all current or former elected officials in Nebraska with expertise in and experience with L.B. 20, 108th Leg., 2d Sess. (2024). Both former Governors Ricketts and Heineman and current Governor Pillen opposed bills which purport to restore the right to vote without compliance with Article VI, Section 2 of the Nebraska Constitution. All four Nebraska Senators opposed L.B. 20 because it conflicts with the Nebraska Constitution, Neb. Const. art. VI, §2, and is bad policy for Nebraska.

Amici Curiae believe that as "officers of this state…[they] are sworn to support the constitution. Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed and the statute disregarded." *Planned Parenthood of the Heartland, Inc. v. Hilgers*, 317 Neb. 217, 224 (2024) (quoting *Van Horn v. State*, 46 Neb. 62, 82–83 (1895)). Amici Curiae therefore urge the Court to deny the Relators' Petition for a Writ of Mandamus.

STATEMENT OF THE CASE, PROPOSITIONS OF LAW, AND STATEMENT OF FACTS

Amici adopt Respondents' statement of the case, propositions of law, and statement of facts.

ARGUMENT

This case comes down to what "restored to civil rights," means in Article VI, Section 2 of the Nebraska Constitution. That section states: "No person shall be qualified to vote who is non compos mentis, or who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights."

That section means, and has always meant, that convicted felons must have their "civil rights"—*rights plural*—restored before voting in Nebraska elections. And those rights must be "restored" in a manner consistent with the Nebraska Constitution.

Relators' argument is not so simple. They brush aside over a hundred years of state history to claim that Nebraska actually has a "longstanding" history of authorizing the legislature to throw the text of Section 2 out the window. (Relators' Application for Leave to Commence an Original Action, p. 2). Relators' revisionist argument posits that the legislature can somehow re-define "civil rights," as whatever rights—or *singular* right—the legislature wishes to restore. And those rights can be restored through whatever mechanism the legislature chooses.

But the power to interpret the Constitution lies with this Court, not the legislature. *Pig Pro Nonstock Coop. v. Moore*, 253 Neb. 72, 79 (1997) ("The construction and interpretation of the Constitution is a judicial function."). Nowhere in the Nebraska Constitution is such a blank check hiding. By enacting L.B. 20, the legislature attempted to "automatically remove[]" the "disqualification" from exercising the *singular* right to vote. Neb. Rev. Stat. § 29-112. This does not satisfy the Constitution's plain meaning for two reasons: it does not restore those convicted of a felony to their civil *rights*, plural, and by "automatically remov[ing]" the disqualification from voting, it usurps the Board of Pardons' constitutional authority. Moreover, L.B. 20 is bad policy for Nebraska because it removes the (actually "longstanding") recidivism-reducing individualized process by which the Board of Pardons restores civil rights.

I. Article VI, section 2 of the Nebraska Constitution clearly establishes the substance of which "civil rights"—plural—must be "restored" for an individual convicted of a felony to be qualified to vote.

The legislature's attempt to restore *only* the right to vote cannot possibly satisfy the Constitution's condition of "restored to civil rights."

Start with the plain meaning. *City of N. Platte v. Tilgner*, 282 Neb. 328, 345-46 (2011) ("If the meaning is clear, we give a constitutional provision the meaning that laypersons would obviously understand it to convey."). Under Section 2, a convicted felon is disqualified from voting. Only if "restored to civil rights" is the individual qualified again. *Gandy v. State*, 10 Neb. 243, 247 (1880) ("[I]t is clear that a person convicted of a *felony*…is not qualified to vote unless he be 'restored to civil rights.'" (emphasis original)).

The operative phrase contemplates an individual person and their plural "civil rights," lost by reason of conviction. Had the framers intended to signify one right, i.e., *the* right to vote, they would have said "unless restored to the right to vote," or "unless restored to *the* civil right." *See Lozier Corp. v. Douglas Cnty. Bd. of Equalization*, 285 Neb. 705, 715 (2013) (explaining that had the legislature intended a particular meaning, "it could have said so explicitly").

Instead, the framers recognized that convicted felons lose more than just their right to vote, and the most reasonable interpretation is that the framers intended to condition re-eligibility to vote upon the restoration of "civil rights," plural. This Court "may not supply any supposed omission…or take words from the provision" in interpreting Section 2 now. *Tilgner*, 282 Neb. at 345.

