NO. A21-0830

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.

BRIEF OF APPELLANT/CROSS-RESPONDENT CHIEF JUSTICE LORIE GILDEA

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STATEMENT OF ISSUE

Question presented: Did the district court err in holding that Minn. Stat. §§ 638.01 (second sentence) and 638.02, subd. 1—which empower the board of pardons by unanimous vote, to grant pardons, reprieves, and commutations—are unconstitutional because they conflict with Minn. Const. art. V, § 7, which establishes the board of pardons and empowers "[t]he governor in conjunction with the board of pardons … [to] grant reprieves and pardons"?

How raised and preserved: All parties moved for summary judgment on stipulated facts. The Chief Justice petitioned for accelerated review on this issue.

Apposite authorities:

Cases:
Reed v. Bjornson, 253 N.W. 102, 104 (Minn. 1934)
State v. Peterson, 198 N.W. 1011, 1012 (Minn. 1924)
In re Krogstad, 958 N.W.2d 331 (Minn. 2021)

Constitutional Provision:

Minn. Const. art. V, § 7

Statutory Provisions:

Minn. Stat. §§ 638.01 & 638.02

STATEMENT OF CASE AND THE FACTS

Trial Court: Second Judicial District

Trial Judge: Hon. Laura E. Nelson

Nature of the case: Constitutional challenge to Minn. Stat. §§ 638.01, 638.02 as in conflict with Minn. Const. art. V, § 7.

Disposition: Minn. Stat. § 638.01 second sentence, Minn. Stat. § 638.02 subd. 1 held unconstitutional.

INTRODUCTION

In 1896, the people of Minnesota amended their Constitution to preclude the governor from granting a pardon by himself. The people instead placed that power in a three-person board that includes the governor. In plain language, the constitution confirms this intention to remove the pardon authority from the governor and place that power with the board of pardons. But if this Court concludes that the Constitution is ambiguous, the canons of construction likewise confirm that intent. Because the district court's decision thwarts the people's intent, it must be reversed.

BACKGROUND

The constitutional question at issue here arises from the denial of Plaintiff Amreya Shefa's pardon application.

A. Shefa is convicted of manslaughter.

In 2013, Shefa stabbed her husband to death, and later was convicted of first-degree heat-of-passion manslaughter. (Doc. 13 ¶ 10-11.) She was sentenced and served nearly five years in prison at Shakopee Correctional facility. She was released in 2018. (*Id.* ¶ 11, 13.)

During her sentence Shefa appealed, arguing that the evidence provided at trial was insufficient to prove that she intended to cause the victim's death and was not acting in self-defense. *State v. Shefa*, No. A15-0974, 2016 WL 3042908 (Minn. App. May 31, 2016). The court of appeals

affirmed. Shefa petitioned for review, and this Court denied review. *State v. Shefa*, No. A15-0974, Order, Aug. 9, 2016.

B. Shefa applies for a pardon, sues attorney general.

Shefa filed her first application for pardon and commutation in June 2018. That application was screened and excluded from the hearing agenda. (Doc. 13 ¶ 24.)

Shefa filed a second pardon application in December 2018, which was denied based on the conclusion that her prior, screened application had been denied on the merits. (Doc. 13 ¶ 25.) Shefa challenged the conclusion that her June 2018 application had been denied on the merits, and in June 2019 the board agreed that her application should proceed. (Doc. 13 ¶ 28.)

C. Shefa's pardon application is denied.

Shefa requested a continuance in December 2019, and in June 2020, the board considered her application. (Doc. 13 ¶¶ 29-30, 32.) To her supporters, Shefa was a sympathetic pardon applicant. Those opposed to her pardon disagreed. For example, her pardon was opposed by the State of Minnesota acting through the Hennepin County Attorney's Office, who opposed her application "for multiple reasons, including the brutality of Defendant's acts, and most importantly, the wishes of the family members of the victim, H[redacted] T[redacted], who continue to feel the loss of their brother and friend." (A.Add.15.)

The Governor and the Attorney General supported Shefa's application; the Chief Justice voted to deny it. (*Id.* ¶¶ 33-35.) Lacking unanimous support, the petition was denied. (*Id.* ¶ 36.)

