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State of Minnesota

In Supreme Court

Amreya Rahmeto Shefa,
Respondent/Cross-Appellant,

vs.

Attorney General Keith Ellison, in his official capacity,
Appellant/Cross-Respondent,

Governor Tim Walz, in his official capacity,
Respondent/Cross-Appellant,

and

Chief Justice Lorie Gildea, in her official capacity,
Appellant/Cross-Respondent.

REPLY AND RESPONSE BRIEF OF APPELLANT/CROSS-RESPONDENT CHIEF JUSTICE LORIE GILDEA

TAFT STETTINIUS & HOLLISTER LLP
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
(612) 977-8400
sflaherty@taftlaw.com

Attorneys for Appellant/Cross-Respondent Chief Justice Lorie Gildea

BLACKWELL BURKE P.A.
Andrew J. Crowder (#0399806)
431 South Seventh Street, #2500
Minneapolis, MN 55415
(612) 343-3200
acrowder@blackwellburke.com

Attorneys for Respondent/Cross-Appellant Amreya Rahmeto Shefa

(Counsel for the parties continues on following page)

2021 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518

OFFICE OF THE MINNESOTA
ATTORNEY GENERAL
Peter J. Farrell (#0393071)
Jason Marisam (#0398187)
Assistant Attorneys General
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2131
(651) 757-1350
peter.farrell@ag.state.mn.us
jason.marisam@ag.state.mn.us

Attorneys for Appellant/Cross-Respondent
Attorney General Keith Ellison

CIRESI CONLIN LLP
Barry M. Landy (#0391307)
Kyle W. Wislocky (#393492)
225 South Sixth Street, Suite 4600
Minneapolis, MN 55402
(612) 361-8200
bml@ciresiconlin.com
kww@ciresiconlin.com

Attorneys for Respondent/Cross-Appellant
Governor Tim Walz

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INTRODUCTION

Governor Walz and Shefa fail to meet the heavy burden to demonstrate beyond a reasonable doubt that the statutory unanimity requirement is unconstitutional. The Constitution gives the legislature the responsibility to define the "powers and duties" of the board. The legislative choice to require unanimity does not conflict with the Constitution because the Constitution does not prohibit unanimity but leaves the choice to the legislature. Moreover, the unanimity requirement does not unconstitutionally impinge the Governor's authority because the Governor is a member of the board and his pardon power is joined with it. The district court should be reversed.

ARGUMENT

I. THE GOVERNOR HAS NO PARDON POWER SEPARATE FROM THE BOARD.

The Governor admits that he may not exercise the pardon power separate from the Board. (Gov. Br. 21.) He admits he may grant a pardon only "in conjunction with" the Board. (*Id.*) This admission puts the Governor directly at odds with the district court's conclusion that "the Governor has some pardon power or duty separate from or apart from the Board of Pardons." (A.Add.13.)

Shefa disagrees with the Governor, and still defends the district court by arguing that Art. V, § 7 "grants the Governor pardon power apart from the Board of Pardons." (Shefa Br. 18, 26, 45.) The Constitution's plain language

contradicts Shefa's argument and the district court's conclusions. "Conjunction" and "separation" are antonyms, (C.J. Br. 17) and the governor's pardon power is joined with the board—not separate from it.

No definition of "conjunction" supports the Shefa's view that the Governor has some power separate from the board. The plain meaning of "conjunction" controls. The Court applies unambiguous language as written, *see Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005). The word "conjunction" refers to a joining together. (C.J. Br. 11-12 (citing dictionaries).)

II. THE CONSTITUTION DOES NOT REQUIRE MAJORITY VOTE BY THE BOARD.

Admitting that he lacks pardon power separate from the board, the Governor argues that he acts in conjunction with the board when a single other member of the board agrees with him. (Gov. Br. 21, 43, 47.) But he cites no case holding that. And the Constitution says no such thing.

