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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 Lori Gildea, in her official capacity,

Appellants/Cross-Respondents

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INTRODUCTION

The Attorney General's reading of the constitution follows its plain text and is consistent with contemporaneous evidence of its intent, as well as 124 years of practice. By contrast, Respondents' claim that the constitution sets the pardon process, by requiring a "Governor plus one" voting rule, lacks any textual hook and any supporting indicia of constitutional intent. Their argument that the pardon statute violates the separation-of-powers principle is also baseless. This Court should reverse the district court and hold that the pardon statute, Minn. Stat. §§ 638.01-.02, is constitutional, as it has been for the past 124 years. Alternatively, if the Court holds the statutory provisions are unconstitutional, it should determine what is constitutional and should declare that Shefa is pardoned. The Attorney General has enormous sympathy for Shefa and worries for her safety. If this Court rejects his arguments on the merits, he supports immediate relief for Shefa.

ARGUMENT

I. APPELLANTS' READING IS CONSISTENT WITH THE TEXT AND ORIGINAL UNDERSTANDING, WHILE RESPONDENTS OFFER A NARROW, ATEXTUAL INTERPRETATION THAT DISRUPTS 124 YEARS OF PRACTICE.

The constitutional phrase the "governor in conjunction with the board of pardons" is flexible. Minn. Const. art. V, § 7. It accomplishes the amendment's goal of removing the pardon power from the Governor alone, but it leaves room for the legislature to determine exactly what "in conjunction" looks like in practice. The amendment specifically called on the legislature to define the respective powers and duties of the board, and the legislature did just that in 1897. 1897 Minn. Laws ch. 23, §§ 1-2. This reading of the constitutional provision effectuates its plain meaning. It is also consistent with the

constitutional debates leading up to its enactment, the attorney general's contemporaneous statement of purpose, and the contemporary legislature's enactment of the pardon statute, as well as the implicit acceptance of the unanimity requirement for the past 124 years. *See* Brief of Appellant/Cross-Respondent Attorney General Keith Ellison (A.G. Br.) at 3-18.

Respondents, in turn, argue that the phrase "in conjunction with" can only mean one thing[1]: for an applicant to be pardoned, she must receive the Governor's vote plus the vote of either the attorney general or chief justice (or both). Brief of Respondent/Cross-Appellant Governor Tim Walz (Gov. Br.) at 23. Respondents *must* win this interpretive point to meet their heavy burden to establish that sections 638.01 and 638.02 are unconstitutional. This rigid interpretation, though, is devoid of textual and historical support. There is also no precedent or policy that supports such a limited reading.

A. The Attorney General's Reading Is Consistent with the Plain Text, Original Understanding, and 124 Years of Practice.

As the parties have briefed, the meanings of "in conjunction with" include "together with" or "in combination with" or "in association with." A.G. Br. at 11-12; Gov. Br. at 21. None of those phrases exclude unanimity. Instead, the definition encompasses both unanimous action and action by the Governor plus one other member. It is constitutional for the legislature to enact a statute requiring a unanimous vote by the Governor and both other board members, as has been the law for 124 years, and it would be constitutional for

[1] Shefa does not say this explicitly but uses opaque phrasing about the Governor's vote being "elevated" over the others. Brief of Amreya Shefa (Shefa Br.) at 4, 19, 22, 25, 34. As she offers no explanation for what that means in terms of the votes required to pardon an applicant, the Attorney General presumes her interpretation aligns with the Governor's.

the legislature to enact a statute effectuating pardons with a vote by the Governor plus one other member, as was proposed in unsuccessful bills last session. *See* H.F. 2584, 92nd Leg. (2021); S.F. 2487, 92nd Leg. (2021). The constitutional language permits both.

It is perfectly acceptable for the constitution to not prescribe a particular outcome; just because the constitution allows for multiple ways to satisfy it does not make it ambiguous or unreasonable in the interpretive sense. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 673 (1988) (the Appointments Clause "clearly" gives Congress significant discretion to determine by statute which branch of government appoints inferior officers); *State, by Pollution Control Agency v. U.S. Steel Corp.*, 240 N.W.2d 316, 379 (Minn. 1976) (statute "unambiguously accords the state discretion in selecting the means of enforcement").

