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Inefficient Mercy: The Procedural, Constitutional, and Prudential Issues that Plague Minnesota's Pardoning Process

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**INEFFICIENT MERCY: THE PROCEDURAL,
CONSTITUTIONAL, AND PRUDENTIAL ISSUES THAT
PLAGUE MINNESOTA’S PARDONING PROCESS**

By: Maddie Post[‡]

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I. INTRODUCTION

In this paper, I will discuss the procedural, constitutional, and prudential issues that plague the current pardoning system employed in Minnesota. I ultimately advocate for the reform of this process. I begin by

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describing the three grants of clemency that are available in Minnesota: pardons, commutations of sentences, and pardons extraordinary.¹ Next, I highlight the issues that burden the pardon system by looking at a particular applicant's case: Amreya Shefa.² In 2015, Shefa was convicted of first-degree manslaughter for killing her abusive husband, Habibi Tesema, who violently sexually assaulted her.³ Despite her compelling pleas for forgiveness in front of the Board of Pardons, Shefa was denied a pardon.⁴ Amreya Shefa's case stands as an example of the onerous challenges that pardon applicants in Minnesota face.⁵

Following this, I discuss the importance of pardons in our criminal justice system.⁶ Not only do pardons and pardons extraordinary remedy many of the legal penalties and disabilities people experience because of their conviction, they are also a symbol of the reform the applicant has made in their life.⁷ Pardons are recognition from the three highest officials in the state of Minnesota that an applicant is forgiven for their crime.⁸ Despite the crucial importance of this process, pardons are rarely granted and have been granted in significantly declining numbers over the last few decades.⁹

Next, I discuss why pardons and pardons extraordinary have been granted in such low numbers over the last few years.¹⁰ First, I begin with the procedural issues that affect grants of clemency in Minnesota.¹¹ This includes increased regulation of the procedural and substantive components for grants of clemency by the Minnesota Legislature.¹² Next, I examine the state constitutional issues that burden the pardoning system in Minnesota.¹³ The Minnesota Board of Pardons consists of the governor, attorney general, and chief justice of the Minnesota Supreme Court, and all pardons must be granted through a unanimous vote by the Board.¹⁴ I argue that the structure of the Board, coupled with the unanimous vote requirement, is inconsistent with the structure and text of the Minnesota Constitution.¹⁵

Next, I discuss the prudential issues with the Board of Pardons.¹⁶ I

¹ See *infra* Part II.

² See *infra* Part III.

³ See *infra* Part III.A.

⁴ See *infra* Part III.B.

⁵ See *infra* Part III.

⁶ See *infra* Part IV.B.

⁷ See *infra* Part IV.A.

⁸ See *infra* Part IV.A.

⁹ See *infra* Part V.

¹⁰ See *infra* Part V.A.

¹¹ See *infra* Part V.A.

¹² See *infra* Part V.A.

¹³ See *infra* Part V.B.

¹⁴ See *infra* Part V.B.

¹⁵ See *infra* Part V.B.

¹⁶ See *infra* Part V.C.

argue that the current structure of the Board is unwise policy.¹⁷ I find it unwise to vest pardoning power exclusively in the hands of three of the top officials in Minnesota.¹⁸ I also find it unwise for the chief justice of the Minnesota Supreme Court to be involved in this process.¹⁹

Finally, after discussing the problems that continue to burden the process of granting pardons in Minnesota, I describe a potential solution to these issues.²⁰ I recommend that the Minnesota Legislature pass a law to create a Clemency Review Commission to change the current structure of this process.²¹ This solution was proposed in a bill in 2019.²² Unfortunately, this bill died when the legislative session ended.²³ I argue that legislators should continue to push for a Clemency Review Commission to reform the pardoning process in Minnesota.²⁴

I ultimately conclude that the process for granting pardons in Minnesota is in dire need of reform and that the Minnesota Legislature needs to make an active effort in the upcoming legislative session to solve some of these problems.²⁵ Pardons and pardons extraordinary play an incredibly important role in our criminal justice system, and especially in the lives of those that are granted clemency.²⁶ It is in the best interest of the State of Minnesota that this process is fair and unburdened.²⁷

II. MINNESOTA'S PARDONING PROCESS

Under Minnesota law, there are three grants of clemency available to those convicted of a crime: pardons, commutations of sentences, and pardons extraordinary.²⁸ A pardon is “an act of forgiveness” that exempts an applicant from the punishment imposed by their conviction.²⁹ A commutation is a reduction of a sentence.³⁰ Pardons and commutations of sentences are both available to people currently serving their sentence.³¹ From 1940 to 1989, the Board of Pardons commuted 741 sentences,

¹⁷ See *infra* Part V.C.

¹⁸ See *infra* Part V.C.1.

¹⁹ See *infra* Part V.C.2.

²⁰ See *infra* Part VI.

²¹ See *infra* Part VI.

²² See *infra* Part VI.

²³ See *infra* Part VI.

²⁴ See *infra* Part VI.

²⁵ See *infra* Part VII.

²⁶ See *infra* Part VII.

²⁷ See *infra* Part VII.

²⁸ MINN. STAT. § 638.02 (2020).

²⁹ 2019 *Legislative Report*, MINN. BD. OF PARDONS 2 (Jan. 10, 2020), <https://www.leg.mn.gov/docs/2020/mandated/200130.pdf> [https://perma.cc/ZC82-C639].

³⁰ *Id.*

³¹ *Application Process*, MINN. DEP'T OF CORR., <https://mn.gov/doc/about/pardon-board/application-process/> [https://perma.cc/7LCT-LZQE].

granting commutations for eighty-four percent of applicants.³² However, the Board of Pardons has only granted one absolute pardon since 1984³³ and two commutations of sentences since 1981.³⁴ Because the Board of Pardons grants absolute pardons and commutations at such a low rate, the most realistic grant of clemency for applicants to seek is a pardon extraordinary.³⁵

A pardon extraordinary is “statutorily-created relief granted to applicants who have served their sentences.”³⁶ Pardons extraordinary are granted if the Board of Pardons determines that the person is “of good character and reputation.”³⁷ To be eligible for a pardon extraordinary, an individual convicted of a crime of violence must be crime-free for a minimum of ten years.³⁸ For non-violent offenders, the individual must not commit a crime for five years.³⁹ Federal offenders and individuals convicted of crimes in other states are not eligible for a pardon extraordinary.⁴⁰ Unless the Board unanimously votes in writing to put this waiting period aside, an application for a pardon extraordinary cannot be filed until this time period has elapsed.⁴¹

The Minnesota Board of Pardons consists of the governor, the attorney general, and the chief justice of the Minnesota Supreme Court.⁴² Applications for pardons extraordinary are investigated prior to the Board’s meeting.⁴³ The county attorney, the judge involved in the case, and any victims are asked for input on the application.⁴⁴ If the Board grants a pardon extraordinary, the conviction is set aside and nullified.⁴⁵ Once someone is

³² Andy Mannix & Briana Bierschbach, *Far from Grace: How Minnesota Radically Changed the Way it Forgives Criminals*, MINNPOST (July 30, 2015), <https://www.minnpost.com/politicspolicy/2015/07/far-grace-how-minnesota-radically-changed-way-it-forgives-criminals/> [https://perma.cc/9KP7-NR8V].

³³ *Id.* In 2020 the Board granted the first absolute pardon in four decades to Maria Elizondo, a woman convicted in 2012 of fraudulently receiving \$25,000 in food stamps and benefits. Esme Murphy, *Minnesota Board of Pardons Grants First Full Pardon in 37 Years to Maria Elizondo*, CBS MINN. (Jan. 25, 2021), <https://minnesota.cbslocal.com/2021/01/25/minnesota-board-of-pardons-grants-first-full-pardon-in-37-years-to-maria-elizondo/> [https://perma.cc/3E6Q-7KMA].

³⁴ Mannix & Bierschbach, *supra* note 32. The Board of Pardons granted all three of these acts of clemency in 2020. *2020 Legislative Report*, MINN. BD. OF PARDONS 2 (Feb. 12, 2021), https://mn.gov/doc/assets/Board%20of%20Pardons%202020%20Report%20%28final%29_cm1089-468448.pdf [https://perma.cc/85A4-FNDF].

³⁵ *Id.*

³⁶ *Id.*

³⁷ MINN. STAT. § 638.02, subdiv. 2 (2020).

³⁸ MINN. STAT. § 638.02, subdiv. 2(1) (2020); MINN. STAT. § 624.712, subdiv. 5 (2020) (defining a “crime of violence”).

³⁹ MINN. STAT. § 638.02, subdiv. 2(2) (2020).

⁴⁰ MINN. CONST. art. V, § 7; MINN. STAT. § 638.01 (2020).

⁴¹ MINN. STAT. § 638.02, subdiv. 2.

⁴² MINN. CONST. art. V, § 7.

⁴³ Minn. Dep’t of Corr., *supra* note 31.

⁴⁴ *Id.*

⁴⁵ MINN. STAT. § 638.02, subdiv. 2(2).

granted a pardon extraordinary, they will never be required to disclose their conviction again other than “in a judicial proceeding or as part of the licensing process for peace officers.”⁴⁶ However, a pardon extraordinary does not expunge the crime or seal the person’s record.⁴⁷ After a pardon extraordinary is granted, a copy of the pardon is filed with the district court where the conviction occurred.⁴⁸ The court is then directed to set aside the conviction and keep a copy of the pardon on file.⁴⁹

III. EXPOSING THE PROBLEMS: AMREYA SHEFA’S CASE

A. Amreya Shefa’s Conviction and Sentencing

One recent pardon applicant in Minnesota, Amreya Shefa, helps illuminate the procedural, constitutional, and prudential issues that burden grants of clemency in this state. Amreya Shefa met Habibi Tesema in Addis Abba, Ethiopia, in 2006.⁵⁰ The couple married one month later.⁵¹ At the beginning of their marriage, Tesema lived in the United States while Shefa remained in Ethiopia.⁵² Tesema agreed that after the couple had three children together, he would bring Shefa and the children over to the United States to live with him.⁵³ In 2012, after six years of marriage, Tesema brought Shefa and their two children to live with him in Richfield, Minnesota.⁵⁴ Shefa had no friends, family, or independent income in the United States and became dependent on Tesema.⁵⁵ In contrast, Tesema had lived in the United States for almost twenty years, spoke English well, worked full-time, owned a home, and had a large network of friends and family in Minnesota.⁵⁶

After bringing Shefa and the children over to the United States, Tesema became abusive.⁵⁷ Shefa claimed that throughout their marriage,

⁴⁶ *Id.*

⁴⁷ *Minnesota Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT, <http://ccresourcecenter.org/state-restoration-profiles/minnesota-restoration-of-rights-pardon-expungement-sealing/> [https://perma.cc/ZW56-F9XY].