D. Shefa sues Governor, Attorney General, Chief Justice.

Shefa then sued each of the three members of the board, asking for an order (1) striking down as unconstitutional the statutory unanimity requirement for granting a pardon, (2) "enjoining the Governor to reconsider [Shefa's] pardon petition," and (3) "[e]njoining the Attorney General to immediately and permanently take steps to ensure all future pardon petitions are assessed" in a manner so as not to require unanimous vote. (Doc. 1 p. 15.)

All four parties stipulated to facts (Doc. 13), and all four parties moved for summary judgment. (Docs. 17, 19, 24.) Though nominally a defendant, the Governor agreed with Shefa on the merits. In each of their summary judgment papers, Shefa and Governor Walz both argued that the statutory unanimity requirement was unconstitutional. (Docs. 18, 20.) The Attorney General and the Chief Justice sought dismissal of the complaint, arguing that the statutory unanimity requirement was not unconstitutional. (Doc. 25.)

E. District court's ruling

The district court granted in part Shefa's and Governor Walz's summary judgment motions and denied the summary judgment motion filed by the Attorney General and the Chief Justice. (Doc. 50.)

The district court's April 20, 2021 order found Minn. Stat. §§ 638.01 and 638.02, subd. 1 unconstitutional and in conflict with Minn. Const. art. V, § 7. (Doc. 50 pp. 1-2.) First, the district court considered and rejected Shefa and Governor Walz's argument that the Constitution's use of the phrase "in conjunction with" showed that the drafters of the amendment did *not* intend the governor and the board to have joint power, as the drafters could have used advise-and-consent language to accomplish a similar result. (A.Add.7-9.) Next, the district court rejected Shefa and Governor Walz's argument that the Constitution's use of the singular verb "has"—rather than the plural verb "have"—assigns the pardon power solely to the governor, rather than to the board as a whole. (A.Add.9-10.) Finally, the district court rejected Shefa and Governor Walz's argument that the governor has the inherent power to pardon because it is an executive function. (A.Add.10.)

But the district court accepted Shefa and Governor Walz's argument that the 124-year-old statutory unanimity requirement was unconstitutional because the governor is mentioned twice in Minn. Const. art. V, § 7. In the district court's view, the canon against surplusage mandates that the

governor has some pardon power or duty separate from any pardon power or duty belonging to the board. (A.Add12-13.) In the district court's view, the drafters of the amendment could have removed—but chose not to remove—the language "the governor in conjunction with," (A.Add.12), and so, the district court concluded, the statutory language requiring unanimity effectively read that quoted phrase out of the constitution. (A.Add.12.)

The district court rejected the Attorney General and Chief Justice's argument that the 1896 amendment removed the sole pardon power from the governor and invested that power in the board. (A.Add.10.)

Though the district court agreed with Governor Walz and Shefa on the constitutional question, the district court denied their request for additional relief ordering Governor Walz to issue a pardon to Shefa. (A.Add. 11-14.) The district court concluded that their additional requested relief would invalidate the Chief Justice's role in the pardon process altogether. In the district court's view, now that the statutory unanimity requirement had been invalidated, it was the duty of the legislature to enact a new law. (A.Add.14.)

After an informal status conference, the district court issued a July 1, 2021 Amended Order[1] substantially similar to its April 20, 2021 order, differing only in that (1) the amended order explicitly directed entry of

[1] A.Add.2.

judgment; and (2) the amended order narrowed its finding of unconstitutionality regarding Minn. Stat. § 638.01 to just the second sentence of that section. (A.Add.2. ¶¶ 4-5.)

The court administrator entered judgment on the Amended Order (Doc. 65), and the Chief Justice appealed. The other three parties filed notices of related appeal. This Court ordered accelerated review and ordered expedited briefing.

ARGUMENT

I. REVIEW IS *DE NOVO*.

An issue of constitutional interpretation is a question of law reviewed *de novo*. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 617 (Minn. 2017).

II. THE DISTRICT COURT ERRED IN STRIKING DOWN § 638.02 SUBD. 1 AND PART OF § 638.01.

A. Principles of constitutional interpretation

1. Constitutional text, if unambiguous, controls.

When this Court interprets the text of the Minnesota Constitution, first the Court determines whether the language in question is ambiguous. *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000). If the constitutional language is unambiguous, the Court applies that language as written. *See Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005).

