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No. 21-0830

STATE OF MINNESOTA

IN SUPREME COURT

Amreya Rahmeto Shefa,

Respondent/Cross-Appellant,

vs.

Governor Timothy Walz, in his official capacity,

Respondent/Cross-Appellant,

and

Attorney General Keith Ellison, in his official capacity;
Chief Justice Lorie Gildea, in her official capacity,

Appellants/Cross-Respondents.

BRIEF OF APPELLANT/CROSS-RESPONDENT ATTORNEY GENERAL KEITH ELLISON, IN HIS OFFICIAL CAPACITY

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LEGAL ISSUES

Whether Minn. Const. art. V, § 7, which gives the Legislature discretion to determine the "powers and duties" of the Board of Pardons, authorizes the Legislature to require a unanimous vote by Board members to grant a pardon, or whether the 124-year-old unanimity requirement is unconstitutional.

District Court Decision: The district court held that the 124-year-old unanimity requirement, codified at Minnesota Statutes sections 638.01 and 638.02, subdivision 1, is unconstitutional.

Apposite Authorities:
Minn. Const. art. V, § 7
Minn. Stat. §§ 638.01-.02
State ex rel. Jaffa v. Crepeau, 184 N.W. 567 (Minn. 1921)
State ex rel. Gardner v. Holm, 62 N.W.2d 52 (Minn. 1954)
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STATEMENT OF THE CASE

Originally, the Minnesota Constitution granted the Governor plenary power to issue pardons. In 1896, the Constitution was amended to deprive the Governor of this plenary power and to vest power in a Board of Pardons. The express purpose of the 1896 amendment was "to deprive the governor of the power to alone grant pardons." The amendment achieves its purpose by requiring the Governor to act "in conjunction with" the Board. Minn. Const. art. V, § 7. The members of the Board are the Governor, the Attorney General, and the Chief Justice of the Minnesota Supreme Court.

The amendment vests the Legislature with the power to define and regulate the "powers and duties" of the Board. *Id.* In 1897, the Legislature passed a law providing that a pardon requires a "unanimous vote of the board." 1897 Minn. Laws ch. 23, §§ 1-2. That is, the Legislature required the Governor, the Attorney General, and the Chief Justice to vote in favor of a pardon for it to take effect. This unanimity requirement has been in place since 1897 and today is codified at Minnesota Statutes section 638.01 and section 638.02, subdivision 1.

Respondent/Cross-Appellant Amreya Rahmeto Shefa challenged the constitutionality of the unanimity requirement after her application for a pardon was denied. The Governor and the Attorney General voted in favor of a pardon; the Chief Justice voted against. Shefa sued all three Board members—Respondent/Cross-Appellant Governor Tim Walz, Appellant/Cross-Respondent Attorney General Keith Ellison, and Appellant/Cross-Respondent Chief Justice Lorie Gildea—in their official capacities. But the Governor agreed with Shefa that the unanimity requirement was unconstitutional, and

he retained separate counsel to join her claims for relief. All parties then moved for summary judgment on stipulated facts.

The district court declared that sections 638.01[1] and 638.02, subdivision 1, are unconstitutional because they give each member of the Board of Pardons equal voting power and do not recognize that the Governor has extra or separate pardon power. The district court did not enter any injunctive relief or detail a new process for the Board.

The district court got it wrong. The Legislature's unanimity requirement is consistent with the plain and unambiguous language of the Minnesota Constitution. The unanimity requirement is also consistent with the purpose of the 1896 amendment, the original understanding of the amendment's meaning, 124 years of settled practice in Minnesota, and legal precedent. Whether the unanimity requirement is wise policy—and whether it may lead to unjust results in specific cases—is not the question before this Court. The question for this Court is whether the Legislature's unanimity requirement violates the Minnesota Constitution. It does not.

STATEMENT OF FACTS

I. THE MINNESOTA CONSTITUTION WAS AMENDED IN 1896 TO TAKE AWAY THE GOVERNOR'S PLENARY PARDON POWER AND CREATE A BOARD OF PARDONS.