⁴⁸ *See id.* (citing MINN. STAT. § 638.02, subdiv. 3).

⁴⁹ *Id.*

⁵⁰ *State v. Amreya Rahmeto Shefa*, No. 27-CR-13-39734, 2015 WL 1279762, at *1 (Minn. Dist. Ct. Jan. 30, 2015).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* From 2006 to 2012, Tesema visited Shefa numerous times in Ethiopia. During this period, Shefa gave birth to two children, a boy and a girl. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at *9.

⁵⁶ *Id.* at *2.

⁵⁷ Matt Sepic, *Richfield Woman Asks Pardons Board to Help Her Avoid Persecution in Home Country*, MPR NEWS (June 26, 2019), <https://www.mprnews.org/story/2019/06/26/shefa-clemency-deporation-minnesota-board-pardons> [https://perma.cc/F22W-YPNN].

Tesema forced her to perform sex acts against her will.⁵⁸ On one occasion, Shefa claimed that Tesema and an unknown man had sex with each other and then sexually assaulted her in the basement of their home.⁵⁹ Later, Tesema told Shefa that as a result of that assault, she “likely had contracted AIDS.”⁶⁰ Shefa has claimed that throughout their marriage, Tesema raped her frequently, allowed his friends to rape her, beat her, and used her for forced labor.⁶¹

In a recorded interview, Shefa told Richfield Detective Joseph Edwards, “I am not even afraid of Allah (God) as I am afraid of [Mr. Tesema]” and “I am afraid of [Mr. Tesema] all of the time.”⁶² Shefa stated that she never left Tesema because, “I don’t know my way around, I am not familiar with the country. I don’t have any relative [sic], . . . [I] don’t have anyone, where do I go? In fact, he was telling me to leave, but where do I go? I don’t know anyone.”⁶³ Shefa had no power in the relationship, no control over the couple’s assets, and remained dependent upon Tesema in the United States.⁶⁴ For these reasons, she remained in the relationship despite the abuse.⁶⁵

On the night of December 1, 2013, Tesema had been drinking alcohol and smoking khat.⁶⁶ Tesema began to initiate sex with Shefa.⁶⁷ Shefa claimed that after the couple had vaginal intercourse, Tesema made her perform oral sex on him.⁶⁸ Then Tesema proceeded to penetrate Shefa’s anus with a dildo.⁶⁹ Tesema played pornographic movies on his computer and asked her, “If these people are doing it, why can’t you do it?”⁷⁰ Tesema asked Shefa if she would have anal intercourse with him and told her that if she

⁵⁸ *Id.*

⁵⁹ *Shefa*, 2015 WL 1279762, at *2.

⁶⁰ *Id.* At trial, Shefa claimed that Tesema “took her to an unknown hospital where she received medication for an abortion and AIDS.” *Id.* No evidence was offered concerning either the alleged abortion or AIDS at trial. *Id.* A member of Shefa’s legal team claims she is now HIV positive. Sepic, *supra* note 57.

⁶¹ Compl. at 10, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

⁶² *Shefa*, 2015 WL 1279762, at *2.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Id.* at *3. Khat is a stimulant drug made from the leaves and twigs of an evergreen shrub native to Ethiopia. The active ingredients are cathine and cathinone. *Drug Fact Sheet: Khat*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/factsheets/khat> [<https://perma.cc/W6UL-EGNZ>]. Tesema’s blood was tested for the presence of Khat, but none was found. *Shefa*, 2015 WL 1279762, at *3 n.2. However, there was no testimony on the amount of time that Khat would remain in Tesema’s blood after consumption. *Id.* There was evidence that Tesema had been drinking; his blood alcohol concentration was .09, and bottles of alcohol were found at the scene. *Id.*

⁶⁷ *Shefa*, 2015 WL 1279762, at *3.

⁶⁸ *Id.*

⁶⁹ *Id.* Shefa’s account of the assault was corroborated by evidence that two dildos were in the room where the homicide occurred. *Id.*

⁷⁰ *Id.*

refused to have sex with him, he would find someone who would.⁷¹

After Tesema penetrated Shefa with a dildo, Shefa proceeded to pick up a knife and stab Tesema.⁷² Shefa later explained that she had told Tesema, “No, you’re not going to do that to me! You’re not going to do that to me!”⁷³ Shefa stabbed Tesema thirty times.⁷⁴ The Chief Hennepin County Medical Examiner determined that a stab wound through both pumping chambers of the heart killed Tesema.⁷⁵

Shefa was charged with second-degree murder under Minnesota Statutes section 609.19, subdivision 1(1).⁷⁶ Shefa raised two defenses at trial: self-defense and the heat of passion defense.⁷⁷ She requested that the judge consider the lesser charge of first-degree manslaughter in violation of Minnesota Statutes section 609.20, subdivision 1.⁷⁸ At Shefa’s bench trial, Judge Elizabeth Cutter denied Shefa’s claim of self-defense, finding that the number of sharp force injuries inflicted upon Tesema, in addition to his level of intoxication, indicated that the force Shefa used exceeded the amount necessary to defend herself.⁷⁹ However, the court did find that the sexual assault was sufficient to show provocation for the use of the heat of passion defense.⁸⁰ Because the court found that the State had not proven beyond a reasonable doubt that Shefa did not act in the heat of passion, she was convicted of first-degree manslaughter.⁸¹ Shefa served five years in prison at the Shakopee Correctional Facility without incident and with good behavior.⁸² Upon her pending release, she was charged as removable from

⁷¹ *Id.* at *6.

⁷² *Id.* at *3. Shefa testified that the knife was in the room because she had used it earlier to cut an orange. *Id.* This was corroborated by evidence that there was a sliced orange in the room. *Id.*

⁷³ *Id.* at *7.

⁷⁴ *Id.* at *3.

⁷⁵ *Id.* at *5.

⁷⁶ *Id.* at *7. *See* MINN. STAT. § 609.19, subdiv. 1(1) (2015). Whoever “causes the death of a human being with intent to effect the death of that person or another, but without premeditation” is guilty of murder in the second degree and may be sentenced to imprisonment for not more than 40 years. *Id.*

⁷⁷ *Shefa*, 2015 WL 1279762, at *7. *See* MINN. STAT. § 609.20(1) (2020). First-degree manslaughter is when the defendant “intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances.” *Id.*

⁷⁸ *Shefa*, 2015 WL 1279762, at *1. Shefa waived her right to a jury prior to the beginning of trial. *Id.*

⁷⁹ *Id.* at *9.

⁸⁰ *Id.* at *8–9.

⁸¹ *Id.* at *9. Shefa appealed her case to the Minnesota Court of Appeals in 2016, claiming that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that she intended to cause the death of Tesema and was not acting in self-defense. *State v. Shefa*, No. A15-0974, 2016 WL 3042908, at *4 (Minn. Ct. App. May 31, 2016). The court of appeals affirmed the trial court, agreeing that the number of sharp force injuries inflicted upon Tesema greatly exceeded the degree of force necessary to defend herself. *Id.*

⁸² Compl. at 11, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

the United States and taken into Immigration and Customs Enforcement (“ICE”) custody.⁸³ Despite finishing her sentence, Shefa was detained at the Kandiyohi County Jail in Willmar, Minnesota, in anticipation that the Department of Homeland Security would deport her.⁸⁴

B. The Denial of Amreya Shefa’s Pardon Application

After serving her sentence in Shakopee, Shefa filed her first application for a pardon extraordinary in June of 2018.⁸⁵ Her application was denied because it was “deemed undeserving by the secretary for further review by the board.”⁸⁶ In December of 2018, Shefa filed a second pardon application.⁸⁷ Her second application was also denied on the mistaken conclusion that the prior application had been denied on its merits.⁸⁸

Shefa challenged this denial and was permitted to present the issue during the Board of Pardons meeting in June of 2019.⁸⁹ Shefa begged for forgiveness over the phone from the Kandiyohi County Jail, where she was being detained by ICE.⁹⁰ She told the Board that if she was not granted a pardon, she would be deported to Ethiopia.⁹¹ She claimed her husband’s family in Ethiopia would have her killed if she ever returned.⁹² Shefa told the Board, “I am very remorseful for killing my husband.”⁹³ At the meeting, Chief Justice Lori Gildea announced her intention to deny the pardon if Shefa was allowed to apply.⁹⁴ Chief Justice Gildea said, “I don’t support the pardon. The crime caused the death of a person, so it’s on that basis that I don’t support Ms. Shefa’s pardon application.”⁹⁵

In December of 2019, Shefa requested that the merits of her case go before the Board of Pardons once again.⁹⁶ This request was granted, and the Board agreed to hear her case at the Board of Pardons meeting in June of

⁸³ *Id.* See 8 U.S.C. § 1227 (2008). Any alien who “(I) is convicted of a crime involving moral turpitude committed within five years [...] after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.” *Id.*

⁸⁴ Brandon Stahl, *Pardon Hearing Set for Rape Survivor Who Served Time After Killing Husband*, STAR TRIB. (Minneapolis) (June 17, 2019), <https://www.startribune.com/rape-survivor-gets-her-shot-at-freedom/511420192/> [https://perma.cc/U2ZD-WGRC].