2. If ambiguous, constitutional text may be interpreted to determine its framers' purpose.

If a constitutional provision is ambiguous, the Court will look to the history and circumstances contemporaneous to constitutional provision's framing and ratification to determine the provision's purpose. *Id.* The Court will, "whenever reasonably possible," resolve ambiguity in a way that furthers the apparent purpose for which the provision was adopted. *Id.* The Court attempts to ascertain and give effect to the intent of the constitution as indicated by the framers and the people who ratified it. *Reed v. Bjornson*, 253 N.W. 102, 104 (Minn. 1934). The Court presumes that, in enacting a law, a legislature does not intend to violate the state constitution. *State v. Koenig*, 666 N.W.2d 366, 372-73 (Minn. 2003).

In determining the meaning of a constitutional provision, the Court may consider 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*, 253 N.W. at 104. The ultimate test for resolving constitutional meaning, though, is that "if the meaning be at all 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.*

3. Declaring a statute unconstitutional is a disfavored, last-resort option.

This Court is extremely reluctant to declare a statute unconstitutional and will do so "only when absolutely necessary," *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989), "and with extreme caution." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979). Precedent requires "every presumption" to be "invoked in favor of upholding [a] statute" that is challenged on constitutional grounds. *State v. Schwartz*, 628 N.W.2d 134, 138 (Minn. 2001). The presumption of constitutionality creates a heavy burden in making this challenge. *In re Haggerty*, 448 N.W.2d at 364. A party challenging a statute has a very high burden and must demonstrate "beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990).

B. No conflict exists between the unambiguous constitutional text and the statutory text.

1. The Constitutional text is unambiguous.

The entirety of the three-sentence constitutional provision at issue here reads as follows:

> 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 (2020). These three sentences do three things. The first sentence creates the pardon board and defines its members. The second sentence empowers the legislature to define and regulate the pardon board's powers; this task is expressly committed to the legislature via the constitutional phrase of art "defined and regulated by law." *See State ex rel. Gardner v. Holm*, 62 N.W.2d 58-59 (Minn. 1954).

The third sentence births the question presented in this case. According to the district court, this sentence has special significance: it contains the section's second reference to the governor, who, according to the district court, is mentioned "once individually and once as a member of the Board of Pardons." (A.Add.10.)

This Court's analysis of the phrase the "governor in conjunction with the board of pardons" should begin and end with the plain meaning of "conjunction." The Court applies unambiguous language as written, *see Kahn*, 701 N.W.2d at 825, and neither the word "conjunction" nor the phrase "in conjunction with" is ambiguous. A general dictionary available in 1896 offered the principal definition of the word "conjunction" as "[t]he act of conjoining, or the state of being conjoined, united, or associated; union; association; league." *See* 1 Noah Porter, *Webster's International Dictionary of the English Language* 304 (Geo. Bell & Sons 1890). Likewise, a legal dictionary published not long after the amendment defined "conjunction" as

"jointly." Charles E. Chadman, *A Concise Legal Dictionary* 107 (Am. Correspondence School of Law 1909).[2] Modern dictionaries offer similar definitions, referring to joining. (A.Add.8 (*citing* Merriam-Webster Dictionary 225 (11th ed. 2018).)

Consistent with these definitions, the constitution joins or unites the governor's pardon power with the board. No plain meaning supports the district court's view that the governor has some power left un-joined or separate from the board. (A.Add.13.)

The structure of the constitution provides additional context that undercuts the district court's view that the governor has some power separate from the board. Article V, § 3 of the constitution is titled "Powers and duties of governor." This section lists the governor's powers. Before the 1896 amendment to the constitution, the power to pardon was included in the constitution's listing of the governor's powers. But today, the power to grant pardons is not included among the governor's powers. The pardon power is

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[2] Many contemporaneous legal dictionaries did not define "conjunction." *See, e.g.*, William C. Anderson, *A Dictionary of Law* 228 (T.H. Flood & Co. 1893); 1 John Bouvier, *A Law Dictionary* 308-09 (T. & J.W. Johnson 2d ed. 1843); 1 Alexander M. Burrill, *A New Law Dictionary and Glossary* 260 (Voorhies 1850); Frederic Jesup Stimson, *Glossary of Technical Terms, Phrases, and Maxims of the Common Law* 68 (Little, Brown & Co. 1881); Henry Campbell Black, *A Dictionary of Law: Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* 252 (West Pub., 1891). A modern edition of *Black's* likewise does not define "conjunction." *See Black's Law Dictionary* 343 (West Pub. Co. 9th ed. 2009).

instead listed in art. V § 7, and assigned to the board of pardons. The constitution's structure thus contradicts the district court's holding that the governor has some power or duty separate or apart from the board.