The Constitution does not refer to a governor acting "in conjunction with *another member* the board of pardons." The Attorney General is not the board, and when the Governor acts with the Attorney General, he is not acting with the board. The board's power is defined and regulated by the legislature. Minn. Const. Art. V, § 7 ("Its powers and duties shall be defined and regulated by law."); *State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 58-59 (Minn. 1954).

In arguing otherwise, the Governor attempts to import into the Constitution a majority-vote requirement, citing an 1847 case from Massachusetts and John Locke's *Second Treatise*. (Gov. Br. 22.) Neither of those authorities appears in the Minnesota Constitution.

The Governor's attempt to engraft a majority-vote requirement into the Constitution fails. Nothing in Art. V, § 7 requires a majority vote of the board, nor prohibits unanimous board action. The question of what constitutes board action is left to the legislature. *See* Minn. Const. Art. V, § 7.

The framers of the 1896 amendment could have written a majority-vote standard into the Constitution, but they did not do so. When a majority-vote requirement is constitutionally required, the Constitution explicitly provides it. *See, e.g.*, Minn. Const. Art. VIII, § 1 (majority vote required in house for impeachment); Art. IX, § 1 (majority vote required in house and senate to propose amendments; majority of voting electors required to approve); Art. IV, § 13 (majority of house and senate constitute a quorum); Art. VI, § 13 (majority of judges select district court clerk). The Court should not read a majority-vote requirement into Art. V, § 7 where no language exists. *See State ex rel. Putnam v. Holm*, 215 N.W. 200, 202 (Minn. 1927) ("Unambiguous words need no interpretation... [w]e are not empowered to say that [the framers] meant something they did not say.").

Other specific voting requirements appear in the Constitution but not in Art. V, § 7. For example, a two-thirds vote is required to override a veto, Minn. Const. Art. VI, § 23, to pass a general banking law, *id.* § 26, to waive the three-day reporting requirement for bills, *id.* § 19, or to convict in an impeachment trial, Art. VIII, § 1. The Constitution does not provide that a pardon shall issue upon a two-thirds vote of the board.

A majority vote is not always a constitutional requirement, but it is sometimes a constitutional floor. For example, neither the house nor the senate may pass a law with less than a majority. *See* Minn. Const. Art. VI, § 22. A majority vote is not always a constitutional floor. Some action is constitutionally permissible with less than majority. For example, a group of legislators smaller than a majority may adjourn from day to day, and may compel the attendance of absent members. Minn. Const. Art. VI, § 13. Together, these several provisions show that when the constitution requires specific voting limits, it is explicit. No such voting limit or requirement is imposed on the board in Art. V, § 7.

There is thus no conflict between the Constitution's delegation to the legislature to determine how the board acts, and the statutory requirement that the board act unanimously. The Governor is a member of the board, and he has no pardon power except the power that is conjoined with the board. If he, and the many *amici* who support him, want a pardon to issue upon a two-

thirds vote of the board, they can urge the legislature to enact different statutes.

The Governor and Shefa argue that a narrow construction should be given to the legislature's power to define and regulate the powers and duties of the board. (Gov. Br. 30-31; Shefa 52.) No construction is necessary at all, however, because the phrase "by law" is not ambiguous. That phrase gives power to the legislature. *E.g., Gardner,* 62 N.W.2d at 58-59. Neither the Governor nor Shefa offer a competing construction of that phrase that would trigger a finding of ambiguity and subsequent construction of it.

III. THE GOVERNOR AND SHEFA MISREPRESENT THE PLAIN-LANGUAGE ARGUMENTS.

A. The absence of advise-and-consent language does not preclude unanimity.

Shefa, but not the Governor, argues that the absence of advice-and-consent language from Art. V, § 7 means that the voters who approved the 1896 amendment did not mean create a joint power. (Shefa Br. 27-28.) Shefa offers no definition of the word "conjunction" that would support her argument.

Moreover, in the examples cited by Shefa, advise-and-consent language is used for inter-branch relationships—like the President's relationship with the Senate in connection with the treaty power. (Shefa Br. 28.) Shefa has no example of advise-and-consent language being used to define an intra-branch

relationship, like the governor's relationship with the pardon board. He is a member of the executive branch and pardon board, which is a part of the executive branch.