⁸⁵ Compl. at 11, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 12.

⁹⁰ Sepic, *supra* note 57.

⁹¹ Brett Hoffland, *Minnesota Woman Convicted of Killing Her Husband Pleading for a Pardon*, KSTP (June 25, 2019), <https://kstp.com/news/minnesota-woman-convicted-of-killing-her-husband-pleading-for-a-pardon/5402752/> [https://perma.cc/LN7K-368W].

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Compl. at 12, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

2020.⁹⁷ In her application, Shefa stated that only a pardon or commutation could serve the interests of justice because although her case was correctly decided, her case was one of “unfortunate guilt.”⁹⁸

Shefa stated that her punishment for killing her husband has been more than just incarceration.⁹⁹ As a result of her conviction, Shefa lost parental rights, faced possible death at the hands of her husband’s family if she returned to Ethiopia, and would be unable to manage her HIV in Ethiopia.¹⁰⁰ Shefa also maintained that domestic violence victims are good candidates for clemency and that the Board would be sending a message that gender-based violence would not be tolerated.¹⁰¹

Despite these compelling pleas, Shefa’s pardon application was denied.¹⁰² On June 12, 2020, Governor Walz and Attorney General Ellison voted to grant Shefa’s pardon request.¹⁰³ Both officials supported Shefa’s petition for a pardon extraordinary.¹⁰⁴ However, Chief Justice Gildea voted to deny Shefa’s petition, just as she said she would.¹⁰⁵ In response, Shefa filed a lawsuit seeking declaratory and injunctive relief against Governor Walz, Attorney General Ellison, and Chief Justice Gildea, all in their official capacities.¹⁰⁶ In the complaint, Shefa challenged the constitutionality of Minnesota Statutes section 638.02 and its requirement for a unanimous vote from the Board of Pardons.¹⁰⁷ She claimed that the statute violated the Minnesota Constitution because the constitution vests the pardoning power

⁹⁷ *Id.*

⁹⁸ Application for a Pardon or Commutation: Amreya Shefa, MINN. DEP’T OF CORR. 4 (Nov. 29, 2018).

⁹⁹ *Id.* at 5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Compl. at 2, Shefa v. Ellison, No. 62-CV-20-4090 (Minn. Dist. Ct. July 17, 2020).

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* On May 7, 2020, Shefa filed a lawsuit against Attorney General Ellison in his official capacity, seeking declaratory and injunctive relief in anticipation of Chief Justice Gildea denying her pardon application. *See* Compl., Shefa v. Ellison, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020). Shefa claimed that the requirement of a unanimous vote from the Board of Pardons as required by Minnesota Statutes Section 638.02 violated the pardon power granted to the governor under the Minnesota Constitution. *Id.* at 2. That case was dismissed without prejudice, on the basis that Shefa’s claims were not yet ripe for adjudication. *See* Order Denying Motion and Order for Judgment, Shefa v. Ellison, No. 27-CV-20-6768 (Minn. Dist. Ct. June 3, 2020). The district court found that “Chief Justice Gildea’s comments at Shefa’s June 2019 pardon hearing are insufficient to jeopardize any constitutional rights that would merit declaratory or injunctive relief. The Court cannot predict how Chief Justice Gildea . . . will vote regarding Shefa’s pardon application.” *Id.* at 7. Because Chief Justice Gildea had not yet denied Shefa’s pardon application, Shefa’s injury was hypothetical and she could not seek relief. *Id.* After her pardon application was officially denied at the June meeting, she filed another lawsuit in July. Compl., Shefa v. Ellison, No. 62-CV-20-4090 (Minn. Dist. Ct. July 17, 2020).

¹⁰⁶ Compl., Shefa v. Ellison, No. 62-CV-20-4090 (Minn. Dist. Ct. July 17, 2020).

¹⁰⁷ *Id.* at 13.

with the governor.¹⁰⁸ Shefa claimed that “[b]ut for the unanimous vote’ required under 638.02,” her pardon would have been granted.¹⁰⁹

Shefa filed a motion for summary judgment, asking the court to find Minnesota Statutes section 638.02, subdivision 1 unconstitutional and order Governor Walz to reconsider her pardon application.¹¹⁰ Agreeing with Shefa’s constitutional challenge to the current regulation of the Board of Pardons, Defendant Governor Walz filed a motion for summary judgment asking the court to find Minnesota Statutes sections 638.01 and 638.02 unconstitutional¹¹¹ and to grant Shefa’s pardon *nunc pro tunc*.¹¹² In opposition, Defendants Attorney General Ellison and Chief Justice Gildea filed a motion for summary judgment seeking dismissal of Shefa’s complaint.¹¹³

Ramsey County Judge Laura Nelson sided with Shefa and Governor Walz, finding the second sentence of Minnesota Statutes section 638.01 unconstitutional.¹¹⁴ Judge Nelson found that the plain language of article V, section 7 of the Minnesota Constitution “names the Governor separate and apart from the Board of Pardons, of which he is a member.”¹¹⁵ Based on this plain language, Judge Nelson concluded that the governor has some pardon power separate from the Board of Pardons.¹¹⁶ Accordingly, Judge Nelson found that Minnesota Statutes sections 638.01 and 638.02, subdivision 1, which give pardon power to the Board of Pardons alone, are

¹⁰⁸ *Id.* at 13-14.

¹⁰⁹ Pl.’s Mem. of Law in Support of Mot. for Summ. J. 11, *Shefa v. Ellison*, No. 62-CV-20-4090 (Minn. Dist. Ct. Nov. 20, 2020) (quoting the “but for” language utilized by the governor).

¹¹⁰ *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 1679835, at *1 (Minn. Dist. Ct. Apr. 20, 2021). On June 24, 2021, this matter came before Judge Nelson again to discuss whether this decision prohibited the Board of Pardons from meeting. *Id.* Judge Nelson held that the Board’s constitutional authority, as well as Minnesota Statutes section 638, remains in full force and effect, except for the second sentence of Minnesota Statutes section 638.01 and Minnesota Statutes section 638.02, subdivision 1. Judge Nelson clarified that nothing in the order prohibited the Board of Pardons from meeting as mandated by Minnesota Statutes section 638.04. *Id.*

¹¹¹ Despite his position as a defendant in the lawsuit, Governor Walz sided with the plaintiff. Because of this stance, he obtained outside counsel with the Ciresi Conlin law firm. Stephen Montemayor, *Minnesota’s Unanimous Pardon Board Requirement Ruled Unconstitutional*, STAR TRIB. (Minneapolis) (Apr. 21, 2021), <https://www.startribune.com/minnesota-s-unanimous-pardon-board-requirement-ruled-unconstitutional/600048574/?refresh=true> [https://perma.cc/2R2B-X2QZ].

¹¹² *Id.* A *nunc pro tunc* entry is an entry made now of something actually previously done to have effect of the former date. *Lazar v. Ganim*, 220 A.3d 18, 33 n.4 (Conn. 2019) (expressing *nunc pro tunc* literally means “now for then.”).

¹¹³ *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 3440678, at *1 (Minn. Dist. Ct. July 2, 2021).

¹¹⁴ Montemayor, *supra* note 111.

¹¹⁵ *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 1679835, at *6 (Minn. Dist. Ct. Apr. 20, 2021).

¹¹⁶ *Id.*

unconstitutional.¹¹⁷

The defendants appealed Judge Nelson's ruling to the Minnesota Supreme Court.¹¹⁸ On September 16, 2021, a day after hearing oral arguments, Justice G. Barry Anderson, signed an order reversing Judge Nelson's ruling.¹¹⁹ The Minnesota Supreme Court held that the statutes governing the Board are constitutional.¹²⁰ The court issued the order prior to releasing an opinion "[s]o as not to impair the orderly function of the board of pardons."¹²¹

Amreya Shefa's case illustrates the multitude of issues that plague the current pardoning system in Minnesota. Her case demonstrates the procedural issues that burden the current process, such as when her application was denied because the Board mistakenly believed that her case had been denied on the merits.¹²² Her case also demonstrates the constitutional issues that are presented when the head of the judiciary, Chief Justice Gildea, has absolute veto power over a process originally designed for the executive of Minnesota's government to grant.¹²³ There are also prudential issues that arise when offenders go before the head of the judiciary to ask for mercy.¹²⁴ Amreya Shefa's case exemplifies many of the issues that burden this system today.

IV. THE IMPORTANCE OF PARDONS

The pardoning process in Minnesota needs reform because of the crucial role clemency plays in the criminal justice system and in the lives of those convicted of crimes. Pardons extraordinary in Minnesota are a grant of clemency that give those convicted of a crime the opportunity to discharge many of the lingering consequences of a criminal conviction.¹²⁵ In addition to a court-imposed sentence, individuals with criminal convictions also face a range of legal penalties and disabilities.¹²⁶ After a conviction, many face a loss of civil rights, limited access to housing, loss of employment, and loss of welfare benefits.¹²⁷ In addition to the permanent changes to an individual's

¹¹⁷ *Id.*

¹¹⁸ Shefa v. Ellison, 964 N.W.2d 157 (Minn. 2021).

¹¹⁹ *Id.*

¹²⁰ *Id.* Chief Justice Gildea recused herself from the case because of her status as a defendant in the matter. Brian Bakst, *MN Supreme Court Blocks Remake of Pardon Process*, MPR NEWS (Sept. 16, 2021), <https://www.mprnews.org/story/2021/09/16/mn-supreme-court-blocks-remake-of-pardon-process> [<https://perma.cc/8N9V-93J6>].

¹²¹ *Id.*

¹²² Compl. at 11, Shefa v. Ellison, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

¹²³ See *infra* Part V.B.