This reading of the constitution is also supported by the fact that the legislature clearly believed it had such discretion when it enacted the pardon statute just after the constitutional provision was amended. *See* A.G. Br. at 15-16. The "contemporaneous interpretation of [a constitutional amendment] by the first Legislature assembled after its adoption is entitled to great weight." *State v. Peterson*, 198 N.W. 1011, 1012 (Minn. 1924); *see also Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003).

This reading also has 124 years of practice on its side. *See* A.G. Br. at 16-17. 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 v. Pawlenty*, 755 N.W.2d 293, 306 (Minn. 2008) (quoting *City of Faribault v. Misener*, 20 Minn. 396, 401 (1874)).

B. Respondents' Narrow Interpretation Lacks Textual and Historical Support.

Respondents argue that the constitution locks in one outcome: for an applicant to be pardoned, she must receive the Governor's vote plus the vote of either the attorney general or chief justice (or both). Gov. Br. at 23. The flaw with this position is that there is simply too great a logical leap from the constitutional phrase to that outcome. If the goal were to constitutionally establish a "Governor plus one" rule for pardons, there are many clearer ways to write that into the constitution than amorphous language saying he should act "in conjunction with" the board of pardons. Respondents also point to no contemporaneous documents suggesting the intent of the constitutional amendment was a "Governor plus one" rule, and they provide no convincing reason why this Court should overturn 124 years of practice to reach that rule. *See Brennan v. U.S. Postal Service*, 439 U.S. 1345, 1346-47 (1978) (rejecting a "miserly construction" that would limit Congress's discretion under the postal clause and contravene "long historical practice").

Respondents' interpretation does not comport with the basic principles of constitutional interpretation. The most important goal of constitutional interpretation is assessing the plain meaning of the text, and a close second is assessing the intent behind it. *See Clark*, 755 N.W.2d at 304; *Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005). "The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it." *Lyons v. Spaeth*, 20 N.W.2d 481, 484 (Minn. 1945) (quoting *Reed v. Bjornson*, 253 N.W. 102, 104 (Minn. 1934)). "The history of the times, the state of things existing

when the provision was framed and adopted should be looked to in order to ascertain the mischief and the remedy." *Id.* Official representations to the voters, including the published statements from the attorney general, serve as consideration when interpreting the constitution. *See Sheridan v. Comm'r of Rev.*, -- N.W.2d --, 2021 WL 3745173, at *8 (Minn. Aug. 25, 2021). No canon of construction can obviate a common sense reading of a constitutional phrase or the clear intent of the drafters. *See, e.g., State v. Pakhnyuk*, 926 N.W.2d 914, 920-22 (Minn. 2019) (canons of construction only apply to resolve ambiguity where intent is unclear).

Because the plain language of the constitutional phrase does not convey the meaning Respondents propose, and they have no supporting indicia of original intent, they cannot prevail on their reading.

Stuck promoting an untenable affirmative reading of the constitutional phrase, Respondents take comfort in attacking Appellants' interpretation. Their efforts, though, are textually misguided. The Governor is not actually named twice in the constitutional sentence; he is named once and the board is named once. Minn. Const. art. V, § 7. The reference to the Governor acting "in conjunction with" the board of pardons may have been an effort to reference the historical context. While the Governor previously had exclusive power to grant pardons and reprieves, Minn. Const. art. V, § 4 (1857), that power was now being shared with the Attorney General and Chief Justice. Stylistically, naming the Governor in that sentence may have merely been an attempt to signal to voters that the drafters were still keeping the Governor involved in pardons. It was a way of indicating that the change was to add the number of people who involved in pardons, and not to

subtract. Viewed that way, those words are not necessarily "surplusage," but even if they were, that cannot overcome the Attorney General's reading set forth above. *See In re Krogstad*, 958 N.W.2d 331, 335 (Minn. 2021) (canon against surplusage must be applied with judgment and discretion, depending on the context and intent). And, courts do not expect that drafters of either legislative or constitutional texts are exemplars of precision who use as few words as possible. *See id.; see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018) ("Many perfectly constitutional statutes use imprecise terms.").