Constitutional disputes over the scope of the pardoning power have existed since the state's founding. In the debates from Minnesota's 1857 constitutional convention,

[1] The district court declared that the "second sentence" of section 638.01 was unconstitutional, but not the first sentence, which simply restates the membership of the Board. *See* Minn. Stat. § 638.01. Add. 2, ¶ 5. When this brief refers to the district court's decision regarding section 638.01, it refers to the portion of the statute deemed unconstitutional, unless otherwise noted.

some delegates were uneasy about granting the Governor plenary pardon power. One delegate stated: "This is a most dangerous power to vest in the hands of one man, and I hope some check will be placed upon it." *State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 62 (Minn. 1954) (citing Minnesota Constitutional Debates, Francis H. Smith, reporter, p. 379). Another observed that "the pardoning power is a power which has been as much abused as any connected with the Executive office." *Id.* (citing the Debates, p. 382).

These delegates lost the initial debate on pardon power. The original state constitution granted the Governor sole and plenary power over pardons: "And he shall have power to grant reprieves and pardons after conviction for offenses against the state." Minn. Const. art. V, § 4 (1857).

But the Governor's broad pardoning powers were short lived. In 1896, voters approved a constitutional amendment that altered the existing language to remove plenary pardon power from the Governor. The 1896 amendment vested the power in a Board of Pardons, consisting of the Governor, Attorney General, and Chief Justice:

> And he shall have power in conjunction with the board of pardons, of which the governor shall be ex-officio a member, and the other members of which shall consist of the attorney general of the state of Minnesota and the chief justice of the supreme court of the state of Minnesota, and whose powers and duties shall be defined and regulated by law, to grant reprieves and pardons after conviction for offenses against the state.[2]

[2] It appears that Chief Justice Charles Start was not pleased with his new, uncompensated duties on the Board of Pardons. *See Hillman v. Bd. of Comm'rs*, 86 N.W. 890, 891 (Minn. 1901) ("The chief justice of this court has had imposed upon him the duty of sitting upon the board of pardons, which requires the performance of onerous and burdensome duties, and yet no compensation has been provided therefor.")

1895 Minn. Laws. ch. 2, § 1 (codified at Minn. Const. art. V, § 4 (1897)). Voters approved the amendment by nearly a 4-to-1 margin. *See* Matt Gehring, *Minnesota Constitutional Amendments: History and Legal Principles*, Minn. House Research Department 61 (2013).

By statute, the Attorney General must provide a statement of purpose and effect for all constitutional amendments. Minn. Stat. § 3.21. The statement of purpose and effect for the 1896 amendment was "to deprive the governor of the power to alone grant pardons and reprieves, which he now enjoys, and to create a board of pardons, consisting of the governor, the attorney general and the chief justice of the supreme court."[3] Add. 15 (Doc. 36, ¶ 3, Ex. 1). The statement also provided: "The proposed amendment contemplates that its adoption will be followed by the enactment of a suitable law defining and regulating the powers and duties of such board of pardons in granting reprieves and pardons." *Id*

The constitutional debate over the pardon power did not end there. In the 1970s, a state commission studied whether and how to reform the constitution, including the pardon power provisions. The committee studying the executive branch recommended that "the board of pardons be deleted from the Minnesota Constitution and that the governor be given the sole power of pardon subject to procedures established by the Legislature."

[3] This statement reflected the goals of the author of the 1896 amendment, Dr. E.B. Zier, who reportedly observed in a debate leading up to the amendment's passage: "The Minnesota bill will make the governor, the chief justice, and the attorney of the state the board of pardons. It certainly is much better than having power lodged in the hands of one man, especially a man so busy as the governor." *Board of Pardons Discussed*, Minneapolis Tribune, July 3, 1895, at 3.

Minn. Const'l Study Comm'n, *Final Report and Committee Reports*, *Executive Branch Committee Report* 21-22 (1973). Ultimately, this recommendation was not enacted.