Section 2's use of the plural phrase "civil rights," shows, beyond a reasonable doubt, that *multiple* rights are contemplated. The constitution contemplates *more than one right*, while L.B. 20 only purports to restore *one.* That is simply not enough.

Moreover, "the established laws, usages and customs of the country at the time of [Section 2's] adoption," *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 405 (1950), along with "historical facts," *State ex rel. Lemon v. Gale*, 272 Neb. 295, 304 (2006), clarify that the "civil rights," plural, lost as a result of a felony conviction include *at least* the rights to vote, hold office, and serve on a jury.

First, the Nebraska Constitution in Article XV, Section 2, related to the qualifications for office-holding, provides that "[n]o person convicted of a felony shall be eligible to any such office [of trust

or profit] unless he shall have been restored to civil rights." The use of identical language—"restored to civil rights"—as a consequence for the same act—conviction of a felony—indicates that *both* the right to hold office *and* the right to vote are part of the body of "civil rights" referenced in both sections of the Constitution.

Next, for much of Nebraska's history, the three core civil rights—voting, holding office, and jury service—were always lost upon felony conviction. For example, an 1873 law provided that "[a]ny person sentenced to be punished for any felony…shall be deemed incompetent to be an elector, or juror, or to hold any office of honor, trust, or profit, within this state." Neb. Gen. Stat. ch. 58, § 258, p. 783 (1873). That disqualification continued "unless said convict shall receive…a general pardon…in which case said convict shall be restored to his civil rights and privileges." *Id.*

Nebraska law was the same *for over a century*. *See, e.g.*, Neb. Rev. Stat. § 8912 (1913) (felons "incompetent to be an elector or juror or to hold any office of honor, trust or profit" unless restored to civil rights by pardon); 1919 Neb. Laws ch. 56, § 1, p. 160 (same); Neb. Comp. Stat. § 9933 (1922) (same); Neb. Comp. Stat. § 29-112 (1929) (same); Neb. Rev. Stat. § 29-112 (1943) (same); 1951 Neb. Laws ch. 86, § 1, p. 249 (same); 1959 Neb. Laws ch. 117, § 1, p.448 (felons "incompetent to be an elector or juror, or to hold any office of honor, trust, or profit" unless such person receives a "warrant of discharge" from the Board of Pardons); L.B. 1054, § 3, 97th Leg., 2nd Sess. (Neb. 2002) (same). It was not until 2005 when things changed, L.B. 53, § 1, 99th Leg., 1st Sess. (Neb. 2005), and the right to vote was treated differently. The automatic 2-year restoration provision of that 2005 law departed from the historical meaning of the Nebraska Constitution, was unconstitutional then, and is unconstitutional now.

This history coheres with a national understanding of the phrase "civil rights" around the time of the 1875 Nebraska Constitution. *Black's Law Dictionary* 208 (1st ed. Saint Paul, West Pub. Co. 1891) ("Rights appertaining to a person in virtue of his citizenship in a state or community"). Thus, federal courts have easily

concluded that "restoration of civil rights," in federal law "encompass[es] those rights accorded to an individual by virtue of his citizenship in a particular state. These rights include the right to vote, the right to seek and hold public office and the right to serve on a jury." *United States v. Cassidy*, 999 F.2d 543, 549 (6th Cir. 1990); *see also Logan v. United States*, 552 U.S. 23, 28 (2007) (interpreting "civil rights" as "the rights to vote, hold office, and serve on a jury") (Ginsburg, J., for a unanimous Court).

Amici are unaware of any declarative precedent holding that restoring the *singular* right to vote restores "civil rights," *plural*. This Court has acknowledged that "[t]he right to vote is *a* civil right"—not all of them. *Ways v. Shively*, 264 Neb. 250, 255 (2002) (emphasis added). And other states with similar constitutional provisions treat the rights to hold office, serve on a jury, and vote the same. *See, e.g.*, Ariz. Rev. Stat. § 13-904(A) (suspending the right to vote, hold office, and serve as a jury for a felony conviction); N.D. Cent. Code. § 12.1-33.01 (stating that incarcerated felons cannot vote *or* hold office); *Id.* § 27-09.1-08 (stating that those who have "lost the right to vote" are disqualified from jury service).