Similarly, while Shefa insists the constitutional amendment would have used "advice and consent" if it intended the board to have the voting power it does under the current statute, those terms would make no sense in this context. Shefa Br. at 27-28. The Minnesota constitution uses "advice and consent" once, when referring to the Senate's role in approving or rejecting the Governor's appointment of certain officers, such as commissioners. Minn. Const. art. V, § 3. The board's role under the pardon statute is not to approve or reject pardon candidates put forward by the Governor. The appointment process and pardon process are not analogous.

The rules of grammar also do not support Respondents' narrow view of the constitutional phrase the "governor in conjunction with the board of pardons has power to grant reprieves and pardons." Minn. Const. art. V, § 7. The word "has" in the phrase is singular because it refers to the two entities, "governor" and "board," together. The governor only has the pardon power jointly or in association with the board, so those two entities are treated singularly, as one. The Governor acknowledges as much in his brief. Gov. Br. at 20. The singular "has" is consistent with the drafters' intent that the Governor

work as one with the board to grant or reject pardons. Similarly, nothing about the titles of the amendment or provision forecloses Appellants' reading of the constitutional phrase. The flexible reading still relates to the pardon powers and authority of the governor. *Compare* Gov. Br. at 32-33; Shefa Br. at 25-26.

Contrary to Respondents' claims, the Attorney General did not forfeit any of the arguments it presents here. At the district court, the Attorney General argued that the constitutional language afforded the legislature discretion to determine that the votes must be unanimous, (Index Nos. 25, 30), and that is the same argument he makes now. Nothing in the quoted transcript conflicts with that argument. Shefa Br. at 29-30. It is inaccurate and inappropriate to argue the Attorney General has shifted his legal theory on appeal or raised a wholly new issue. *Id.* at 30-31. The cases cited in support of Shefa's position are inapposite. In *Denoyer v. Railroad Transfer Co.,* for example, the defendant argued that the trial court erred by failing to instruct the jury in a particular way, and the supreme court noted that the defendant had never requested that instruction. 141 N.W. 175, 176 (Minn. 1913). And in *Gillen v. Commissioner of Taxation*, the appellant argued that the primary case relied on by the court below had been abrogated by a subsequent statute, but because the appellant had not informed the lower court of the fact, the court refused to address it. 232 N.W.2d 894, 898 (Minn. 1975). There is no similar forfeiture here, and in any case the constitutional import of this case dictates that all arguments should be considered. *See Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982).

C. There Is No Precedent or Policy Supporting Respondents' Narrow Reading.

With respect to precedent, Respondents repeatedly cite *State v. Meyer*, 37 N.W.2d 3 (Minn. 1949), and suggest it supports their position. *See, e.g.,* Shefa Br. at 33, 37-38; Gov. Br. at 1, 12, 24. But that case never addressed whether the Governor has "elevated" power over other pardon board members, or whether a unanimity requirement is constitutional. The Court expressly avoided making any interpretation of the pardon provision: "Neither is it necessary now to determine whether the power to pardon is vested exclusively in the board of pardons under our constitution." *Meyer*, 37 N.W.2d at 300. It addressed a very different question: whether the Youth Conservation Act, which established a board for sentencing people under 21 years of age, infringed on the constitutional power of the board of pardons. *Id.* at 300. And because the act only allowed the grant of a parole, not a pardon, the court found no violation. As there was no discussion of the authority of the governor vis a vis the board of pardons, there is no basis to attribute any meaning to the conjunctive "or" in the court's holding that the act was constitutional because it did not "prevent the governor or the state board of pardons from granting a pardon." *Id.* at 302. Respondents attempt to imbue meaning into that sentence that clearly was not intended.

With respect to public policy, the Respondents prefer to focus on the goal of clemency and offering a relief valve for harsh results. *See, e.g.,* Gov. Br. at 27-28; Shefa Br. at 37-38. However, there is a competing goal at work in the 1896 amendment, which is curbing potential abuse of the pardon power. As described in the Attorney General's

initial brief, A.G. Br. at 3-4, the constitutional convention revealed serious concerns about placing such discretion in the hands of just one individual.[2] Therefore, there are at least two important public policies at work in section 7. It makes sense for the drafters to allow the legislature to determine exactly how to balance those competing goals, as it is the kind of decision the legislature makes regularly.