But even if such an example existed, Shefa cites no case nor any other legal authority holding that advise-and-consent language is the *exclusive* means by which a joint power can be created. Her argument is without legal support.

B. Shefa mischaracterizes the Chief Justice's argument.

Throughout her brief, Shefa incorrectly characterizes the Chief Justice's position as "the intent was to strip the Governor of all power and vest all power in the Board." (Shefa Br. 38.) The Chief Justice does not contend that the governor has been stripped of all pardon power nor that he was divested of all authority. (Shefa Br. 4, 37.) Rather, her position is that the 1896 Amendment joined his pardon power to the board. He was not "stripped" of *all* pardon power; he was left without *separate* pardon power. He still exercises the power in conjunction with the board.

C. The Governor has a special role within the executive branch.

Neither the Governor nor Shefa deny that the Governor has a unique role within the executive branch. (Gov. Br. 18; Shefa Br. 23.) Though they note that his procedural and administrative duties are not explicitly mentioned in Art. V, § 7, (*id.*) they do not dispute those duties that differ from

the Attorney General's and the Chief Justice's. The fact that those duties are not specifically in Art. V, § 7 does not make them any less real. The governor's role in the executive branch is unique.[1]

Shefa argues that the Chief Justice is limited by her counsel's purported concession in the district court. (Shefa Br. 22-23.) But a litigant may refine an argument on appeal in response to a district court's ruling. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 523 (Minn. 2007) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). And the Court is bound to apply the law correctly, regardless of a party's position as to what the law is, even if a party fails to raise the proper issue entirely. *State v. Jones*, 516 N.W.2d 545, 549 n.5 (Minn. 1994); *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). The Chief Justice argued below and still argues now that the statutory unanimity requirement is constitutional.

IV. DICTA FROM PRIOR CASES DOES NOT CONTROL THE OUTCOME HERE.

The Governor and Shefa both rely on dicta from *State v. Meyer*, 37 N.W.2d 3, 14 (Minn. 1949) and *Rhodes v. Walsh*, 57 N.W. 212, 214 (Minn. 1893). The issue in *Meyer* was the lawfulness of a sentence pursuant to the

[1] The governor is also historically unique in that, prior to the 1896 amendment, he alone had the pardon power which is now joined to the board. In 1896, neither the attorney general nor the chief justice had any preexisting pardon power that could have been joined to the newly created board.

Minnesota Youth Conservation Act, not whether the governor had pardon power separate from the board. *Meyer*, 37 N.W.2d at 13-14. As explained in the prior brief (C.J. Br. 16 & n.4), *Meyer* itself recognized that it did *not* decide whether there exists a pardon power separate from the board. *Id.* ("Neither is it necessary now to determine whether the power to pardon is vested exclusively in the board of pardons under our constitution.").

Rhodes is no more useful than *Meyer*. The issue in *Rhodes* was whether a Minnesota legislator was immune from civil process. 57 N.W. at 212-13. The language Shefa quotes is dicta and from a paragraph explaining how Wisconsin's constitution differs materially from Minnesota's constitution. The context showed that a legislator's privilege against "arrest" was distinct from a legislator's privilege against "civil process." *Id.* at 214. The Court observed that the two words in the Wisconsin constitution, used in two separate phrases, must mean two different things.

Rhodes does contain a general statement that constitutions generally are written concisely, *id.*, but flawless conciseness is an aspiration—not always a reality. Constitutions are written by humans, not angels. *See The Federalist* No. 51 (James Madison). Real constitutional drafting can be messy, as this Court has noted: "Minnesota's first and only constitutional convention, called to order on July 13, 1857, was somewhat of a mess. Bickering Democrats and Republicans split into two constitutional

conventions, each of which produced its own document." *State v. Lessley*, 779 N.W.2d 825, 838 (Minn. 2010) (quotations and citations omitted).