In 1974, as part of a general effort to simplify and clarify antiquated constitutional language, the section on the pardon power was altered to its current text:

> **Board of pardons.** The governor, the attorney general and the chief justice of the supreme court constitute a board of pardons. Its powers and duties shall be defined and regulated by law. The 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.

Minn. Const. art. V, § 7. This change in language from the original 1896 amendment was meant to improve the document's clarity but did not change its legal effect. *See City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 159 (Minn. 2017).

II. FOR THE PAST 124 YEARS, MINNESOTA LAW HAS REQUIRED A UNANIMOUS VOTE BY THE BOARD OF PARDONS.

In 1897, a few months after the 1896 amendment was passed, the Legislature enacted a law defining the Board's powers and establishing that a pardon requires a "unanimous vote of the board duly convened." 1897 Minn. Laws ch. 23, §§ 1-2. This unanimity requirement has existed since then. The powers and voting process for the Board are now codified in Minn. Stat. §§ 638.01 and 638.02, subd. 1 (2020).

Section 638.01 defines the Board's powers as follows: "The board may grant pardons and reprieves and commute the sentence of any person convicted of any offense against the laws of the state, in the manner and under the conditions and rules hereinafter proscribed, but not otherwise." Minn. Stat. § 638.01.

Section 638.02, subdivision 1, establishes the unanimity requirement: "Every pardon or commutation of sentence shall be in writing and shall have no force or effect unless granted by a unanimous vote of the board duly convened." Minn. Stat. § 638.02, subd. 1.

This past legislative session, legislators introduced bills that would have amended section 638.02 to establish that a pardon is effective when the Governor plus one other Board member—either the Attorney General or the Chief Justice—votes in favor. *See* H.F. 2584, 92nd Leg. (2021); S.F. 2487, 92nd Leg. (2021). The bills did not pass, and the unanimity requirement remains the law on the books.

III. THE DISTRICT COURT DECLARES THE 124-YEAR-OLD UNANIMITY REQUIREMENT UNCONSTITUTIONAL.

In 2014, Shefa, a citizen of Ethiopia and a lawful permanent resident of Minnesota, was convicted of manslaughter in the first-degree for killing her husband "in the heat of passion." Doc. 13, ¶¶ 1, 10 (citing Minn. Stat. § 609.20(1)); *see also State v. Shefa*, No. A15-0974, 2016 WL 3042908, at *2 (Minn. Ct. App. May 31, 2016). While she was in prison, Shefa was charged as removable from the United States. Doc. 13, ¶14. Shefa challenged her removal from the United States. *Id.* ¶¶ 15-23. She alleged that her former husband's family would kill her if she was removed to Ethiopia. *Id.* ¶ 16. Her immigration proceedings remain pending. *Id.* ¶ 22.

In 2018, Shefa applied to the Board for a pardon. Add. 04. She supported her application with testimony about the abuse that her late-husband had inflicted on her. Doc. 13, ¶ 29. The Board decided the merits of her application on June 12, 2020. Add. 04. The

Board denied her application because the vote was not unanimous. *Id.* The Governor and Attorney General voted in favor of a pardon; the Chief Justice voted against. *Id.*

In July 2020, Shefa sued all three Board members, in their official capacities, challenging the statutory requirement that a pardon requires an affirmative, unanimous vote by all members. *Id.* The Governor was named as defendant in the complaint, but he agreed with Shefa that the unanimity requirement was unconstitutional. *Id.* at 3. The Governor thus presented his own challenge to the statute through the litigation initiated by Shefa. *Id.*

All parties moved for summary judgment on stipulated facts. Docs. 13, 17, 19, 24. In addition to arguing that the statute is unconstitutional, Shefa sought an order requiring reconsideration of her pardon application. Doc. 18 at 4, 25-26. The Governor sought an order granting Shefa a pardon *nunc pro tunc*. Doc. 20 at 24.