¹²⁴ See *infra* Part V.C.

¹²⁵ *Board of Pardons*, MINN. DEP'T OF CORR., <https://mn.gov/doc/about/pardon-board/> [<https://perma.cc/ERX5-TDMS>].

¹²⁶ Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* 6 (2005).

¹²⁷ *Id.*

legal status, criminal convictions are accompanied by stigma, discrimination, and shame.¹²⁸

A. Pardons Play an Important Role in the Lives of Individuals Who Have Committed a Crime

In Minnesota, a felony conviction deprives individuals serving their sentence of their civil rights and full citizenship.¹²⁹ These rights include the right to vote, hold office, and own a firearm.¹³⁰ Upon release from their sentence, the right to vote and hold office is restored.¹³¹ However, the right to a firearm is not restored upon release.¹³² Rights to a firearm may be regained if the individual petitions the court for restoration.¹³³ A court “may grant the relief sought if the person shows good cause to do so and the person has been released from physical confinement.”¹³⁴ However, individuals convicted of a “crime of violence” are “not entitled to ship, transport, possess, or receive a firearm or ammunition for the remainder of [their] lifetime.”¹³⁵

Additionally, a pardon extraordinary has immense value for convicted individuals looking for employment.¹³⁶ While it is the policy of the State of Minnesota to encourage the rehabilitation of individuals convicted of a crime through the opportunity to “secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession, or business,” there are numerous setbacks to getting employment post-conviction.¹³⁷ In Minnesota, public and private employers are prohibited from inquiring into the criminal record or history of an applicant until the applicant has been selected for an interview.¹³⁸ However, this law does not require or encourage private and public employers to hire individuals once they look into their criminal history.¹³⁹

¹²⁸ *Id.*

¹²⁹ *Id.* at Minnesota-1.

¹³⁰ *Id.* (citing MINN. STAT. § 609.195 (2005)).

¹³¹ *Id.* The right to hold public office is still deprived if the individual was convicted of bribery. MINN. STAT. § 609.42, subdiv. 2 (2020).

¹³² *Id.*

¹³³ MINN. STAT. § 609.165, subdiv. 1(a) (2020).

¹³⁴ *Id.* § 609.165, subdiv. 1(d).

¹³⁵ *Id.* § 609.165, subdiv. 1(a).

¹³⁶ Mannix & Bierschbach, *supra* note 32.

¹³⁷ LOVE, *supra* note 126.

¹³⁸ MINN. STAT. § 364.021(a). Governor Dayton signed the Criminal Background Check bill, which expanded Ban the Box to private employers starting on January 1, 2014. This requirement has been in effect for public employers in Minnesota since 2009. *Criminal Background Checks, Facts About Ban the Box*, MINN. DEP’T OF HUM. RTS., <https://mn.gov/mdhr/employers/criminal-background/> [https://perma.cc/H8EH-4D4G].

¹³⁹ *Technical Guidance 364.021*, MINN. DEP’T HUM. RTS., https://mn.gov/mdhr/assets/Technical_Guidance_364.021_tcm1061-213501.pdf

In addition, for many, a pardon extraordinary is a symbol of the reform they have made in their lives.¹⁴⁰ A pardon extraordinary is recognition from three of the highest-ranking officials in Minnesota that someone convicted of a crime has turned their life around.¹⁴¹ Contrary to what many may think, a pardon does not necessarily imply that the underlying conviction is invalid.¹⁴² More often, it is recognition of the individual's post-conviction rehabilitation.¹⁴³ Much of what a post-conviction pardon does is lessen the psychological stigma for an individual convicted of a crime.¹⁴⁴ After receiving his pardon extraordinary from the Minnesota Board of Pardons, former convict Seth Evans commented, "I know that God has forgiven me for the things I have done, but I feel that finally the state of Minnesota has forgiven me and I don't have to keep going back into those boxes and look at that person."¹⁴⁵ This forgiveness from the state is an important part of pardons extraordinary for many.¹⁴⁶

B. Pardons Are an Important Part of Our Criminal Justice System

The use of pardon power is an essential element of mercy within the American criminal justice system.¹⁴⁷ Pardoning individuals for the crimes they have committed has ancient, historical roots.¹⁴⁸ Clemency has been around since the code of Hammurabi and classical Rome.¹⁴⁹ This process was used in English common law and, from there, incorporated into the text of the United States Constitution.¹⁵⁰ The framers of the United States Constitution were explicit in connecting the pardon power with notions of mercy.¹⁵¹ Alexander Hamilton wrote that the president had the unfettered

[<https://perma.cc/E7CF-JSS3>]. This law actually encourages more discriminatory conduct by employers by encouraging racial discrimination. It is likely that many employers use race as a substitute for direct information about criminal background. D.J. Tice, *So You Banned the Box: How Did That Work Out?*, STAR TRIB. (Minneapolis) (May 25, 2018), <https://www.startribune.com/so-you-banned-the-box-how-did-that-work-out/483744171/> [<https://perma.cc/9LJ7-M3DY>].

¹⁴⁰ Mannix & Bierschbach, *supra* note 32.

¹⁴¹ *Id.*

¹⁴² Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 33 (2005).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Stephen Montemayor, *Gov. Tim Walz Weighs Changes to State Pardon System*, STAR TRIB. (Minneapolis) (Mar. 31, 2020), <https://www.startribune.com/gov-tim-walz-weighs-changes-to-state-pardon-system/569270562/> [<https://perma.cc/6DTK-5TXG>].

¹⁴⁶ *Id.*

¹⁴⁷ Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 1 (2015).

¹⁴⁸ Morison, *supra* note 142.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY 36, 39 (Austin Sarat & Nasser Hussain eds., 2007).

power to dispense “the mercy of government” so that justice did not appear too “sanguinary and cruel.”¹⁵²

At the Constitutional Convention, James Iredell argued that pardons were necessary because a person may violate the law, “yet peculiar circumstances . . . may entitle him to mercy.”¹⁵³ Pardons and commutations of sentences have historically been described by jurists as based on principles of mercy.¹⁵⁴ As Chief Justice John Marshall remarked in 1833, “[a] pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”¹⁵⁵ Thus, mercy-based clemency has historical and philosophical roots in the American criminal justice system.¹⁵⁶ While some argue that mercy should be left entirely to philosophers or theologians, it is difficult to ignore the important role mercy plays in our criminal justice system.¹⁵⁷

Additionally, pardons play an important political role by signaling issues within our criminal justice system.¹⁵⁸ The Framers intended pardons to not only be rooted in mercy, but also to assist in balancing between the branches of the government.¹⁵⁹ Out of political motivations, legislators are more prone to create harsh sentences for crimes.¹⁶⁰ Politicians are prone to react to the public and the media in response to crime.¹⁶¹ The pardon power brings some balance to these tough sentences.¹⁶² Pardons send political messages to both the legislative and judicial branches about good criminal justice policy.¹⁶³ This influence is incredibly important to maintaining a fair and balanced system.¹⁶⁴ For all of the above reasons, pardons play a crucial role in our criminal justice system and in the lives of those that seek a grant of clemency.

V. THE PROBLEMS THAT PLAGUE THE USE OF THE PARDON POWER IN MINNESOTA

Historically, the Minnesota Board of Pardons granted pardons regularly and frequently.¹⁶⁵ Pardons and commutations were even regularly

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *United States v. Wilson*, 32 U.S. 150, 150 (1833).

¹⁵⁶ *Kobil*, *supra* note 151.

¹⁵⁷ *Id.*

¹⁵⁸ *Barkow & Osler*, *supra* note 147.

¹⁵⁹ *Id.* at 17.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 18.

¹⁶³ *Id.* at 11.

¹⁶⁴ *Barkow & Osler*, *supra* note 147, at 18.

¹⁶⁵ *Mannix & Bierschbach*, *supra* note 32.

granted to both violent and non-violent offenders alike.¹⁶⁶ From 1940 to 1989, the Board granted eighty-seven percent of all applications for pardons and commutations.¹⁶⁷ Additionally, pardons extraordinary were granted for nearly every single applicant who applied for one.¹⁶⁸ Pardons extraordinary were denied only six percent of the time during this period.¹⁶⁹ Pardons and pardons extraordinary were granted even in cases involving murder, robbery, and sexual abuse.¹⁷⁰

Since then, the process has shifted dramatically. Only about a third of pardons extraordinary are granted a year.¹⁷¹ Additionally, pardons extraordinary are only granted to individuals who committed non-violent crimes and waited at least a decade before applying.¹⁷² In 2015, Governor Mark Dayton remarked that the Board would not consider a pardon for somebody accused of sexual assault.¹⁷³ Dayton commented, “The statute and the rules don’t prevent them from applying, so it comes down to us to say we are not going to consider that, basically, ‘Don’t come back.’”¹⁷⁴ This is a substantial change from the days when the Board regularly granted pardons extraordinary for almost any applicant, including those convicted of violent crimes.¹⁷⁵

A. The Procedural Issues with Minnesota’s Pardoning Process

The decline in pardons in Minnesota reflects greater trends in other

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* (citing data from the Minnesota Department of Corrections).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Ruben Rosario, *Does Minnesota ‘Have a Compassion Problem’ When Issuing Pardons?*, ST. PAUL PIONEER PRESS (Minn.) (Dec. 9, 2018), <https://www.twincities.com/2018/12/09/rosario-too-few-pardons-in-minnesota-even-less-than-alabama-time-for-change/> [https://perma.cc/GJH4-YG5A].

¹⁷² Restoration of Rts. Project, *supra* note 47.