Although some states with similar constitutional provisions treat the statutory permission to vote differently via legislation that violates their own constitutional disqualification provisions, *see* Minn. Stat. § 201.014, subd. 2a, this practice has *not* been endorsed by any court of last resort that Amici have found, *see Minn. Voters All. v. Hunt*, No. A23-1940, 2024 Minn. LEXIS 409, at *7 n.2 (Minn. Aug. 7, 2024) (declining to rule on the constitutionality of the 2023 felon-voting law), and is also a sharp departure from the state's history, *see, e.g.*, *Schroeder v. Simon*, 985 N.W.2d 529, 542-43 (Minn. 2023) (discussing a 1907 Minnesota statute and concluding "the statute clarifies that in 1907, the Legislature equated the restoration of civil rights with the right to vote and hold office"); Minn. Stat. § 5262 (1909) (limiting the jury right, two years later, to "qualified voter[s]").

Nebraska's purported restoration of the singular right to vote defies the plain meaning of Article VI, Section 2 of the Nebraska

Constitution and neglects over a century of consistent practice in Nebraska. The substance of "civil rights," plural, in Section 2 plainly contemplates that more than the singular right to vote must be restored for convicted felons to be qualified electors again.

II. The history of Article VI, section 2 of the Nebraska Constitution also clearly establishes the mechanism by which "civil rights" can be restored.

Like the *substance* of what "civil rights," plural, means, the *mechanism* of restoring civil rights, plural, has also been consistent for most of Nebraska's history. The chosen mechanism—a pardon—is a "[l]egislative and official interpretation, long acquiesced in," which is "entitled to weight in seeking the meaning of doubtful constitutional provisions." *State ex rel. State Railway Com. v. Ramsey*, 151 Neb. 333, 340 (Neb. 1949). In other words, what was *originally* done to implement the Constitution, *for over a century*, is strong evidence of the Constitution's meaning. And that "original meaning" should govern now. *REO Enters., LLC v. Vill. of Dorchester*, 312 Neb. 792, 812 (2022) (Papik, J., concurring) (explaining that the "'main inquiry' in interpreting the Nebraska Constitution is the original meaning of its provisions" (quoting *Ramsey*, 151 Neb. at 340)).

Nebraska's pardon power was initially vested in the governor, Neb. Const. art. V, § 12 (1866); Neb. Const. art. V, § 13 (1875), and then in the Board of Pardons after the 1920-21 constitutional convention, Neb. Const. art. IV, § 13 (1920); Neb. Const. art. IV, § 13 (1967). In turn, before 1959, Nebraska statutes only authorized the restoration of civil rights through a pardon from the governor or Board of Pardons. *See, e.g.*, 1951 Neb. Laws ch. 86, § 1, p. 249.

In 1959, the legislature made a temporary modification. For individuals sentenced to confinement, receipt of a warrant of discharge was still the only way to restore "civil rights," and was vested in the Board of Pardons' discretion. 1959 Neb. Laws ch. 117, § 1, p.448. For individuals otherwise sentenced, however, the Board of Pardons had to issue the warrant of discharge once the sentence was reported

complete. *Id.* § 2, p.448–49. In 2002, the legislature removed this limitation on the Board of Pardons' discretion and reaffirmed that the Board of Pardons possesses the sole power to restore civil rights. L.B. 1054, § 4, 97th Leg., 2nd Sess. (Neb. 2002).

In sum, a pardon or warrant of discharge has always, until 2005, been the *sole* mechanism to restore civil rights in Nebraska. That power is vested solely in the Board of Pardons, Neb. Const. art. IV, § 13, and with the exception of the 1959 statute, the correct constitutional authority has always retained sole discretion over the exercise of that power. L.B. 20 (and its predecessor, L.B. 53), is thus a historical anomaly. It purports to restore the right to vote *without* a pardon or warrant of discharge, and *without* any discretionary action by the Board of Pardons.

Relators' argument about what other states do neglects this unique history. (Br. of Relators pp. 23-24). For example, although Minnesota has a similar constitutional provision for restoring voting rights, *see* Minn. Const. art. VII, § 1, Minnesota historically authorized a *different* mechanism for the restoration of "civil rights."