On April 20, 2021, the district court issued an order declaring the unanimity requirement in section 638.01 and section 638.02, subdivision 1, unconstitutional. Doc. 50 at 12-13. The court reasoned that the statutes give each member of Board of Pardons equal voting power but, under the Minnesota Constitution, "the Governor has some pardon power or duty separate or apart from the Board of Pardons." *Id.* at 13. The district court did not enter any injunctive relief or detail a new process for the Board of Pardons. *Id.* at 14. The district court also declined the Governor's request to grant Shefa a pardon *nunc pro tunc*, as well as Shefa's request that the Governor reconsider her pardon application. *Id.*

On July 1, 2021, the district court issued an amended order. Add. 1-2. The court clarified that nothing in its order should be construed as prohibiting the Board from meeting, and that the Board's statutory and constitutional authority remained intact, except

to the extent the district court had determined that section 638.01 and section 638.02, subdivision 1, were unconstitutional. *Id.* The court entered final judgment shortly thereafter. Doc. 66.

The Chief Justice and the Attorney General appealed. The Chief Justice also filed a petition for accelerated review under Rule 118 in this Court. This Court granted review and ordered expedited briefing.

STANDARD OF REVIEW

Whether a statute is constitutional presents a question of law that this Court reviews de novo. *In re Welfare of M.L.M.*, 813 N.W.2d 26, 29 (Minn. 2012). The Court "presume[s] that Minnesota statutes are constitutional and will strike down a statute as unconstitutional only if absolutely necessary." *Id.* "The party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision." *Id.*

The Court's analysis starts "with the language of the constitutional provision in question to determine whether it is ambiguous." *Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005). If the language is unambiguous, "it is effective as written and we do not apply any other rules of construction." *Id.* If the language is ambiguous, then the Court "will consider other indicia of intent" and "seek, whenever reasonably possible, to resolve that ambiguity in a way that forwards the apparent purpose for which the provision was adopted." *Id.*; *see also State v. Khalil*, 956 N.W.2d 627, 640 n.10 (Minn. 2021) (if the text is unclear, courts consider the "purpose" and "policy issue to be remedied").

ARGUMENT

Under the plain text and purpose of the 1896 constitutional amendment, the Legislature's 1897 enactment of the unanimity requirement was a valid exercise of its constitutional discretion. The 1897 law also deserves great weight because it is contemporaneous evidence of the meaning of the constitutional amendment, and all relevant officeholders acquiesced to this understanding for well over a century. The district court's analysis finding the statutes unconstitutional is atextual, ahistorical, and unpersuasive.

I. THE 1897 LAW WAS A VALID EXERCISE OF THE LEGISLATIVE DISCRETION GRANTED BY THE 1896 CONSTITUTIONAL AMENDMENT.

The purpose of the 1896 constitutional amendment was "to deprive the governor of the power to alone grant pardons." Add. 15. The amendment achieves this by requiring the Governor to act "in conjunction with" the Board of Pardons. Minn. Const. art. V, § 7. The amendment does not spell out the precise division of power among the Governor and other Board members. Instead, the Minnesota Constitution leaves that task to the Legislature. The unanimity requirement is a valid exercise of the constitutional discretion vested in the Legislature.

A. The Governor Only Has Pardon Power "In Conjunction With" the Board.

The 1896 amendment must be understood against the historical background in which it was adopted. Before it was enacted, the Governor had plenary power to approve or reject pardon applications on his own, with no constitutional restrictions on how he could exercise that power. Minn. Const. art. V, § 4 (1857); *Moyer v. Cantieny*, 42 N.W. 1060,

1060 (Minn. 1889) ("The grounds upon which the constitutional power to pardon may be exercised are not defined in the constitution."). Since before the state's founding, there were concerns about vesting such unlimited discretion in one officeholder. *See supra* at 4. The 1896 amendment was designed to serve as a significant check on the Governor's power and a constitutional guarantee that the Governor alone cannot grant a pardon.

The text of the constitutional amendment accomplishes this check on executive power by requiring the Governor to act "in conjunction with" the other members of the Board of Pardons to grant a pardon. Minn. Const. art. V, § 7. The text states, in relevant part: "The 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." Minn. Const. art. V, § 7 (emphasis added).