¹⁷³ Mannix & Bierschbach, *supra* note 32.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The possibility of re-offense continues to be something that Board members are frequently concerned about. *See id.* During his time on the Board of Pardons, Governor Mark Dayton expressed concern about the possibility of those who are granted pardons reoffending. He stated, “[n]o matter how careful you are or how careful all three of you are, and the whole scrutiny that went into it before, there’s always that risk that somebody could go out and reoffend, and God forbid reoffend more severely.” *Id.* Former Governor Tim Pawlenty did have a pardon applicant reoffend. *Id.* In 2010, a Blue Earth County prosecutor charged Jeremy Giefer with sexually abusing his daughter more than 200 times. *Id.* In 2007, Pawlenty and the Board of Pardons had granted Giefer a pardon extraordinary for Giefer’s 1994 statutory rape conviction, in part because Giefer had married the victim and raised a child with her. *Id.* The timing of Giefer’s re-offense looked particularly bad at the time because Pawlenty was running for president, and part of his legacy as governor was being tough on sex offenders. *Id.*

states and with the federal government.¹⁷⁶ In the 1980s, criminal justice reform was focused on getting tough on crime.¹⁷⁷ Following a push from Congress for harsher sentences, the rate of federal clemency dropped.¹⁷⁸ Minnesota followed with similar tough-on-crime measures in the 1980s.¹⁷⁹ Minnesota became the first state to adopt legally binding sentencing guidelines.¹⁸⁰ These guidelines provide judges with much less discretion on individual cases.¹⁸¹ Additionally, Minnesota got rid of its parole board in exchange for supervised release.¹⁸² Following these reforms, there was a decline in the number of pardons granted.¹⁸³

A number of regulations imposed on Minnesota's pardoning process create procedural issues for those seeking a grant of clemency. One reason for the shift in the use of pardoning power in Minnesota is due to statutes passed by the Minnesota Legislature in 1992 that make it significantly more difficult for applicants to apply for a pardon.¹⁸⁴ Research during this time period indicated that more than fifty percent of convicted individuals released from prison were arrested for a new felony or gross misdemeanor in Minnesota within three years of their release.¹⁸⁵ Faith in the pardoning system waned, and legislators found that there was more to lose than gain when individuals were granted pardons.¹⁸⁶ This led the Minnesota

¹⁷⁶ See Aliza B. Kaplan & Venetia Mathew, *The Governor's Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon*, 23 LEWIS & CLARK L. R., 1285, 1308 (2020).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1310. "Just prior to the Sentencing Reform Act passing in 1984, President Carter granted full pardons to 33% of the petitions he received, which was a lower percentage than many of his recent predecessors such as President Nixon at about 51% and President Ford at 39%. As the president who signed the Act, Ronald Reagan granted full pardons to about 19% of petitions received during his eight years in office. President George H.W. Bush granted pardons to about 10% of petitions received. President Clinton granted full pardons to about 20% of petitions received and President George W. Bush granted full pardons to only 7.5% of petitions. In President Obama's first term, he granted an even lower rate than his predecessor." *Id.*

¹⁷⁹ Mannix & Bierschbach, *supra* note 32.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Recidivism of Minnesota Felons*, OFF. OF THE LEGIS. AUDITOR STATE OF MINN. (Jan. 1997), <https://www.auditor.leg.state.mn.us/ped/pedrep/9701-ch3.pdf> [<https://perma.cc/A2SR-QBGK>]. "Overall, we found that about 59 percent of the offenders released from prison in 1992 were arrested for a new felony or gross misdemeanor in Minnesota within three years, and an additional 5 percent were rearrested for a felony or gross misdemeanor outside of Minnesota during the three-year follow-up period. During the three years, 45 percent were convicted of a new offense in Minnesota, and 40 percent were imprisoned for new offenses or technical violations of their supervised release." *Id.*

¹⁸⁶ Mannix & Bierschbach, *supra* note 32. In addition, national attention was brought to

Legislature to put substantially more requirements on the pardoning process in an effort to reduce these negative consequences.¹⁸⁷

The Minnesota Legislature created new procedural and substantive requirements for pardon applicants in 1992.¹⁸⁸ The legislature added the requirement that individuals convicted of crimes of violence must be crime-free for a minimum of ten years prior to applying.¹⁸⁹ Additionally, non-violent offenders were required to be crime-free for a minimum of five years.¹⁹⁰ In addition to these added requirements, the Minnesota Legislature removed a benefit of the pardon extraordinary.¹⁹¹ No longer would an applicant's record be sealed once they were granted a pardon extraordinary.¹⁹² Even after receiving a pardon extraordinary, the crime would remain on the applicant's criminal history.¹⁹³ Finally, the legislature added the requirement that an applicant must be in "good character and reputation" to be eligible to apply.¹⁹⁴ These procedural changes are one of the reasons grants of clemency are so rare in Minnesota today.

Changes to the application process for pardons have made the process difficult and rigorous, which may deter many individuals from completing an application.¹⁹⁵ Applications have steadily dropped since the 1980s.¹⁹⁶ In the 1980s, 522 applicants went before the Board.¹⁹⁷ From 1990 to 1999, the Board heard applications from 365 individuals.¹⁹⁸ From 2000 to 2010, the Board only heard 224 applications.¹⁹⁹ This is a fifty-seven percent decrease from the 1980s.²⁰⁰

To apply for a pardon, an applicant must fill out a lengthy application.²⁰¹ The applicant must describe, in detail, their conviction, their

clemency issues when in 1986, the Massachusetts Department of Correction granted Willie Horton a furlough from prison. *Id.* Horton was in prison for killing a gas station attendant during a robbery. *Id.* When Horton's furlough was over, he did not return to prison and subsequently raped a woman at gunpoint and beat her fiancé. *Id.* This brought to the attention of many the potential dangers of releasing violent offenders from prison. *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Application for Pardon Extraordinary*, MINN. BD. OF PARDONS, https://mn.gov/doc/assets/APPLICATION-PARDON%20EXTRAORDINARY_tcm1089-361195.pdf [https://perma.cc/ARD6-ZR2B].

¹⁹⁵ Mannix & Bierschbach, *supra* note 32.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Minn. Bd. of Pardons, *supra* note 194.

previous applications for pardons, and their criminal history.²⁰² If an applicant fails to disclose any portion of their criminal history, the Board of Pardons may view this as a failure to disclose an applicant's criminal record.²⁰³ The applicant then must detail their current and past employment and education.²⁰⁴ In addition, the applicant must detail all of the steps they have taken to improve themselves since their conviction.²⁰⁵ This may include community service, volunteer activities, support groups, and service to family members.²⁰⁶ The applicant must also explain to the Board why they deserve a pardon and what a pardon would help them accomplish.²⁰⁷ Applicants should also arrange witnesses to speak on their behalf as well as up to three letters of recommendation.²⁰⁸

Once submitted, the application will go through a rigorous background check to ensure that the information on the application is correct.²⁰⁹ The Commissioner of Corrections will reject all applications that are not eligible according to the criteria.²¹⁰ The information in the application is checked against other records such as "records from prison, probation or supervised release, courts, and driving records."²¹¹ The Bureau of Criminal Apprehension ("BCA") and Federal Bureau of Investigation ("FBI") will then verify that the applicant has been crime-free.²¹² The Department of Corrections will also publish notice in a newspaper in the county the applicant was convicted, indicating the applicant's crime, conviction date, and that the applicant is now seeking a pardon extraordinary.²¹³

This process is intimidating and difficult for applicants. Those that qualify may not even know how to begin the process without the assistance of an attorney.²¹⁴ Individuals who qualify for a pardon extraordinary often do not even know the process exists.²¹⁵ Governor Tim Walz found that the pardon process was in serious need of reform when at his first Board of

²⁰² *Id.*

²⁰³ *Id.* Applicants must include all convictions they have received since their release. *Id.* This includes even misdemeanor traffic convictions. *Id.* Additionally, while the Board of Pardons only grants pardons for convictions that occur in Minnesota, applicants must include all convictions in other state or countries and all violations of condition of release (including supervised release, conditional release, and parole) in their application to the Board. *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Pardon Board: Application Process*, MINN. DEP'T. CORR., <https://mn.gov/doc/about/pardon-board/application-process/> [https://perma.cc/PP9H-94RT].

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Montemayor, *supra* note 145.

²¹⁵ *Id.*

Pardons hearing, he and his staff concluded that the way convicts learn about eligibility and apply for pardons is “random.”²¹⁶

For many, the strict application requirements and the lack of information for applicants are primary issues that plague the pardoning process.²¹⁷ In addition to this, I argue that the prudential and constitutional issues accompanying the unique structure of the Minnesota Board of Pardons are also largely to blame.

*B. The Constitutional Issues with Minnesota’s Pardoning System*²¹⁸

The power to grant pardons in Minnesota is established by the Minnesota Constitution.²¹⁹ Article V, section 7 of the Minnesota Constitution establishes a Board of Pardons consisting of the governor, attorney general, and chief justice of the Minnesota Supreme Court.²²⁰ The Minnesota Constitution states that “[t]he governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the state except in cases of impeachment.”²²¹ This process is further regulated by Minnesota Statutes section 638.02, which says that pardons cannot be granted unless there is “a unanimous vote of the board duly convened.”²²² This, in effect, gives each member of the Board absolute veto power over every pardon application.²²³ The structure of the Board and the unanimous vote requirement create constitutional issues that burden our pardoning system.

By requiring a unanimous vote by the Board of Pardons to grant a pardon, section 638.02 violates the separation of powers among the branches of the government required by the Minnesota Constitution.²²⁴ Separation of powers among the three branches of the Minnesota government is an essential part of our governing system. Article III, section 1 of the Minnesota Constitution states that “[t]he powers of government shall be divided into three distinct departments: legislative, executive and judicial.”²²⁵ Each branch of Minnesota’s government is separate and

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ In this paper, constitutional issues with the Minnesota Board of Pardons refers to issues with the Minnesota Constitution, not the United States Constitution.

²¹⁹ MINN. CONST. art. V, § 7.

²²⁰ *Id.*

²²¹ *Id.*

²²² MINN. STAT. § 638.02, subdiv. 1 (2020).