Decades ago, this Court recognized that vesting the pardon power in the board limited the governor's power. This Court specifically identified the 1896 pardon board amendment as an example of the "reluctance to grant unlimited powers to the executive," *see Gardner*, 62 N.W.2d at 62 (noting "by amendment in 1896 the pardoning power was vested in a board of pardons consisting of the governor, attorney general, and chief justice of the supreme court").

In sum, both dictionary definitions and the context for the operative constitutional provision make plain that the governor no longer has the sole power to pardon.

2. The statutes do not conflict with the constitutional language.

Placed in this appropriate context, there is no conflict between the constitution and Minn. Stat. §§ 638.01-.02. The pardon power is vested in the board, as this Court has recognized. *Gardner*, 62 N.W.2d at 62. The legislature has the constitutional power to define how the board operates, *Id.*, at 58-59. Thus, the statutes requiring unanimity are constitutional.

The relevant constitutional provision is silent regarding how many board members must support a pardon for it to be effective. The constitutional text neither prohibits nor mandates unanimity. It does not even mention unanimity. Instead, the constitution states that the board's powers and duties are left to the legislature to regulate. Minn. Const. art V, § 7.

After the voters approved the 1896 amendment, the subsequent legislature enacted a law stating that no pardon would be effective unless issued by a unanimous vote of the board. *See* 1897 Minn. Laws ch. 23 § 2. The closeness in time between the 1896 amendment and the 1897 statute 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) ("The contemporaneous interpretation of the Babcock Amendment by the first Legislature assembled after its adoption is entitled to great weight," explaining that "the legislative exposition of a constitutional provision, following closely upon the adoption thereof, may well be supposed to result from the views which prevailed among the framers of the provision").[3]

[3] To be sure, the legislature did not have to require that the board be unanimous, but the legislature's choice is not unconstitutional. The argument advanced in support of such a conclusion is the argument adopted by the district court based on the separate reference to the governor in the first

3. The district court's reading is not reasonable.

The district court read the constitution to provide that the governor has some power by himself to pardon. But that reading is not reasonable.

Purporting to apply the canon against surplusage (A.Add.11), the district court reasoned that drafters of the amendment could have removed the language "the Governor in conjunction with" in art. V, § 7 but chose not to do so. (A.Add.12.) According to the district court, because art. V, § 7 names the governor separate from the board of pardons, of which he is a member, the governor has some pardon power or duty separate or apart from the board. (A.Add.13.)

That the governor is mentioned twice in this section does not trigger the surplusage canon. The district court's reasoning assumes that the canon against surplusage requires drafters to be as concise as possible when drafting legal text. But "the canon against surplusage, 'like all other canons, ... must be applied with judgment and discretion, and with careful regard to context.'" *In re Krogstad*, 958 N.W.2d 331, 335 (Minn. 2021) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012)). "Sometimes drafters *do* repeat themselves and *do* include words

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clause of the amendment. As shown above, however, that argument fails. The voters gave the legislature broad powers to regulate how the board would operate and there is no basis in law for the judiciary to overturn that choice.

that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and suspenders approach." *Id.* (quoting Scalia & Garner at 176-77 (emphasis in original)). Context matters. *Id.*

Moreover, it is unsurprising that the governor is mentioned twice. As this Court has recognized, "[a] pardon is the exercise of executive clemency." *State v. Meyer*, 37 N.W.2d 3, 13 (Minn. 1949).[4] The governor, of course, is the head of the executive department and the state's chief executive, *State ex rel. Birkeland v. Christianson*, 229 N.W. 313, 314 (Minn. 1930). He has procedural and administrative duties relating to granting pardons that differ from the other two members of the board. The board of pardons is part of that department. Minn. Const. art V. § 7. The governor supervises the commissioner of corrections—whom he appoints, *see* Minn. Stat. § 241.01—who is the pardon board's secretary. *See* Minn. Stat. § 638.07. That secretary receives all applications, prescreens them, and prepares the calendar, among other procedural duties. *See, e.g.*, Minn. R. 6600.0200, .0400, & .0700. Accordingly, because the source of the pardon power lies within the executive

[4] *Meyer* recognized that the Court did not then need to "determine whether the power to pardon is vested exclusively in the board of pardons under our constitution." 37 N.W.2d at 12. To the extent *Meyer* could be read to suggest an answer to the question posed by the current appeal, any such language is dicta. *E.g.*, *id.* at 14 ("The act does not prevent the governor or the state board of pardons from granting a pardon or a reprieve.").

department, it is not surprising that the governor's administrative role in the process is separately called out in the constitution.