The phrase "in conjunction" means "together" or "in combination with; together with." *See Conjunction*, *The New Oxford American Dictionary* (2d ed. 2001) (defining phrase "in conjunction"); *accord In Conjunction With*, *Merriam-Webster* 225 (11th ed. 2018). This is true now and was true at the time of the 1896 amendment. One of the leading dictionaries from the relevant time period defined "conjunction" as "a joining or meeting of individuals or distinct things; union; connection; combination; association." *Conjunction*, *The Century Dictionary*[4] (1895 ed.); *see also State v. Brooks*, 604 N.W.2d 345, 352-53 (Minn. 2000) (relying, in part, on historical dictionary definition); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 421-22 (2012)

[4] The 1895 edition of *The Century Dictionary* is archived, digitized, and available here: https://archive.org/details/centurydiction02whit/page/n8/mode/2up?q=conjunction.

(listing the 1895 edition of *The Century Dictionary* as one of "the most useful and authoritative" for the 1851-1900 time period).

Under the plain language of the constitutional text, the Governor only has power to grant pardons "in conjunction with"—that is, "together" or "in combination with"—the Board. He does not have independent pardon power.

This Court has implicitly recognized what is clear from the plain text of the constitutional amendment. In *Morgan v. State*, a post-conviction petitioner argued that the "public interest" warranted a reduction in his sentence. 384 N.W.2d 458, 461 (Minn. 1986). The Court rejected the argument because "he must direct his equitable argument to the State Board of Pardons. *That body alone* has the authority to reduce his sentence or to release him in the public interest." *Id.* at 461 (emphasis added). This holding aligns with the text of the constitutional amendment plainly vesting pardon power in the Board, with no independent, residual constitutional authority for the Governor.

B. The 1896 Amendment Made the Legislature Responsible for Defining and Regulating the Board's Powers.

While the Minnesota Constitution is clear that the Governor can only exercise pardon power "in conjunction with" the Board, it does not detail the precise power relationship among the Governor and the other Board members. The Constitution leaves that task to the Legislature.

The Minnesota Constitution states, in relevant part, that the Board's "powers and duties shall be defined and regulated by law." Minn. Const. art. V, § 7. The phrase "defined and regulated by law" means that "the powers and duties" of the Board of Pardons

are defined and regulated through legislative enactments. *See State ex rel. Gardner*, 62 N.W.2d at 58-59 (recognizing that the phrase "by law" in the Minnesota Constitution refers to the legislative process of enacting laws). To honor the text and purpose of the 1896 amendment, the Legislature had to enact a law that provided that the Governor could not grant a pardon alone and that other Board members had voting power to provide a check on the chief executive.

In 1897, the Legislature exercised its direction by enacting a law requiring that the Governor and both other Board members vote in favor of a pardon for it to have effect. *See* 1897 Minn. Laws ch. 23, §§ 1-2. The Legislature thus honored the purpose of the amendment by ensuring that the Governor cannot act alone to grant a pardon. And the Legislature honored the text of the Minnesota Constitution by ensuring that the Governor and the two other Board members must act in conjunction with each other.

C. The Minnesota Legislature Has Discretion to Require a Unanimous Vote by the Board of Pardons.

The Legislature's enactment carries a strong presumption of constitutionality. *See Wegan v. Village of Lexington*, 309 N.W.2d 273, 279 (Minn. 1981). Shefa and the Governor can only win if they can convince the Court that the 1896 constitutional amendment, while granting significant discretion to the Legislature, did not authorize the Legislature to require that the Governor must receive support from both other members of the Board to grant a pardon. There is no textual basis for that constrained reading of the Minnesota Constitution. The 1896 amendment provides that the Governor must act "in conjunction with" the Board, whose powers are set by the Legislature. The Legislature has

constitutionally set those powers by requiring that the Governor and both other Board members must vote for a pardon.