V. THE STRUCTURE OF THE CONSTITUTION SUPPORTS REVERSAL.

The Governor and Shefa misunderstand how the constitution's structure supports the Chief Justice's argument. They correctly note that the structural change to the constitution's pardon clause occurred with the 1974 amendments. (Gov. Br. 20-21; Shefa Br. 25-26.) And they correctly note those amendments were stylistic, not substantive. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 617 n.7 (Minn. 2017).

The substantive change occurred in 1896, with the passage of the amendment that deprived the governor of the separate power to pardon. (*See* Doc. 32.) That substantive change was later confirmed by the conforming style change in 1974. Neither the Governor nor Shefa offer any reason why the 1974 amendments removed the pardon clause from the gubernatorial powers-and-duties section of Article V. But the reason is understandable: the 1974 amendments caused the structure to reflect the substantive transfer of power that had *already* occurred in 1896.

VI. ANY AMBIGUITY FAVORS FINDING THE STATUTES CONSTITUTIONAL.

A. Any ambiguity is resolved in favor the amendment's purpose, "to deprive the governor of the power to alone grant pardons and reprieves".

Shefa argues that the Court should resolve ambiguity in her favor. (Shefa Br. 19.) Shefa relies on use of the phrase "in conjunction with" in other statutory contexts. (Shefa Br. 19, 35-36.) That reliance is directly undermined by *Butler Taconite v. Roemer*, 282 N.W.2d 867, 870 (Minn. 1979). There, the Court noted that it was only deciding what the amendment language at issue ("due and payable") meant in that particular constitutional provision, and not what it meant in every context. *Id.* Context matters. *In re Krogstad*, 958 N.W.2d 331, 335 (Minn. 2021). Here, every meaningful contextual clue supports the Chief Justice's interpretation.

In determining the meaning of an ambiguous constitutional provision, the Court considers a variety of things: "necessities which gave rise to the provision"; "the controversies which preceded [it]"; "the conflicts of opinion which were settled by its adoption"; and the "history of the times" among others. *Reed v. Bjornson*, 253 N.W. 102, 104 (Minn. 1934). If a constitutional provision is ambiguous or doubtful, "the doubt should be resolved, wherever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted." *Id.*

No one disputes the purpose of the 1896 amendment: "*to deprive the governor of the power to alone* grant pardons and reprieves, which he now enjoys, and to create board of pardons, consisting of the governor, the attorney general and the chief justice of the supreme court." (Doc. 32

(emphasis added).) The statutory unanimity requirement does not conflict with the stated purpose of depriving the governor of his formerly separate pardon power.

B. The Governor and Shefa do not rebut the stronger-than-normal presumption of constitutionality that applies here. [2]

Neither the Governor nor Shefa dispute that the closeness in time between the 1896 amendment and the 1897 statutory unanimity requirement entitles the latter to a very strong presumption of constitutionality, even stronger than the presumption offered to run-of-the-mill statutes. *State v. Peterson*, 198 N.W. 1011, 1012 (Minn. 1924). (C.J. Br. 13-14.) Instead, they attack straw-men arguments.

The Governor suggests that the temporal proximity between the 1896 amendment and statutory unanimity requirement means the latter is "impervious to constitutional scrutiny." (Gov. Br. 38-39.) No one argues that the statutory unanimity requirement is "impervious." Rather, the argument is that because the statutory unanimity requirement was passed shortly after the constitutional amendment, and was passed unanimously (C.J. Br. 27-29), the statutory unanimity requirement itself is powerful evidence of the meaning of the constitutional phrase "in conjunction with." No statute is

[2]Rather than offer evidence of some other purpose for the 1896 amendment, the Governor and Shefa instead discuss the purpose of the pardon power. But the purpose of the pardon power is not at issue here.

impervious to constitutional scrutiny, but the statutes challenged here are fully consistent with the constitution and are helpful in interpreting it.