But the fact that the source of the power is executive in character says nothing about how that power may be exercised. And the first reference to the governor clearly does not mean that the governor is empowered to make the pardon decision by himself. The rest of the sentence tells us that the pardon can only come from the governor acting in union with the board. This Court is not free to ignore the constitutional provision for the board, and so the district court's reading is simply not reasonable.

Because there is only one reasonable reading of the constitutional amendment, the provision is not ambiguous. "Conjunction" and "separation" are not synonyms; "disjunction" and "separation" are synonyms. Peter Mark Roget & John Lewis Roget, *Thesaurus of English Words and Phrases* 15 (Longmans, Green, & Co., new ed. 1894). Under the plain meaning of the provision, the governor's pardon power is joined with the board—not separate from it. Instead, the authority to pardon is vested in the governor acting in union with the board. Adhering to the plain meaning of the constitution requires reversal.

C. ALTERNATIVELY, IF THE COURT FINDS THE CONSTITUTIONAL TEXT AMBIGUOUS, IT SHOULD CONSTRUE THAT TEXT CONSISTENT WITH CONTEMPORANEOUS UNDERSTANDING OF ITS FRAMERS, PUBLIC DELIBERATION, LEGISLATIVE UNDERSTANDINGS, AND LONG-HELD PRACTICE.

In the alternative, if this Court concludes that the district court's reading of the art. V, § 7 is reasonable, then the provision is ambiguous because it has more than one reasonable interpretation. *See Harris v. County of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004). In determining the meaning of an ambiguous constitutional provision, the Court may consider 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*, 253 N.W. at 104. The ultimate test for resolving constitutional meaning, though, is that "if the meaning be at all 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.*

1. Nineteenth-century governors wanted to give up the pardon power to a board.

As early as 1878, the *Minneapolis Tribune* reported that Governor Pillsbury wanted a board of pardons. The paper reported that the governor sought the creation of a board of pardons so "that the executive may be relieved from the responsibility and the bur[d]en of pardoning and examining

the petitions for pardons." Editorial, *The Governor's Message*, *Minneapolis Tribune* Jan. 11, 1878, at 2. (A.Add.17.[5])

Governor Pillsbury was not alone. Governor McGill later recommended that the legislature remove the pardoning power from the governor and place it in the hands of a pardon board. Editorial, *A Pardon Board*, *St. Paul Daily Globe*, Jan, 10, 1889, at 4. (A.Add.20.)

Governor Clough delivered the governor's regular message to the joint session of the legislature, reported by the *Minneapolis Tribune* in 1897. Relevant here, in the interim between the voters' 1896 approval of the amendment and before the enactment of the 1897 operating statute, Governor Clough was reported as saying "there is need of some legislation to make valid the constitutional provision adopted at the last election creating a board of pardons. At present *no pardon can be granted by any one* until a statute law makes valid the provision of the constitution." *Governor's Message*, *Minneapolis Tribune*, Jan. 7, 1897 at 5 (A.Add.23.)

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[5] All the documents in this addendum are public, but not all are part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01. Nonetheless, the Court is "empowered to take judicial notice of public records and may look beyond the record where the orderly administration of justice commends it." *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 581 n.8 (Minn. 2021) (quotations and citations omitted). As noted herein, the Court looks to the history and circumstances contemporaneous to constitutional provision's framing and ratification to determine a provision's purpose.

Governor Clough's contemporaneous statement contradicts the district court's view that "the Governor has some pardon power or duty separate or apart from the Board of Pardons." (A.Add.13.) If Governor Clough would have had some constitutional power separate from the board, he could have exercised that constitutional power without a legislative statute. Governor Clough's understanding, and the reported views of Governor Pillsbury and Governor McGill all support reversal.