This Court has long recognized the Legislature's discretion in this area. Over a century ago, the Court considered a challenge to the constitutionality of the state parole board. *State ex rel. Jaffa v. Crepeau*, 184 N.W. 567 (Minn. 1921). One argument was that the board's authorizing statute allowed the board to grant what was essentially a pardon, which infringed on how the Minnesota Constitution vested pardon powers. *Id.* at 568. The Court rejected this argument by citing the constitutional provision giving the Legislature discretion to define and regulate pardon powers and concluding: "We think this provision permits the legislation here in question." *Id.* The same principle—that the Minnesota Constitution grants the Legislature significant discretion to set and regulate pardon powers by statute—supports the constitutionality of the statutes at issue here.

In short, the challenged statutes do not invade the Governor's constitutional pardon powers. The Legislature has the authority to set those powers, and the statutes are a valid exercise of that legislative authority.

II. THE ORIGINAL UNDERSTANDING OF THE 1896 AMENDMENT AND HISTORICAL PRACTICE SHOW THAT THE UNANIMITY REQUIREMENT IS CONSTITUTIONAL.

The Court need go no further than the plain language and purpose of the 1896 amendment to uphold the unanimity requirement as a valid exercise of legislative discretion. But even if the Court were to conclude that the Minnesota Constitution is ambiguous, other "indicia" of intent—such as the original understanding of the 1896

amendment and longstanding historical practice—show that the unanimity requirement is constitutional. *See Kahn*, 701 N.W.2d at 825.

A. The 1897 Law is Contemporaneous Evidence of the Original Understanding of the 1896 Amendment and Deserves Great Weight.

The 1897 law itself is relevant—and significant—evidence as to the proper interpretation and understanding of the 1896 amendment.

As a matter of original understanding, the only relevant evidence presented in this case is the legislators' vote to approve the unanimity requirement—and the governor's signature on that bill—a few months after the amendment was passed. Those early lawmakers and governor did not think the amendment precluded a unanimity requirement. Their actions enacting the law in 1897 shed significant light on the original understanding of the 1896 amendment. *See City of Golden Valley*, 899 N.W.2d at 160 n.9 (considering contemporaneous legislative enactments as evidence of framers' intent); *accord Printz v. United States*, 521 U.S. 898, 905 (1997) ("Early congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning.") (cleaned up).

Those early lawmakers' understanding of the constitutional amendment is entitled to great weight because they acted contemporaneously with the 1896 amendment. This Court has stressed that the "implementation" of a constitutional provision by the legislature is relevant to constitutional interpretation. *See Clark v. Pawlenty*, 755 N.W.2d 293, 306 (Minn. 2008) (internal quotation marks and citation omitted). In a similar vein, the United States Supreme Court "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and

framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [the Constitution's] provisions." *Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003) (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)).

Here, the Legislature voted in 1895 to put the constitutional amendment on the pardon power before the people. *See* 1895 Minn. Laws. ch. 2, § 1. In 1896, voters approved the amendment, and, in 1897, the Legislature enacted the statutes setting out the powers for the Board of Pardons. *See* 1897 Minn. Laws ch. 23, §§ 1-2. This 1897 law is a contemporaneous legislative exposition of the 1896 amendment. In addition, the governor endorsed the unanimity requirement by signing it into law, and all Board members at the time complied with the requirement with no objection to its constitutional validity. The 1897 law is thus significant—if not dispositive—evidence that "fixes the construction to be given" to the Constitution.

B. Historical Practice Supports the Unanimity Requirement.

The original understanding of the 1896 amendment by those early lawmakers is reinforced by historical practice over the next 124-plus years.

This Court recognizes that "a practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people for many years, is always entitled to receive great consideration from the courts." *Clark*, 755 N.W.2d at 306 (quoting *City of Faribault v. Misener*, 20 Minn. 396, 401 (1874)). In *Clark v. Pawlenty*, the Court held that the Minnesota Constitution did not prohibit a judge appointed by the governor from running for reelection to retain the office. *Id.* at 307. The Court stressed

that the challenger's interpretation of the statute contradicted more than 150 years of state history. *Id.* Similarly, in *State v. Lessley*, the Court held that the Minnesota Constitution allowed a criminal defendant to waive a jury trial without the state's consent. 779 N.W.2d 825 (Minn. 2010). The Court again emphasized historical practice and observed that "the criminal-justice system has operated for more than 75 years under procedures that do not make the criminal defendant's jury-trial waiver subject to the consent of the State." *Id.* at 838.