In 1867, the warden would give Minnesota's convicted felons a certificate after completing their sentence, and they were restored to civil rights after presenting it to the governor. *Schroeder*, 985 N.W.2d at 541. By 1907, the legislature established a "judicial process" by which a judge could restore civil rights. *Id.* at 542-43. These limitations on the Minnesota Board of Pardons' discretion were permissible because its "powers and duties shall be defined and regulated by law." Minn. Const. art. V, § 7. Nebraska's Constitution does not authorize the legislature to interfere with the Board of Pardons' authority.

Relators' citation to what other states do is therefore imprecise. Those other states may lack a past practice that is "entitled to weight in seeking the meaning of" Article VI, Section 2. *Ramsey*, 151 Neb. at 340. And they may lack a similar constitutional mandate to respect the Board of Pardons' discretion. *See Otey v. State*, 240 Neb. 813, 824 (1992).

Properly weighing past practice, it becomes apparent that, in L.B. 20, the legislature usurped the pardon power and violated the Separation of Powers Clause, Neb. Const. art. II, § 1. In doing so, it failed to "restore" "civil rights," in a mechanism consistent with Article VI, Section 2 of the Nebraska Constitution. Only a pardon can restore "civil rights" consistent with the Constitution. The legislature cannot require the Board of Pardons to exercise that power or take that power for itself.

III. Restoring the right to vote in the manner required by the Constitution serves important state interests.

"A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact." *Green v. Bd. of Elecs.*, 380 F.2d 445, 451 (2d Cir. 1967). As Judge Friendly explained, "eleven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons." *Id.* at 450. By 1967, when *Green* was decided, the total was 42, including Nebraska. *Id.* at 450; *id.* at 450 n.6. This practice, in place in the majority of states for much of our nation's history, makes good sense "especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime." *Id.* at 451.

The individualized process of restoring "civil rights" through the Board of Pardons allows Nebraska to consider recidivism. Nebraska's Pardon Application asks individuals convicted of a felony to "tell [their] story of the crime(s)," admit guilt, report if stolen property was returned or paid for, and give the "reason for requesting a pardon." Pardon Application, State of Nebraska Board of Pardons, https://pardons.nebraska.gov/pardon-application (accessed Aug. 21, 2024). These factors help determine "whether it is likely that the felon is now responsible, trustworthy, and committed enough to following the law that he or she can be entrusted with a role in the solemn enterprises of justice." Brief of Amicus Curiae the Center for Equal

Opportunity at 9, *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018).

This individualized process also increases the likelihood that convicted felons who have their "civil rights" restored will not re-offend. Data from Florida when the state required an individualized assessment for restoration of civil rights demonstrated that recidivism rates under rigorous review remained at 1% *or lower* for those who received a pardon. *See id.* at 13-14. It is deeply flawed to assert that these low recidivism rates can be extended by legislative dictate. As former Attorney General Michael B. Mukasey explained, "those who are motivated to navigate" the individualized pardon process "self-select as a group less likely to repeat their crimes." Michael B. Mukasey, *What Holder Isn't Saying About Letting Felons Vote*, The Wall Street Journal, Feb. 14, 2014.

In sum, Amici believe that individualized consideration by the Board of Pardons serves an important state interest in discouraging recidivism and promoting rehabilitation.

CONCLUSION

For the reasons set forth herein, this Court should deny Relators' Petition for a Writ of Mandamus.

DATED this 26th day of August, 2024.

Respectfully submitted,

Governor Jim Pillen, United States Senator Pete Ricketts, Former Nebraska Governor Dave Heineman, Senator Joni Albrecht, Senator Bruce Bostelman, Senator Robert Clements, and Senator John Lowe

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CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. App. P. § 2103, this brief was prepared using Microsoft Word in 12-point Century Schoolbook font, in compliance of said rules. This brief contains 3,768 words, excluding this certificate.

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Robert Evnen represented by Eric James Hamilton (25886) service method: Electronic Service to **eric.hamilton@nebraska.gov**
Robert Evnen represented by Hallie Ann Hamilton (27327) service method: Electronic Service to **hhamilton@akclaw.com**
Robert Evnen represented by Lincoln Jacob Korell (26951) service method: Electronic Service to

lincoln.korell@nebraska.gov
Robert Evnen represented by Zachary Brent Pohlman (27376) service method: Electronic Service to **zachary.pohlman@nebraska.gov**

Tracy Overstreet represented by Martin R Klein (22917) service method: Electronic Service to **courtnotices@hallcountyne.gov**

Signature: /s/ GRASZ, BRENNA M (26794)