2. The 1896 voting public was officially told that the amendment would deprive the governor of his pardon power.

By statute, the Minnesota Attorney General is required to "furnish to the secretary of state a statement of the purpose and effect of all [constitutional] amendments proposed[]." Minn. Stat. § 3.21. The stated purpose of the 1896 amendment[6] was "*to deprive the governor of the power to alone* grant pardons and reprieves, which he now enjoys, and to create board

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[6] The bill authorizing the 1896 constitutional amendment provided:

> striking the following words, viz.: 'And he shall have power to grant reprieves and pardons after convictions for offenses against the state," and inserting in lieu thereof the following, that is to say: '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….'

1895 Minn. Laws ch. 2.

of pardons, consisting of the governor, the attorney general and the chief justice of the supreme court." (Doc. 32 (emphasis added).) Nothing in this statement of purpose prohibited the legislature from requiring unanimity from the pardon board.

The attorney general's statement of purpose constitutes the lay public's understanding of a proposed amendment. *See Knapp v. O'Brien*, 179 N.W.2d 88, 93 (Minn. 1970) ("[T]he Legislature has been mindful of the fact that frequently people who are not educated in law do not understand the legal terminology of a proposed constitutional amendment and, for that reason, has required that the attorney general explain it to them so they understand what they are voting on."). The voters who approved the amendment in November 1896 would not have understood it as preserving any gubernatorial pardon power separate from the board. That understanding supports reversal.

3. Contemporaneous press shows an understanding that the amendment would transfer the governor's power to the board.

Contemporaneous newspaper publications show that the statutory unanimity requirement was well-understood and viewed as proper. Years before the amendment passed, the public was debating its propriety. As early as 1888, the *St. Paul Daily Globe* reported that the legislature was considering "creat[ing] a board of pardons, taking from the governor that

function." Editorial, *The Next Legislature*, *St. Paul Daily Globe*, Apr. 7, 1888, at 1. (A.Add.18.)

That same year, the *Prison Mirror*[7] published a letter to the editor calling for a board of pardons, urging that the pardoning power "be vested in a body of men, rather than confined to one person." W. F. Mirick, *A Plea for a Board of Pardons*, *Prison Mirror*, July 4, 1888, at 2. (A.Add.19.)

A July 12, 1897 article in the *Minneapolis Tribune* explained that until "the meeting of the last legislature the power of pardon in this state was lodged in the hands of the governor." Editorial, *The Board of Pardons*, *Minneapolis Trib.*, July 12, 1897, at 4 (A.Add.25.) That article told the reading public that the new statute required "every pardon or commutation of sentence shall be in writing and shall have no force of effect unless the same was granted by an [*sic*] unanimous vote by said board convened as such." *Id.*

[7] The *Prison Mirror*, at various times entitled just the *Mirror*, is the newspaper of the Minnesota Correctional Facility - Stillwater, also known as the Stillwater State Prison, and claims to be the longest, continuously published prison newspaper in the country. *See* https://www.mnhs.org/newspapers/hub/prison-mirror (last visited July 29, 2021). It was co-founded by none other than the Younger Brothers. *Id.; see infra* n.8.

That article went on to summarize the well-known[8] case of the Younger Brothers, who were then seeking pardons. Editorializing against their pardons, the *Tribune* wrote: "[w]e are glad the law provides that the pardon cannot be granted except by unanimous vote of the board…. Any one member can prevent the pardon being granted, and if he fails to do so, the pardon will be as much his act as if the whole pardoning power resided in him." *Id.*

It was not just the supporters of creating a pardon board who understood that doing so would diminish the governor's power. Even newspapers that opposed the pardon board's creation understood what it would do to the governor's power. An 1891 edition of Swedish-American *The North*,[9] a weekly newspaper, published a comment noting that there was "some talk in certain political circles in Minnesota about *removing the pardoning power from the governor* and vesting it with a pardoning board…." Skaffaren, Comment to the Editor, *Let the Pardoning Power Remain Where It Now Is*, *North*, Jan. 28, 1891, at 4 (emphasis added). (A.Add.21.) That

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[8] In 1876, the Younger brothers, with others in the James-Younger Gang, robbed the First National Bank of Northfield. The Minnesota Historical Society has a wealth of materials regarding their crimes. *See* https://libguides.mnhs.org/northfieldraid (last visited July 29, 2021).