The same principle animates scores of United States Supreme Court decisions. As Justice Ginsburg once explained, "a page of history is worth a volume of logic." *Eldred*, 537 U.S. at 200. Historical practice is thus entitled to significant weight when engaging in constitutional interpretation. *Id.*; *accord N.L.R.B. v. Noel Canning*, 573 U.S 513, 524-26 (2014).

Historical practice supports the constitutionality of the unanimity requirement. The unanimity requirement has been in place for 124 years. During that period, 28 governors, 22 attorneys general, and 16 chief justices complied with the unanimity requirement, and none challenged its constitutionality. *See* Minn. Leg. Reference Library, *Minnesota Governors, 1849-Present*, https://www.lrl.mn.gov/mngov/gov (listing governors since 1896); Minn. Leg. Reference Library, *Minnesota Territorial and State Attorney General, 1849-Present*, https://www.lrl.mn.gov/mngov/attygen (same for attorney generals); Minn. State Law Library, *Biographies of Minnesota Supreme Court Justices*, https://mn.gov/law-library/research-links/justice-bios/ (same for chief justices). This longstanding—and, until this suit, unbroken—understanding by high-ranking state officials that the unanimity

requirement was a valid exercise of legislative discretion should receive great consideration from the Court.

III. THE DISTRICT COURT'S ANALYSIS IS ATEXTUAL, AHISTORICAL, AND UNPERSUASIVE.

The district court's analysis is at odds with the text, purpose, and history of the 1896 amendment. And the conclusion the district court reached only highlights that the policy judgment of how the Board can exercise pardon power is best left to the Legislature.

A. The District Court Misinterpreted the Text.

The district court's analysis hinged on the observation that the constitutional phrase the "governor in conjunction with the board of pardons" includes two references to the governor – the first a direct reference to the office, and the second an indirect reference to the governor as a member of the board of pardons. Minn. Const. art. V, § 7. The district court reasoned that the Governor must have "some pardon power or duty separate or apart from the Board of Pardons" because he is named "separate and apart from the Board of Pardons, of which he is member." Add. 12-13. The district court then concluded that the challenged statutes are unconstitutional because they "give pardon power to the 'Board of Pardon' alone," and therefore do not give effect to the language "the Governor in conjunction with." *Id.*

The fundamental problem with the district court's textual analysis is that it fails to interpret the text of article V, section 7, as a whole. Language in the constitution cannot be read in isolation; it must be read in context. *See Lessley*, 779 N.W.2d at 833 (refusing to read second sentence of the challenged constitutional provision in isolation); *see also*

Scalia & Garner, *Reading Law* 167-68 (describing the whole-text canon and noting that "[c]ontext is a primary determinant of meaning").

The district court narrowly focused on one phrase of the constitutional text. But the district court gave insufficient weight to the second sentence of the amendment, which gives the Legislature the authority to determine how the "Governor in conjunction with" the Board can exercise the pardon power. In context, the challenged statutes do not read the "Governor in conjunction with" language out of the Constitution. Instead, they give that language effect by defining and regulating how "the Governor in conjunction with" the Board can exercise the pardon power—just as the Constitution prescribes.

B. The District Court Ignored Purpose and History.

The district court compounded the errors in its textual analysis by failing to give any weight to purpose or history. The district court acknowledged that the "[t]he Minnesota Constitution was amended such that the pardon power, formerly uniquely executive power, is now split in some manner with the Board of Pardons." Add. 13. Yet the district court gave no weight to the purpose of the 1896 amendment when it analyzed the constitutional text. Nor did the district court give any weight to the original understanding of the 1896 amendment—as evidenced by the 1897 law and the acquiescence of relevant officeholders—or the 124 years of historical practice that followed.