²²³ *See id.* By requiring a unanimous vote, each member of the Board has the power to unilaterally reject an applicant’s application. *Id.* Even if a majority of the Board agrees to grant a pardon, one vote against the applicant dismisses the application. *See id.*

²²⁴ *See* MINN. STAT. § 638.02 (2020); *see also* MINN. CONST. art. III, § 1.

²²⁵ MINN. CONST. art. III, § 1.

independent of the other branches.²²⁶ No single department can exert control over any other department in the exercise of its official duties prescribed by the Minnesota Constitution.²²⁷

Furthermore, the Minnesota Legislature cannot change the form of government created by the Minnesota Constitution if it would destroy the independence of any department or allow one department to control another department's exercise of its powers.²²⁸ Unlike the United States Constitution, separation of powers is not only a principle that guides the structure of the Minnesota Constitution, it is expressly provided for within the Minnesota Constitution.²²⁹ Article III, section 1, explicitly requires that "[n]o 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."²³⁰

Additionally, the pardon power has traditionally belonged to the Executive Department. The pardon power is listed under article V of the Minnesota Constitution, "the Executive Department."²³¹ This article of the Minnesota Constitution lists all the powers of the governor, lieutenant governor, and executive officers.²³² The only section of article V of the Minnesota Constitution that grants power to another branch of the government is section 7, conferring pardon power upon the Board of Pardons.²³³

Historically, the pardon power in Minnesota was solely vested in the governor.²³⁴ This power was taken away in 1897²³⁵ through a legislatively referred amendment to the Minnesota Constitution.²³⁶ A legislatively

²²⁶ *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 339-340, 229 N.W. 313, 314 (Minn. 1930) ("The three departments of state government, the legislative, executive, and judicial, are independent of each other. Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion.").

²²⁷ *Id.* Separation of powers is not necessarily absolute division of governmental functions. *See Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999) ("The separation of powers doctrine is based on the principle that when the government's power is concentrated in one of its branches, tyranny and corruption will result.").

²²⁸ *State ex rel. Birkeland*, 179 Minn. at 340, 229 N.W. at 314.

²²⁹ *See* MINN. CONST. art. III, § 1.

²³⁰ *Id.*

²³¹ *See id.* at art. V.

²³² *Id.*

²³³ *Id.* at § 7.

²³⁴ MINN. CONST. of 1857 art. V, § 4. The 1857 Minnesota Constitution provided that the "governor shall have power to grant reprieves and pardons after convictions against the State." *Id.* This vested the pardoning power solely in the hands of the governor. *See id.*

²³⁵ 1895 Minn. Laws ch. 2, §1 (codified at MINN. CONST. of 1897 art. V, § 4).

²³⁶ *State Constitutional Amendments Considered*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.mn.gov/lrl/mngov/constitutionalamendments> [https://perma.cc/KL6N-54BB].

referred constitutional amendment is a referendum that appears on a state's ballot as a ballot measure after the legislature has proposed a constitutional amendment and passed a bill to put the amendment before the voters of the state.²³⁷ The Minnesota Legislature proposed to take away the sole pardoning power from the governor through one of these referendums.²³⁸ The amendment was intended to take the sole pardon power away from the governor by giving the governor pardon power only "in conjunction with the board of pardons."²³⁹ Out of 337,229 voters, 130,354 were in favor of the amendment, and 45,097 were opposed.²⁴⁰ With this vote, the Minnesota Constitution was amended, and the governor no longer possessed sole pardoning power.²⁴¹

This amendment materially altered the pardon power under the Minnesota Constitution by conferring a power that was historically reserved for the Executive Department upon the Board of Pardons.²⁴² Pardoning power has traditionally been considered an executive function. Despite the Board of Pardons wielding pardoning power since 1897, pardoning power has continued to be considered an executive function in Minnesota. In 1949, the Minnesota Supreme Court recognized that pardons are an executive function.²⁴³ In *State v. Meyer*, the Minnesota Supreme Court found that "a pardon is [an] exercise of executive clemency."²⁴⁴ Not only is pardoning power traditionally considered an executive function in Minnesota, but it is also recognized throughout the country as a power typically belonging to the executive.

In 1833, Chief Justice John Marshall described pardons as "an act of grace, proceeding from the power intrusted [sic] with the execution of the laws."²⁴⁵ In *Ohio Adult Parole Authority v. Woodard*, the Supreme Court

²³⁷ *Legislatively Referred Constitutional Amendment*, BALLOTPEDIA, https://ballotpedia.org/Legislatively_referred_constitutional_amendment [https://perma.cc/H3B7-KPM8].

A legislatively referred constitutional amendment is a limited form of direct democracy in comparison with an initiated constitutional amendment. *Id.* With an initiated constitutional amendment, the voters propose the amendment and approve it. *Id.* In this case, the voters did not propose the amendment to the Minnesota Constitution, the Minnesota Legislature did. *See* MINN. LEGIS. REFERENCE LIBR., *supra* note 236.

²³⁸ 1895 Minn. Laws ch. 2, §1 (codified at MINN. CONST. of 1897 art. V, § 4).

²³⁹ *Id.*

²⁴⁰ Minn. Legis. Reference Libr., *supra* note 236.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *State v. Meyer*, 228 Minn. 286, 301, 37 N.W.2d 3, 13 (Minn. 1949) (finding that "laws vesting in administrative boards the authority to determine how a convict should be handled after conviction interfere with the pardoning power vested in the executive or a pardon board most frequently stems from the failure to distinguish between a pardon or reprieve and a parole or probation.").

²⁴⁴ *Id.*

²⁴⁵ *United States v. Wilson*, 32 U.S. 150, 160 (1833) ("The power of pardon, in criminal cases,

stated that “the clemency and pardon powers are committed, as is our tradition, to the authority of the executive.”²⁴⁶ In *Connecticut Board of Pardons v. Dumschat*, the Court held that “pardon and commutation decisions have not traditionally been the business of courts.”²⁴⁷ Despite the continued acknowledgment that pardons are traditionally an executive function and not a function of the judicial branch, the Minnesota Board of Pardons involves the judicial branch by making the head of the judicial branch a member of the board with absolute veto power.²⁴⁸ Additionally, the text of the Minnesota Constitution vests the pardoning power in the governor “in conjunction with” the Board of Pardons.²⁴⁹ This implies that the power is still vested with the governor but adds a requirement that the governor must consult with the other members of the Board.²⁵⁰ Minnesota Statutes section 638.02 is inconsistent with the language of the Minnesota Constitution by turning a mere consultation with the Board into a requirement for a unanimous vote.²⁵¹ That unanimous vote in effect gives both the attorney general and the chief justice absolute veto power.²⁵² This is inconsistent with the text of the Minnesota Constitution by giving the other members of the Board equal footing with the governor.²⁵³ This was Judge Laura Nelson’s conclusion in her ruling in Amreya Shefa’s lawsuit against the Board of Pardons.²⁵⁴

Ruling in favor of Shefa and Governor Walz’s challenges to the constitutionality of the Board of Pardons, Judge Laura Nelson found that because Minnesota Statutes section 638.01 and section 638.02, subdivision 1 do not give effect to the language “the Governor in conjunction with,” these statutes are unconstitutional.²⁵⁵ Judge Nelson found that the plain language of article V, section 7, names the governor “separate and apart from the Board of Pardons, of which he is a member.”²⁵⁶ Based on this plain language, and applying the canon against surplusage, Judge Nelson agreed that the Minnesota Constitution confers some pardon power upon the

has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance.”).

²⁴⁶ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998).

²⁴⁷ *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

²⁴⁸ See MINN. CONST. art. V, § 7; see also MINN. STAT. § 638.02 (2020).

²⁴⁹ MINN. CONST. art. V, § 7.

²⁵⁰ Mark Osler, *A New Pardons Process Would Nix Drama, Meet Constitutional Standard*, STAR TRIB. (Minneapolis) (Oct. 11, 2019), <https://www.startribune.com/a-new-pardons-process-would-nix-drama-meet-constitutional-standard/562859252/> [https://perma.cc/2FJY-SRLG].

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 3440678 (Minn. Dist. Ct. July 2, 2021).

²⁵⁵ *Id.* at *6.

²⁵⁶ *Id.*

governor separate from the Board of Pardons.²⁵⁷ This makes the second sentence of Minnesota Statutes section 638.01 and Minnesota Statutes section 638.02, subdivision 1, which give pardon power to the Board of Pardons alone, unconstitutional.²⁵⁸ The Minnesota Supreme Court rejected this interpretation, holding that both statutes that govern the Board of Pardons are constitutional.²⁵⁹

Furthermore, if the Minnesota Legislature intended for the Minnesota Constitution to require a unanimous vote by the Board, the Minnesota Constitution would likely have been amended to require the “advice and consent” of the other board members.²⁶⁰ This is a term used at both the federal and state level in constitutions when drafters intend for there to be consultation with a secondary party over a decision.²⁶¹ If the lawmakers wanted the governor to receive consent from the attorney general and the chief justice on the granting of pardons, then the Minnesota Constitution would reflect that.²⁶² However, the drafters did not do that, implying that the power is still vested in the governor as the head of the executive department.²⁶³

²⁵⁷ *Id.* The canon against surplusage is a canon of construction that favors “giving each word or phrase in a statute a distinct, not an identical, meaning.” *State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017).

²⁵⁸ *Shefa*, 2021 WL 3440678 at *6.

²⁵⁹ *Shefa v. Ellison*, 964 N.W.2d 157 (Minn. 2021). At oral arguments Justice G. Barry Anderson expressed skepticism about this argument: “If the Legislature or in the constitutional amendment, the intention had been that the governor’s vote is indispensable it would have said it in the constitutional amendment or said it in the statute,” Justice Anderson said. “It doesn’t say it in either place. We have to get there by implication.” Bakst, *supra* note 120.