[9] That newspaper self-described as "a paper that represents the progressive spirit of the Scandinavian race in this country, and its desire to enter into closer intellectual companionship with the great English-speaking community." Luth Jaeger, *North*, Jan. 28, 1891, at 4.

newspaper opposed transferring the pardon power from the governor to a board, as "the governor has just as much opportunity to look into the character of the crime as a commission…." *Id.*[10]

By the time the amendment was on the ballot in 1896, it had gained support in the press. An October 28, 1896 edition of *The Representative* supported the amendment, writing "[w]e do not believe that the governor alone should have the power to grant pardons for offens[es] against the state. We, therefore, favor the amendment to create a board of pardons, consisting of the governor, the attorney general and the chief justice of the supreme court." Editorial, *Some Const. Amendments*, *Representative*, Oct. 28, 1896, at 3. (A.Add.22.)

After the voters approved the amendment, newspapers recognized that the governor's pardon power had been transferred to the board. An 1897 edition of the *St. Paul Globe* explained "the power of commuting, issuing reprieves or pardons, does not lay in the governor's power at the present time, and has not since election." Editorial, *Clough Will Not Act*, *St. Paul Globe*, Jan. 26, 1897, at 2. (A.Add.24.) It continued, "[t]he constitutional amendment that was adopted at the general election, establishing a board of

[10] This comment appears to be a translated republication from the *Skaffaren*. *See* https://www.mnhs.org/newspapers/hub/minnesota-stats-tidning (last visited July 29, 2021) (describing the history of *Skaffaren* (The Steward) as established by a founder of Gustavus Adolphus College).

pardons in the governor, chief justice and attorney general, took these powers from the governor, it is claimed…." *Id.* Explaining the legislature's role, it stated, the "board of pardons will not be in a position to take action, either" until "the legislature enacts a law, in accordance with the provisions of the constitutional amendment in question, defining the powers of the board and its duties." *Id.*

4. Anderson's *History of the Constitution of Minnesota* shows the pardon power was taken from the governor and given to the board.

"The best edition of the constitution with all the amendments proposed and ratified up to 1921" is William Anderson's *History of the Constitution of Minnesota with the First Verified Text*, (U. of Minn. 1921), according to Folwell. *See* 2 William Watts Folwell, *History of Minnesota*, 1 n.1 (Minn. Hist. Soc. 1961) (citing same).

Anderson's *History of the Constitution* has been cited by the Court repeatedly.[11] At least once, the Court cited it specifically for its history of constitutional amendments. *Knapp*, 179 N.W.2d at 92-93 (Minn. 1970) ("[t]he constitution remained as amended in 1888 until the 1962 amendment. For a

[11] *E.g.*, *Kahn*, 701 N.W.2d at 832; *Contos v. Herbst*, 278 N.W.2d 732, 740 (Minn. 1979); *Gardner,* 62 N.W.2d at 58 nn. 3 & 6, at 62 n.11.

history of these amendments, see Anderson, A History of the Constitution of Minnesota, [at] 165.").

Relevant here, Anderson's *History of the Constitution of Minnesota* has a helpful table in appendix 3 summarizing constitutional amendments. Under the heading "Purpose of Amendment," the table says: "To take pardoning power from the governor and to confer it on a pardon board." *See* Anderson, *History of the Constitution of Minnesota* 281. That identical language of purpose is also found on the website of the legislature's reference library. *See* https://www.lrl.mn.gov/mngov/constitutionalamendments ("To take pardoning power from governor and to confer it on a pardon board.") (last visited July 27, 2021).

Though Anderson's work post-dates the amendment by about 25 years, his scholarship is 100 years closer to that amendment than we are today. The Court's repeated citation to his work, Folwell's praise of him, and his proximity to contemporaneous events of the 1890s entitles his view to some real weight. That view supports reversal.

Moreover, Anderson's view has carried the day—at least with the Secretary of State. The *Minnesota Legislative Manual* describes the amendment's purpose as "[t]o take pardoning power from governor and to confer it on a pardon board." *See 2019–2020 Minnesota Legislative Manual* 79 (Office of Minn. Sec. of State 2019). By law, the Secretary of State must

prepare and print 10,000 copies of this manual for each regular legislative session. Minn. Stat. § 5.08, subds. 1-2. That statute requires these manuals to be distributed to members of this Court. *Id.* subd. 2(6).

5. All relevant legislators in the 29th and 30th Legislatures confirm the intention that a pardon could only be awarded with the unanimous vote of the board.