The district court may have discounted purpose and history because it concluded that the statutes were unconstitutional based on the "plain language" of the Minnesota Constitution. *See* Add. 13. This was error because the most natural reading of the text

does not support the district court's interpretation. *See supra* at 10-14. But it was also error because, if a court believes the textual question is close, then it must "seek to resolve ambiguity in a way that forwards the apparent purpose for which the provision was adopted," giving due weight to "to the history and circumstances of the times and the state of things existing when the constitutional provisions were framed and ratified in order to ascertain the mischief addressed and the remedy sought by the particular provision." *Kahn*, 701 N.W.2d at 825. In doing so, the court must apply the strong background presumption that statutes are constitutional. *In re Welfare of M.L.M.*, 813 N.W.2d at 29. A court may only strike down a statute when the challenging party shows it is unconstitutional "beyond a reasonable doubt." *Id*.

That showing cannot be made here. All the core tools for determining the meaning of the Minnesota Constitution—text, original meaning, original understanding, and historical practice—support the constitutionality of the unanimity requirement. The district court's failure to employ these methods of constitutional interpretation and give them appropriate weight was error.

C. The District Court's Conclusion Shows that the Legislature is the Proper Authority to Determine How the Pardon Power is Exercised.

Finally, the district court's analysis should be rejected because its conclusion only highlights that the Minnesota Constitution properly assigns the task of determining how the pardon power can be exercised to the Legislature. The district court held that the Constitution reserves some undefined pardon power to the Governor. But the district court declined to provide any guidance as to the nature of the Governor's undefined pardon

power. The district court declined, for example, "to address the argument that the correct interpretation of art. V, § 7 would require that a pardon be effective if the Governor and one other member of the Board of Pardons voted yes." Add. 13. The court reasoned that it did "not have the authority to determine how pardons should be granted or the voting procedure amongst those with pardon power." *Id.* The Constitution gives that duty to the Legislature. *Id.*

The Legislature, though, has determined how pardons should be granted and the voting procedure among those with pardon power, and it has determined that unanimity is appropriate. The district court's inability to articulate or describe what pardon power the 1896 amendment reserved to the Governor only highlights that the difficult policy questions posed by this case—how pardons should be granted and how voting power should be allocated among those with pardon power—are best left to legislative discretion.

In a wide variety of contexts, when the Legislature is given discretion under the Minnesota Constitution to make policy judgments, this Court will not interfere with the Legislature's reasonable exercise of its discretion. *See, e.g.*, *Lifteau v. Metro. Sports Facilities Comm.*, 270 N.W.2d 749, 755 (Minn. 1978) (legislature's discretion to classify taxpayers is constitutional as long as there is a reasonable basis for the legislature's decision). The Legislature has reasonably exercised its discretion and determined that a unanimous vote of the Board is required for a pardon to take effect. The Legislature's policy judgment is consistent with the pardoning regimes in numerous other states—many of which have taken similar steps to strip the pardon power from one chief executive under

their constitutions.[5] And the Legislature's policy judgment is entirely consistent with the text, purpose, and original understanding of the 1896 amendment. The challenged statutes should be upheld.

CONCLUSION

For all these reasons, the Attorney General respectfully requests that this Court reverse the district court and declare that sections 638.01 and 638.02, subdivision 1, are constitutional.

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[5] *See, e.g.*, Del. Const. art. VII, § 1 (governor may not grant pardon unless recommended by a majority of the board of pardons, which consists of the chancellor, lieutenant governor, secretary of state, state treasurer, and auditor of accounts); Pa. Const. art IV, § 9(a) (governor may not grant a pardon unless recommended by a board of pardons, which consists of the lieutenant governor, attorney general, and three members appointed by the governor and approved by the senate) Tex. Const. art. IV, § 11(b) (governor may not grant a pardon unless recommended by board of pardons, which consists of seven members appointed by the governor and approved by the senate); *see also* Margaret Colgate Love, *50-State Comparison: Pardon Policy & Practice*, Restoration of Rights Project, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ (last visited July 23, 2021).

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