Finally, while Shefa points to constitutional provisions creating pardon boards in four other states, Shefa Br. at 40, the language from those states' constitutions has no bearing on the constitutionality of Minnesota's statutes. Regardless, the language actually supports Appellants' position. In each of those other states, the quoted language forbids a unanimity requirement by expressly providing that a majority vote is sufficient for a pardon. *Id.* Minnesota did not choose that language, instead leaving the legislature discretion to enact a unanimity requirement.

II. RESPONDENTS' SEPARATION OF POWERS ARGUMENT LACKS MERIT.

If the Court correctly rejects Respondents' argument that the constitutional phrase can only mean "Governor plus one," then there is also no separation of powers problem. Because, if one specific constitutional provision (section seven) authorizes unanimity, then the statute requiring unanimity cannot violate the more general separation-of-powers

[2] Those concerns surface in the present time near the end of every presidential term. Both Bill Clinton and Donald Trump were accused of accepting bribes in return for presidential pardons. *See* Jeffrey Crouch, *Trump and Bill Clinton pardon scandals should help Biden fix a flawed process*, NBC News (Dec. 3, 2020) https://www.nbcnews.com/think/opinion/trump-bill-clinton-pardon-scandals-should-help-biden-fix-flawed-ncna1249785.

principle. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (when the constitution provides "an explicit textual source," the analysis is guided by that source and not a "more generalized" provision or constitutional principle); *Connexus Energy v. Comm'r of Rev.*, 868 N.W.2d 234, 242 (Minn. 2015) (applying the canon that a specific provision prevails over the general). The constitution itself cannot be unconstitutional. A.A. 13-14.

Furthermore, the separation of powers principle comes into play only if the statute authorizes the Chief Justice to infringe on "the unique constitutional functions of" the executive branch. *State v. T.M.B*, 590 N.W.2d 809, 812 (Minn. Ct. App. 1999). In this case, it is hard for Respondents to argue that pardons are still a purely executive function, given the language of the constitutional provision. No matter which interpretation of that constitutional phrase prevails, the constitution clearly places the Chief Justice on the pardon board. The pardon function is no longer a *unique* constitutional function of the Governor.[3] Therefore, it is immaterial whether the Chief Justice can block a pardon with her vote or not. *See* Shefa Br. at 50-52 (arguing the Chief Justice cannot have "unilateral veto" over a pardon).

In addition, Respondents make no effort to explain why it violates the separation-of-powers doctrine if the Chief Justice votes to deny a pardon under the unanimity rule, but it does not violate the separation-of-powers doctrine if she and the Attorney General

[3] The Respondents also assume a situation where the Governor wants to grant pardons and the Chief Justice does not. There have undoubtedly been many times in our state's history where the situation was reversed. Respondents do not argue that the Chief Justice would "infringe" on the Governor's functions if she were the one in favor of pardons.

vote to deny a pardon under the Governor-plus-one rule. She could still be the deciding vote under the scenario that Respondents have posited is constitutional.

III. ALTERNATIVELY, IF THE COURT HOLDS THE UNANIMITY REQUIREMENT UNCONSTITUTIONAL, IT SHOULD DETERMINE WHAT IS CONSTITUTIONAL AND SHEFA SHOULD BE PARDONED.

The Attorney General wants the board of pardons to return to work as soon as possible. There are dozens of applicants waiting for these three officers to decide their fate. It is important that this Court not leave those applicants and the board in procedural limbo. Therefore, if this Court finds that the unanimity requirement is unconstitutional, the Attorney General joins the Governor's request that the Court articulate guidelines for the board's continuing constitutional operation. Otherwise, the board may have to wait until the legislature reconvenes and finds sufficient agreement to continue its important work for the public.

The Attorney General also has enormous sympathy for Respondent Shefa and worries for her safety. If this Court concludes that the unanimity requirement in sections 638.01 and 638.02 is unconstitutional, he supports Shefa receiving immediate relief. As two members of the pardon board already voted to grant her pardon, there is no reason for her to have to reapply if this Court determines two votes are sufficient.

CONCLUSION

For all the reasons in this brief and the Attorney General's initial brief, this Court should reverse the district court and hold that sections 638.01 and 638.02 are constitutional.

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Respectfully submitted,

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