Two different legislatures passed the bill for the 1896 amendment and the bill authorizing the pardon board's first operating statute. The 29th Minnesota Legislature passed H.F. 375 in 1895 (1895 Minn. Laws. ch. 2), which placed the amendment on the 1896 ballot. The 30th Minnesota Legislature passed S.F. 344 in 1897, which became the board's first operating statute and included the unanimity requirement. 1897 Minn. Laws ch. 23, § 2.

The voting records in both chambers show that the statutory unanimity requirement was unobjectionable. The 29th Senate passed H.F. 375, which put the amendment on the ballot, by 30-3.[12] In the 30th Senate, S.F. 344 passed quickly; in a single day, the rules were suspended, the bill was read three times, and it passed unanimously.[13]

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[12] Minn. Sen. J., 29th Minn. Leg., Reg. Sess. 802 (1895).

[13] Minn. Sen. J., 30th Minn. Leg., Reg. Sess. 267-68 (1897).

All 23 senators in the 30th Senate who had served in the 29th Senate voted for S.F. 344 and its unanimity requirement,[14] including notably both of the 'no' votes against H.F. 375. Put another way, the two returning senators[15] who had already opposed the amendment taking power from the governor nonetheless supported imposing the statutory unanimity requirement on the board.

These two men were in the best position to defend the governor's purported post-amendment pardon power against the statutory unanimity requirement. Senators Sperry and Sweningsen could have opposed S.F. 344, just as they voted against H.F. 375. Neither senator was ignorant of the law. Sweningsen had worked for 12 years as clerk of the district court.[16] Sperry had earned a law degree from the University of Michigan decades earlier.[17]

The House's voting pattern tells a similar story. H.F. 375 passed the 29th House with a just a single 'no' vote.[18] And S.F. 344 passed the

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[14] *Compare* Minn. Sen. J. 802 (1895) *with* Minn. Sen. J. 267-68 (1897).

[15] Senators Sperry and Sweningsen voted against H.F. 375 (Minn. Sen. J. 802 (1895)) but in favor of S.F. 344 (Minn. Sen. H. 267-68 (1897).

[16] Sweningsen: https://www.lrl.mn.gov/legdb/fulldetail?ID=15026 (last visited July 27, 2021).

[17] Sperry: https://www.lrl.mn.gov/legdb/fulldetail?ID=14895 (last visited July 27, 2021).

[18] Minn. H.J., 29th Leg., Reg. Sess. 621-22 (1895).

subsequent House unanimously as it had passed the Senate.[19] All 12 members of the 29th House who voted for H.F. 375 also voted for S.F. 344 and its unanimity requirement.[20]

These voting patterns tell a remarkable story of consensus regarding the unanimity requirement. Of those 35 legislators who voted in 1895 for the bill to put the amendment on the ballot, every single one of them voted to impose the statutory unanimity requirement that followed. And of the 129 legislators who voted in 1897 on S.F. 344, every single one of them voted for that bill's statutory unanimity requirement. No one opposed the unanimity requirement.

This Court generally presumes that the legislature knew what it was doing, *Van Asperen v. Darling Olds, Inc.*, 93 N.W.2d 690, 698 (Minn. 1958), and presumes that the legislature did not intend to violate the state constitution. *Koenig*, 666 N.W.2d at 372-73.

Here, that presumption is no legal fiction; it is well-supported. First, there is closeness in time between the amendment and the operating statute. Second, there is meaningful overlap in individual, identifiable legislators across sessions. And third, not a single vote was cast in either chamber

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[19] Minn. H.J., 30th Leg., Reg. Sess. 353 (1897).

[20] Compare Minn. H.J. 621-22 (1895) with Minn. H.J. 353 (1897).

against S.F. 344's unanimity requirement. All these facts support reversing the district court's contrary view. *See Peterson*, 198 N.W. at 1012 (noting favorably the substantial overlap between legislature that passed amendment and subsequent legislature that enacted a law pursuant to it).

The timing and voting pattern of the relevant legislatures strongly supports reversal.

CONCLUSION

A legislature may amend the statutes. The people may amend the constitution. But the judicial branch should not do either. Minn. Stat. §§ 638.01 and 638.02 are valid exercises of the legislature's power to regulate the board of pardons. They are consistent with the Minnesota Constitution. Since 1896, no governor has held pardon power separate from the board's. The Chief Justice respectfully asks the Court to reverse the district court's judgment.

Respectfully submitted.

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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 Word 2010 and contains approximately 6,352 Word Count words, including headings, footnotes and quotations.

August 4, 2021.

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