²⁶⁰ *Thonesavanh*, 904 N.W.2d at 437. This is one of the arguments *Shefa* and Governor Walz advanced in their case. *See Shefa* 2021 WL 3440678, at *4. *Shefa* and Governor Walz further argued that the correct interpretation of article V, section 7 of the Minnesota Constitution would require a pardon to be effective if the governor and one other member of the Board voted in favor of the pardon. *Id.* Judge Nelson refused to address whether this argument was correct, stating that she did not “have the authority to determine how pardons should be granted or the voting procedure amongst those with pardon power.” *Id.*

²⁶¹ *Shefa*, 2021 WL 3440678 at *4.

²⁶² *Id.*

²⁶³ *Id.* While the argument about the interpretation of the Board of Pardons clause has merit, one issue with this argument is that pardoning power was intentionally taken away from the governor in 1897 through a legislatively referred constitutional amendment referendum. 1895 Minn. Laws ch. 2, §1 (codified at MINN. CONST. of 1897 art. V, § 4). Critics of the current interpretation of the power vested to the Board of Pardons claim that the unanimous vote requirement oversteps the “in conjunction with” requirement of the Minnesota Constitution by denying the governor their constitutionally conferred power to pardon. MINN. CONST. art. V, § 7. This argument, however, ignores that the pardoning power was intentionally taken from the governor through an amendment to the Minnesota Constitution. *See* MINN. LEGIS. REFERENCE LIBR., *supra* note 236. Article V, section 7 of the Minnesota Constitution states that the Board’s “powers and duties shall be defined and regulated by law.” MINN. CONST. art 5, § 7. This expressly states that the Board is subject to statutory regulations and limitations. *Id.*

C. Prudential Issues with the Board of Pardons

In addition to the ways in which the current pardoning system is inconsistent with the text and structure of the Minnesota Constitution, there are also prudential considerations. While constitutional arguments contend that the structure of the Board of Pardons and the unanimous vote requirement under Minnesota Statutes section 638.02 violate the Minnesota Constitution, prudential arguments assert policy considerations. The argument here is that the current structure of the Board of Pardons, which puts all grants of clemency in the hands of the chief executive, attorney general, and the chief supreme court justice, is unwise policy.

1. It Is Not Wise to Vest All Pardons in the Hands of the Top Officials in Minnesota State Government.

The Minnesota Constitution vests pardoning power in three of the most powerful individuals in the state of Minnesota: the governor, attorney general, and chief justice of the Minnesota Supreme Court.²⁶⁴ Leaving this process to three of the busiest people in Minnesota creates a “bottleneck problem” that slows the process for anyone seeking a pardon.²⁶⁵ The Board of Pardons is one of the many powerful jobs these officials are tasked with.²⁶⁶ Pardon applications are heard infrequently—only two times a year by the governor, attorney general, and chief justice.²⁶⁷ These three officials have little time to devote to granting pardons.²⁶⁸ Because of the limited amount of time the Board has, only a few cases can be heard every year.²⁶⁹ Between

²⁶⁴ MINN. CONST. art. V, § 7.

²⁶⁵ Montemayor, *supra* note 145 (quoting DFL State Representative from Minneapolis, Jamie Long).

²⁶⁶ Under the Minnesota Constitution, the governor is the head of the executive branch in Minnesota. *See* MINN. CONST. art. V, § 3 (“[The governor] is the commander-in-chief of the military and naval forces and may call them out to execute the laws, suppress insurrection and repel invasion.”). The governor is also tasked with appointing notaries and other officers. *Id.* The governor appoints commissioners and fills vacancies that occur in the offices of secretary of state, state auditor, attorney general, and other state and district officers. *Id.* “The attorney general is the chief legal officer of the State of Minnesota.” *About Our Office*, THE OFF. OF MINN. ATT’Y GEN. KEITH ELLISON, <https://www.ag.state.mn.us/office/> [<https://perma.cc/37YY-95MW>]. The Attorney General’s Office provides legal representation to state agencies, boards, and commissions and represents the State of Minnesota in state and federal court and administrative hearings. *Id.* The chief justice of the Minnesota Supreme Court is the head of the highest court in Minnesota. *See generally* MINN. CONST. art. VI, § 1. The Minnesota Supreme Court is tasked with hearing appeals as well as functioning as the rule-making body for all of Minnesota’s state courts. *Minnesota Supreme Court*, MINN. JUD. BRANCH, <https://mncourts.gov/SupremeCourt.aspx> [<https://perma.cc/MMJ5-23NQ>]. The Minnesota Supreme Court is also responsible for governing the practice of law in Minnesota. *Id.*

²⁶⁷ *Id.*

²⁶⁸ Osler, *supra* note 250.

²⁶⁹ *Id.*

fifteen and thirty cases can be heard each session, resulting in only about sixty cases being heard yearly.²⁷⁰ Because of this, many applications are denied before they even reach the Board.²⁷¹

Additionally, placing the pardon power exclusively in the hands of such powerful individuals creates a stressful and highly publicized affair for both pardon applicants and victims of crime. All pardon applicants are required to appear before the Board of Pardons at one of the biannual meetings.²⁷² In addition, the victims of the applicant's crimes are often also asked to appear at the meeting.²⁷³ This makes for a traumatic encounter for all involved.²⁷⁴ In June of 2019, this was apparent when Thomas Ondov, convicted of raping his niece in 1990, appeared before the Board.²⁷⁵ Ondov's victim was asked to testify before the Board.²⁷⁶ She told the Board, "There is no pardon for me. That can never be erased."²⁷⁷ She went on to say, "I can't erase it and I don't think it should be erased for the person who's responsible for causing me and my entire family so much harm and pain."²⁷⁸ After taking this testimony, the Board unanimously rejected Ondov's pardon request.²⁷⁹ Not only are pardon applicants forced to relive their crimes in front of three of the most powerful individuals in Minnesota, so are the victims.²⁸⁰

Additionally, the Board members likely contemplate their public image when hearing applications and testimony.²⁸¹ During Ondov's case, Attorney General Keith Ellison commented, "[t]he offense is sort of what really has me hung up, I'm really worried about what signal we might send to victims and to the community at large."²⁸² The public perception of these three officials granting pardons to offenders, particularly violent offenders, will continue to restrict the Board of Pardons.²⁸³ Perhaps that accountability is a good thing. Some may argue that offenders such as Ondov have

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Dana Ferguson, 'There Is No Pardon for Me,' *Woman Tells Tim Walz, Keith Ellison and Lorie Gildea. They Turned Down Her Rapist's Pardon Request*, ST. PAUL PIONEER PRESS (Minn.) (June 25, 2019), <https://www.twincities.com/2019/06/25/there-is-no-pardon-for-me-woman-tells-tim-walz-keith-ellison-and-lorie-gildea-they-turned-down-her-rapists-pardon-request/> [https://perma.cc/4K7R-385P].

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* Ondov gave his victim drugs and alcohol without her knowledge, and he proceeded to kiss, touch and rape her. *Id.* He was convicted of first degree criminal sexual misconduct in 1991 and sentenced to 86 months in prison. *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

committed such violent crimes that they do not deserve mercy from these three officials. However, it remains troubling that public perception may be weighing heavily on the members of the Board when they hear applications and testimony during this process. This, in addition to the busy schedules of all three members of the Board, makes it clear that this job should not be left to three of the highest-ranking officials in Minnesota's government.

2. The Chief Justice of the Minnesota Supreme Court Should Not Sit on the Board of Pardons.

Perhaps the most troubling issue with the Minnesota Board of Pardons is that the chief justice of the Minnesota Supreme Court is a member of the Board and wields absolute veto power.²⁸⁴ Serving in the capacity of their official roles, each member of the Board brings a different insight to the proceedings.²⁸⁵ There is no doubt that acting in the official capacity as the head of the judiciary, the chief justice brings a particular mindset and framework to the proceedings.

Some may argue that this brings a beneficial separation of powers framework to the Board of Pardons. Current Chief Justice of the Minnesota Supreme Court, Lori Gildea, remarked that "I think the pardon board in the sense that there are three of us working together, and we can be a check and balance on each other and hopefully a help to each other . . . is a good thing."²⁸⁶ Despite Chief Justice Gildea's beliefs, having a member of the judicial branch on the Board of Pardons may do more harm than good.

Typically, pardons are a grant of executive clemency.²⁸⁷ Most commonly, on the state level, governors are given the ultimate authority to make clemency decisions because they are the head of the executive branch within the states.²⁸⁸ In this kind of pardon structure, the governor is usually assisted in the pardoning process by an administrative agency.²⁸⁹ Some states employ a hybrid system where the clemency power is only exercised by a governor with approval from an administrative board.²⁹⁰ A few states grant clemency authority to an independent board, with the members being appointed by the governor.²⁹¹ It is entirely unique and unusual in Minnesota to have the head of the judiciary sit on the Board of Pardons.²⁹² If this is wise policy, as Chief Justice Gildea believes, it seems as though at least some

²⁸⁴ See MINN. CONST. art. V, § 7; MINN. STAT. § 638.02, subdiv. 1 (2020).

²⁸⁵ Osler, *supra* note 250.

²⁸⁶ Montemayor, *supra* note 145.

²⁸⁷ LOVE, *supra* note 126, at 23.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 28–29.

²⁹¹ *Id.* at 23–26.