Neither the Governor nor Shefa acknowledge the rule in *Peterson*, 198 N.W. at 1012, and accordingly they do not rebut the stronger-than-normal presumption afforded to the statutory unanimity requirement here. Instead of analyzing how that presumption applies to the text at issue in this appeal, the Governor cites to a variety of federal cases: a gender discrimination case from 1982; a privacy case from 1965; cases involving race discrimination; and *Marbury v. Madison*, 5 U.S. 137 (1803). (Gov. Br. 38-39.) To be sure, the litigants who challenged those laws must have overcome the presumption of constitutionality applicable to those laws. But the fact that Sedition Act of 1798 plainly violated the First Amendment says nothing about the laws at issue in this appeal.

The Governor and Shefa have a very high burden. They must demonstrate "beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990). They fail to satisfy that high burden, and fail to even engage with the stronger-than-normal presumption of constitutionality. *See Peterson*, 198 N.W. at 1012.

C. Contemporaneous newspaper articles regarding the 1896 Amendment, and other secondary sources, support reversal.

The Governor and Shefa urge the Court to ignore newspapers contemporaneous to the 1896 Amendment, arguing they are hearsay and not in the record. (Gov. Br. 34-35; Shefa Br. 46-47.)

Generally, the court's analysis is limited to the record below. But the Court sometimes goes beyond the record where justice requires. *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 581 n.8 (Minn. 2021). And the Court may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Minn. R. Evid. 201(b). Old newspapers are good evidence of legislative intent. *E.g.*, *Minnesota Association of Commerce & Industry v. Foley*, 316 N.W.2d 524, 529 (Minn. 1982) ("Several articles in 1912 local newspapers are generally acknowledged to be the only evidence of the legislative intent at the time."). The newspaper excerpts here, dated between 1878 and 1897, fall within the ancient-document hearsay exception of Minn. R. Evid. 803(16) and 901(b)(8).[3]

Each of these old newspapers suggests that the voters intended to limit the governor's pardon power. (*See generally* C.J. Br. 21-25.) They conform to

[3] The Governor and Shefa cite a concurrence of the Chief Justice in urging the Court not to look at the newspaper articles. (Gov. Br. 34 n.8; Shefa Br. 47.) But a concurrence is not precedent.

the Attorney General's stated purpose of the 1896 amendment, "to deprive the governor of the power to alone grant pardons…." (Doc. 32 (emphasis added).)[4]

The newspapers are not the only secondary sources supporting reversal. Though Governor and Shefa urge the Court ignore old newspapers, they do not appear to ask the Court to ignore old books, like William Anderson's *History of the Constitution of Minnesota*. (Gov. Br. 35.) Instead, the Governor argues the book is insufficiently detailed. (Gov. Br. 35.) The Governor makes the same argument against the more recent *Minnesota Legislative Manual*. (*Id.* n.9.)

Neither the Governor nor Shefa offer *any* competing secondary sources regarding the public understanding—past or present—of the 1896 amendment. The Governor and Shefa offer no secondary sources that contradict these. They bear the high burden to "beyond a reasonable doubt" that the statutes are unconstitutional. *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990). They have not met that high burden.

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[4] Shefa suggests that it would not make sense to refer to, say, Twitter to determine contemporaneous legal meaning in 2021. (Shefa Br. 50 n.4.) But at least one federal appellate court has cited Twitter for the purpose of understanding an executive order. *See Hawaii v. Trump*, 859 F.3d 741, 733 n.14 (9th Cir. 2017), *vacated as moot by Trump v. Hawaii*, 138 S.Ct. 377 (2017). If Governor Clough had used Twitter 1897, his tweets would have been relevant.

D. The Constitution does not limit the legislature's power to regulate the board, and the Chief Justice's membership on the board does not violate separation of powers.

The Governor argues that by imposing a unanimity requirement on the board, the legislature is interfering with executive power. (Gov. Br. 41-42.) This argument fails for at least two reasons.

First, where expressly provided, the Constitution allows checks on constitutional power, even if that would otherwise constitute an interference. Minn. Const. Art. III, § 1. ("No 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."). Art. V, § 7 grants the legislature the power to regulate the board. That regulatory power cannot be an unconstitutional "interference" because the governor is a member of the board. If the governor were to be excluded from the legislature's power to regulate the board, the Constitution would say so. *See Ninetieth Minn. State Senate*, 903 N.W.2d at 618 ("Had the framers of the Minnesota Constitution and the people of Minnesota wished to exclude any branch, officer, or agency from the scope of the Governor's veto power, they could have done so.").