²⁹² See generally *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> [https://perma.cc/J38B-D9RE].

other states would have adopted a similar approach. And yet, Minnesota is the only state to give its chief justice absolute veto power over grants of clemency.²⁹³

It is wise public policy to exclude members of the judicial branch from the pardoning process. There are key advantages to vesting the pardon power within the hands of the executive branch.²⁹⁴ First, “undivided responsibility placed in the hands of the executive encourages a sense of care and scrupulousness in making clemency decisions that might be lost if the responsibility were shared with the courts.”²⁹⁵ Second, involving a member of the judicial branch is inconsistent with the purpose of grants of clemency.²⁹⁶ Chief Justice Rehnquist commented on this in *Ohio Adult Parole Authority v. Woodard*.²⁹⁷ He remarked that the pardon power is intended “to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.”²⁹⁸

The governor and the chief justice go into pardon proceedings with different considerations.²⁹⁹ The key to the rule of law for judges is to apply the law evenly and fairly.³⁰⁰ Judges must make legal proceedings clear and transparent and balance the rights of all individuals.³⁰¹ While fair application of the law to the facts is an important hallmark of judicial decision-making, pardons are supposed to be an executive act of mercy by the government.³⁰² Clemency is about forgiveness and grace.³⁰³ It is an exception to the strict enforcement of criminal laws.³⁰⁴ When granting a pardon, more than just the law and the facts of the crime must be considered.³⁰⁵ Clemency is about looking into the defendant’s circumstances and considering whether they deserve to be legally and morally released from the burdens imposed because of their crimes.³⁰⁶ A judge, particularly the head of the judiciary, should not take part in this process.

This issue is particularly relevant when looking at Amreya Shefa’s case.

²⁹³ *Id.*

²⁹⁴ Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 704 (2012).

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 273 (1998).

²⁹⁸ *Id.* at 280–81.

²⁹⁹ Osler, *supra* note 250.

³⁰⁰ *Judges Explain Rule of Law, Why It Matters*, U.S. CTS. (Aug. 8, 2019), <https://www.uscourts.gov/news/2019/08/08/judges-explain-rule-law-why-it-matters#:~:text=Key%20to%20the%20rule%20of,against%20the%20safety%20of%20others> [https://perma.cc/5ESV-DSXV].

³⁰¹ *Id.*

³⁰² Morison, *supra* note 142, at 4.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

Both the Governor and the Attorney General voted in favor of her pardon.³⁰⁷ Governor Walz and Attorney General Ellison heard her story of abuse and were compelled to take this into account when considering whether to forgive Shefa for her crime.³⁰⁸ It was Chief Justice Gildea who was responsible for the denial of Shefa's pardon.³⁰⁹ Chief Justice Gildea said she could not support the pardon because "[t]he crime caused the death of a person, so it's on that basis that I don't support Ms. Shefa's pardon application."³¹⁰ Chief Justice Gildea refused the pardon because Shefa killed her husband.³¹¹ While Chief Justice Gildea's judicial decision-making process makes sense in the context of a court case, different factors must be considered when determining whether to grant an act of grace, such as a pardon. Amreya Shefa committed manslaughter in the heat of passion, and it was not self-defense.³¹² But because Shefa's crime resulted in the death of her husband, Chief Justice Gildea did not fully consider the physical abuse Shefa endured at the hands of her husband for years, the time she spent in ICE custody after she served her sentence, and the terrifying ramifications if she were deported back to Ethiopia.³¹³ Factors like these should be looked at when granting a pardon. A pardon is about mercy and forgiveness for the defendant's crimes, and the chief justice, acting in their official capacity on the Board of Pardons, is not a good fit for this role. It is unwise to allow the head of the judiciary to serve such an important role in grants of clemency in Minnesota.

VI. THE SOLUTION TO MINNESOTA'S PARDON PROBLEM

With all of these issues plaguing the Minnesota Board of Pardons, it is important to start working towards a solution. As Attorney General Ellison commented in 2019, "I think we've got some work to do if we're going to consider ourselves a state that is enlightened and believes in creating hope for people who have made serious mistakes."³¹⁴ In 2019, State Representative Jamie Long from Minneapolis sponsored a bill to reform the current pardoning system in Minnesota.³¹⁵ The bill would have established a Clemency Review Commission in Minnesota.³¹⁶

The commission would consist of nine members, and each would

³⁰⁷ Compl. at 2, *Shefa v. Ellison*, No. 52-CV-20-3090 (Minn. Dist. Ct. July 17, 2020).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Hoffland, *supra* note 91.

³¹¹ See *id.*

³¹² *State v. Amreya Rahmeto Shefa*, No. 27-CR-13-39734, 2015 WL 1279762, at *8 (Minn. Dist. Ct. Jan. 30, 2015).

³¹³ Sepic, *supra* note 57.

³¹⁴ Montemayor, *supra* note 145.

³¹⁵ *Id.*

³¹⁶ *Id.* The Clemency Review Commission is modeled after the pardoning system that South Dakota recently implemented.

serve a four-year term.³¹⁷ The commission would meet four times every year.³¹⁸ The governor, attorney general, and chief justice would each appoint three members and be responsible for replacing members at the end of their term.³¹⁹ The commission would review applications for pardons and commutations before they are considered by the Board of Pardons.³²⁰ The commission would then make a recommendation for each eligible applicant on whether they should be granted a pardon or not.³²¹ The commission would hear from victims and law enforcement at their meetings which would then assist the commission in making a recommendation to the Board.³²² The commission would make a positive or negative recommendation by majority vote for each petition submitted, with the vote of each commission member reported to the Board of Pardons in writing.³²³ Finally, every pardon would be granted by a majority vote of the Board duly convened, and the governor would be required to be within that majority.³²⁴ This would eliminate the unanimous vote requirement, therefore eliminating the absolute veto power of both the attorney general and the chief justice of the Minnesota Supreme Court.³²⁵

Implementing a Clemency Review Commission would solve a number of the problems that burden the current pardoning system in Minnesota. Unfortunately, the legislative session adjourned prior to the passage of the bill, so Minnesota has yet to implement this reform.³²⁶ Legislators must continue to push for this change to the Board of Pardons. A Clemency Review Commission and the accompanying legal changes to the Board of Pardons would solve many issues that weigh down the current pardoning system. This would remedy the constitutional concerns about separation of powers by utilizing a majority vote by the Board, instead of a unanimous one, to grant pardons.³²⁷ It would remedy the prudential issues by putting a large portion of the decision-making in the hands of the designated Clemency Review Commission.³²⁸ Further, it would relieve some of the procedural strain on the Board by holding four meetings a year, instead of two, as well as by putting the application process into the hands of the

³¹⁷ H.F. 2806, 91st Leg., Reg. Sess. (Minn. 2019).

³¹⁸ *Id.* The Board would continue to meet two times per year. *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* With the commission's recommendations, the commission would provide any statement made by the victim of the crime or the law enforcement agency about the applicant's crime. *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

commission prior to reaching the Board.³²⁹ All of these features would improve the pardoning process in Minnesota.

VII. CONCLUSION

Minnesota's pardon system is in desperate need of reform and rehabilitation. With steadily declining numbers for both applications and grants of clemency, it is clear that this process is becoming more and more difficult for applicants to overcome.³³⁰ This is largely due to the inefficiencies caused by procedural, constitutional, and prudential issues that strain the Board of Pardons.³³¹

Procedurally, applicants face a difficult, confusing, and largely inaccessible process that limits the number of pardons that can be granted in a year.³³² Increased regulation of this process has led to inefficiencies.³³³ Many of these regulations stem from a declining faith in rehabilitation and a push for tough-on-crime policies by the Minnesota Legislature.³³⁴

The constitutional issues stem from the Minnesota Legislature taking the power of clemency away from Minnesota's Executive Department through both the legislatively-referred constitutional amendment and the unanimous vote statute.³³⁵ Additionally, not only are convicted persons in Minnesota subject to the will of the governor, but they must also face the attorney general and chief justice of the Minnesota Supreme Court when they apply for a pardon.³³⁶ Furthermore, the unanimous vote requirement is inconsistent with the text and structure of the Minnesota Constitution.³³⁷

Finally, Minnesota's current pardon process is riddled with prudential issues.³³⁸ It is unwise to give complete responsibility for this power to the state's three highest ranking officials.³³⁹ Not only are these individuals extraordinarily busy, but as they act in their official capacities on the Board, it is clear that they will consider the image they project in their official role when they decide grants of clemency.³⁴⁰

It is even more unwise to allow the chief justice of the Minnesota Supreme Court, the head of the judicial branch, to take part in this process.³⁴¹ The judicial branch should stay out of this process entirely; its

³²⁹ *Id.*

³³⁰ *See supra* Part V.A.

³³¹ *See supra* Part V.

³³² *See supra* Part V.A.

³³³ *See supra* Part V.A.

³³⁴ *See supra* Part V.A.

³³⁵ *See supra* Part V.B.

³³⁶ *See supra* Part V.B.

³³⁷ *See supra* Part V.B.

³³⁸ *See supra* Part V.C.

³³⁹ *See supra* Part V.C.

³⁴⁰ *See supra* Part V.C.

³⁴¹ *See supra* Part V.C.

role has been completed after the conviction was served.³⁴² Clemency is intended to be an executive act of mercy.³⁴³ Those that grant pardons must consider not just the law and the facts of the crime, but also additional circumstances.³⁴⁴ Acting in their official capacity, the chief justice of the Minnesota Supreme Court brings a judicial lens that does not belong in the pardoning process.³⁴⁵

There is a solution to these problems.³⁴⁶ A Clemency Review Commission, as proposed to the Minnesota Legislature in 2019, would remedy many of these issues.³⁴⁷ There needs to be an increased effort to pass this legislation.³⁴⁸ Those deserving of a pardon should not be held back by procedural, constitutional, and prudential inefficiencies. As Alexander Hamilton stated in Federalist No. 74, “[h]umanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”³⁴⁹ In both the interest of public policy and in the humanity of individuals convicted, the state of Minnesota must reform its pardoning process.

³⁴² See *supra* Part V.C.

³⁴³ See *supra* Part V.C.

³⁴⁴ See *supra* Part V.C.

³⁴⁵ See *supra* Part V.C.

³⁴⁶ See *supra* Part VI.

³⁴⁷ See *supra* Part VI.

³⁴⁸ See *supra* Part VI.

³⁴⁹ THE FEDERALIST NO. 74 (Alexander Hamilton).