Second, the cases cited by the Governor do not support his interference argument here. (Gov. Br. 40-43.) The Constitution gives the legislature a broad grant of authority to define and regulate the powers and duties of the

board. The cases that the Governor cites do not have any such grant of authority. In *Holmberg v. Holmberg*, 588 N.W.2d 720, 725-26 (Minn. 1999), for example, the Court found a separation of powers violation where an executive branch agency was adjudicating child support matters, which directly infringed upon the district court's original jurisdiction over family court proceedings. Unlike *Holmberg*, the Minnesota Constitution expressly provides that the chief justice is a member of the Board, whose powers and duties are defined and regulated by law.

In *Geim*, the Court rejected a statutory construction that would have unconstitutionally limited the subject matter jurisdiction of the district court. *In re Civ. Commitment of Giem*, 742 N.W.2d 422, 428-29 (Minn. 2007). That case is especially inapposite because no constitutional provision gives the legislature the power over district court subject matter. But here, Art. V, § 7 *does* give the legislature the power to regulate the board. *Sanborn v. Comm'rs of Rice Cty.*, is inapposite for the exact same reason: it involved a purported legislative interference with the judicial power, for which there is no constitutional provision. 9 Minn. 273, 278-79 (1864).

State v. Stern rejected a challenge to the legislature's power to use a prior, out-of-state pardoned offense as a sentencing enhancement for a subsequent crime in Minnesota. 297 N.W. 321, 323 (Minn. 1941). *Stern* says

nothing about limits on the legislature's power to regulate the board, of which the governor is a member.

The Court in *Stern* also noted that "the legislature in not excepting pardoned prior offenses from the habitual criminal act had in mind that if a pardon were granted on the ground of innocence *the pardon board* could and doubtless would bear this circumstance in mind in connection with an application for commutation of the second sentence" because "*[t]hat board*, as set up in this state, has facilities for determining innocence and whether there was a miscarriage of justice." *Id.* at 323 (emphasis added). Thus, *Stern* does not suggest any separation-of-power problems associated with the chief justice's duties on the board.

State ex rel. Childs v. Griffen, differs greatly from this case. 72 N.W. 117, 118 (Minn. 1897). The constitutional provision at issue in *Griffen* gave the governor appointment power limited by the "advice and consent" of the senate. *Id.* But the statute at issue there limited that appointment power—there, to the board of pharmacy—to a set of pharmacists chosen by the state pharmaceutical association. *Id.* That statute was held unconstitutional because the approval of the senate was the sole constitutional restriction on the appointment power. A statute could not limit the appointment of "officers provided by law." *Id.* This appeal involves neither the governor's appointment

power nor the senate's advice and consent power under Art. V, § 3. The senate has no special role in Art. V, § 7. *Griffen* is inapposite.

VII. THE CHIEF JUSTICE'S MEMBERSHIP ON THE BOARD DOES NOT GIVE HER A "VETO."

In their briefs, the Governor and Shefa repeatedly mischaracterize as a "veto" the requirement that the board act unanimously. A veto is gubernatorial action against legislation. Minn. Const. Art. IV, § 23. The legislature's power to regulate the board by enacting voting rules is not a "veto" and the Chief Justice's compliance with those rules is also not a "veto."

The Governor is mistaken when he argues that the statutory unanimity requirement constitutes "granting the judiciary a unilateral veto over pardons." (Gov. Br. 40.) The Chief Justice is not the judiciary. Her membership on the pardon board is constitutionally required. Minn. Const. Art. V, § 7 ("The governor, the attorney general and the chief justice of the supreme court constitute a board of pardons."). Her vote on that board is not a veto. Her presence on the board cannot be a separation of powers violation because the Constitution expressly allows it. Minn. Const. Art. III, § 1. And the Constitution does not specify how the board should vote.

Interbranch checks are not unusual, and they are not all vetoes. The governor can veto bills. That is a veto. The legislature can impeach executive officials (except the lieutenant governor) and judges. Minn. Const. Art. VIII,

§ 2. Impeachment is not a veto. The judiciary can invalidate unconstitutional action taken by either of the other two branches. Declaring an act unconstitutional is not a veto. The senate may refuse to consent to a gubernatorial appointment. Minn. Const. Art. V, § 3. Withholding that consent is not a veto.

Shefa incompletely quotes Chief Justice Oscar R. Knutson's comment to the Executive Branch Committee of the Minnesota Constitutional Study Commission. (Shefa Br. 55-56.) Shefa's omits from her quote the first sentence of Chief Justice Knutson's quotation. "*If the attorney general is to be eliminated from the pardon board,* it probably would be best to go back to the original constitutional provision and have the pardoning power rest in the governor alone." Minn. Const'l Study Comm'n, Final Report and Committee Reports, Executive Branch Committee Report, at 21 (1973) (Italicized portion omitted by Shefa.) The omitted language shows that Chief Justice Knutson's suggestion was not unqualified; it was predicated on removing the Attorney General from the board, which never happened. If the people had wanted to restore the Governor's pre-1896 pardoning power as suggested by Chief Justice Knutson, then they could have done so in 1974. They chose not to.

VIII. THE DISTRICT COURT CORRECTLY REFUSED TO ORDER THE ISSUANCE OF A PARDON TO SHEFA.

The district court correctly held that issuing a pardon is executive in nature. (A.Add.13.) Because that power is not judicial, the district court correctly refrained from ordering a pardon issue to Shefa.

Shefa cites to *State v. Ali*, 855 N.W.2d 235, 240 (Minn. 2014) to argue that the district court should order her pardon. But *Ali* involved a remand for resentencing. Sentencing—unlike pardoning—is a judicial function. *See State v. Chauvin*, 723 N.W.2d 20, 23-24 (Minn. 2006). *Ali* does not apply.

The Governor argues that he may exercise the pardon power even in the absence of a statute, citing *State v. M.A.P.*, 281 N.W.2d 334, 337 (Minn. 1979) and *State ex rel. Peterson v. Quinlivan*, 268 N.W. 858, 862 (Minn. 1936). (Gov. Br. 46-47.) Those two cases are easily distinguishable,[5] and this argument is merely a re-hash of his prior argument, rebutted *supra* pp. 3-5, that when the Governor acts with "one other member" of the board, he has acted with the board. The Constitution does not authorize the governor to issue a pardon acting in conjunction with "one other member" of the board.

[5] *M.A.P.* involved an untimely appeal and the "interests of justice" exception to the timeliness requirement. *Quinlivan* involved the interpretation of a "special provision" concerning regents of the University of Minnesota. Neither case holds that courts may order the issuance of pardons.

The Constitution does not require that a pardon issue upon a two-thirds vote of the board.

CONCLUSION

The Constitution gives the legislature power over the board, and the Governor is a member of the board. His pardon power is joined with it. He has no separate pardon power. The statutory requirement that board decisions be unanimous does not conflict with the Constitution. The Constitution neither prohibits unanimity nor requires a majority vote. The Court should reverse the district court and leave intact the long-standing statutory unanimity requirement.

Respectfully submitted.

August 26, 2021.

TAFT STETTINIUS & HOLLISTER LLP

By: /s/ *Scott M. Flaherty*
Scott M. Flaherty (#388354)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
Telephone: (612) 977-8400
Fax: (612) 977-8640
Email: sflaherty@taftlaw.com

ATTORNEYS FOR APPELLANT/ CROSS-RESPONDENT CHIEF JUSTICE LORIE GILDEA, IN HER OFFICIAL CAPACITY

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant/Cross-Respondent Chief Justice Lorie Gildea, certifies that this Brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word 365 and contains approximately 4,668 Word Count words, including headings, footnotes and quotations.

August 26, 2021.

/s/ *Scott M. Flaherty*
Scott M. Flaherty (#388354)