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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 RESPONDENT/CROSS-APPELLANT GOVERNOR TIM WALZ

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STATEMENT OF THE ISSUES

1. Did the district court correctly determine that Minn. Stat. §§ 638.01 (second sentence) and 638.02, subd. 1 (hereinafter, the "Statutes")—which purport to give the Board of Pardons exclusive power to grant pardons and require it to act by unanimous vote—are unconstitutional as violating Minn. Const. art. V, § 7 (hereinafter, the "Pardon Provision"), which empowers the Governor to grant pardons in conjunction with the Board of Pardons?

How raised and preserved: All parties moved for summary judgment on stipulated facts. The district court held the Statutes unconstitutional as violating the plain language of the Pardon Provision. This Court accepted accelerated review.

Apposite Authorities:

Constitutional provision:
Minn. Const. art. V, § 7

Statutory provisions:
Minn. Stat. §§ 638.01–.02

Cases:
Rhodes v. Walsh, 57 N.W. 212, 214 (Minn. 1893)
State ex rel. Peterson v. Quinlivan, 268 N.W. 858, 860 (Minn. 1936)
State v. Meyer, 37 N.W.2d 3, 13 (Minn. 1949)
Kahn v. Griffin, 701 N.W.2d 815, 825 (Minn. 2005)

2. Did the district court err in concluding that, because the Constitution provides that the Chief Justice of the Minnesota Supreme Court is a member of the Board of Pardons, the Statutes do not violate the doctrine of separation of powers even though the power to pardon is an executive function and the Constitution does not expressly provide the Chief Justice with a unilateral veto power over pardons or allow the Legislature to define when pardons may issue?

How raised and preserved: All parties moved for summary judgment on stipulated facts. The district court held the Statutes unconstitutional as violating the plain language of the Pardon Provision, but not under the doctrine of separation of powers. This Court accepted accelerated review.

Apposite Authorities:

Constitutional provisions:
Minn. Const. art. III, § 1
Minn. Const. art V, § 7

Statutory provisions:
Minn. Stat. §§ 638.01–.02

Cases:
State ex rel. Childs v. Griffen, 72 N.W. 117, 118 (Minn. 1897)
State v. Stern, 297 N.W. 321, 323 (Minn. 1941)
Holmberg v. Holmberg, 588 N.W.2d 720, 723 (Minn. 1999)

3. Did the district court err in declining to decide that, when, as here, the Governor acts in conjunction with the Board on a pardon application, the Governor has the power under the Constitution to grant pardons?

How raised and preserved: All parties moved for summary judgment on stipulated facts. The district court held the Statutes unconstitutional as violating the plain language of the Pardon Provision, but declined to rule on whether when, as here, the Governor acts in conjunction with the Board on a pardon application, the Governor has the power to grant the pardon. This Court accepted accelerated review.

Apposite authorities:

Constitutional provision:
Minn. Const. art. V, § 7

Cases:
Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)
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STATEMENT OF THE CASE

This case is about two statutes—Minn. Stat. §§ 638.01 (second sentence) and 638.02, subd. 1—that purport to restrict the pardon power set forth in Article V, § 7 of the Minnesota Constitution. Because the Statutes are incompatible with the plain language of the Constitution, the district court[1] declared them unconstitutional. This Court should do the same.

In 1896, the people of Minnesota amended the Constitution to provide that the "governor in conjunction with the board of pardons has power to grant reprieves and pardons." Minn. Const. art. V, § 7. The Board of Pardons consists of the Governor, Attorney General, and Chief Justice, and the Constitution provides that the powers and duties of the Board shall be defined by law. *Id.* The Constitution therefore singles out the Governor as having the power to grant pardons and specifies that the Governor "has" that power when the Governor acts in conjunction with the Board. *Id.* In 1897, however, the Legislature passed a law purporting to vest the Board directly with the power to grant pardons, Minn. Stat. § 638.01, and attempting to rewrite the Constitution's "in conjunction with" standard into a unanimous one, stating that a pardon shall have "no force or effect unless granted by a unanimous vote of the board duly convened," Minn. Stat. § 638.02, subd. 1.

The conflict between the Statutes and the Pardon Provision is at the heart of this litigation. This case began with a plea for clemency by a victim, Respondent Amreya

[1] Ramsey County District Court (the Hon. Laura E. Nelson, presiding).

Shefa,[2] who has suffered unspeakable abuse and who faces the prospect of deportation that could put her in grave physical danger once again. The Governor acted in conjunction with the Board and voted, along with the Attorney General, to grant Shefa's request for a pardon. Nonetheless, the pardon was denied because the Chief Justice voted against the pardon and the Governor was obligated to follow the Statutes, which purport to give the Board exclusive power to grant pardons and require a unanimous vote of the Board for pardons to take effect. After her pardon application was denied, Shefa filed an action against the Governor and Appellants, in their official capacities, challenging the constitutionality of the Statutes.

After being sued, the Governor found himself, uncomfortably, facing conflicting duties in this case: He has sworn a solemn oath to support the Minnesota Constitution, which empowers him to act in conjunction with the Board to grant pardons, but he must also faithfully execute Minnesota statutes, which unconstitutionally restrict his constitutional power to grant pardons. Those statutory restrictions led to a denial of Shefa's pardon. But given that the Statutes directly conflict with the Constitution, the Governor joined with Shefa in advocating that the Statutes must yield to the Constitution. The district court agreed.

The district court got it right. The plain language of the Constitution provides that the Governor in conjunction with the Board has the power to pardon. The Statutes directly

[2] This brief refers to the Attorney General and Chief Justice collectively as "Appellants" and Shefa and the Governor collectively as "Respondents."

contradict that plain language by purporting to vest pardon power directly (and only) in a unanimous Board. The Statutes thus unconstitutionally restrict the Governor's power by requiring the Governor to act, not "in conjunction with" the Board, but unanimously with each Board member before granting a pardon. Moreover, even if the Constitution were ambiguous regarding the Governor's power to grant pardons in conjunction with the Board (it is not), the purpose of the Pardon Provision and additional interpretive considerations demonstrate that the Governor's pardon power may not be vested in the Board directly or subjected to Legislative encroachment by a statutorily created unanimity requirement.

The Statutes must also be declared unconstitutional for an independent reason: They violate the separation of powers enshrined in the Constitution. While the Legislature has the authority under the Constitution to define and regulate the powers and duties of the Board, the Constitution does not allow the Legislature to define when pardons may issue. The power to pardon is expressly provided in the Constitution to the Governor in conjunction with the Board. Additionally, nowhere does the Constitution expressly provide the Chief Justice with a unilateral veto over pardons. By imposing an unanimity requirement found nowhere in the Constitution, the Statutes impermissibly restrict the executive branch's power, providing the Chief Justice with power equal to the Governor to unilaterally block any pardon.

Because the Statutes cannot be reconciled with the Constitution, the Court should affirm the district court and declare the Statutes unconstitutional. The Court should also hold that the Governor has already acted in conjunction with the Board with respect to Shefa's pardon application and therefore the Governor has power to grant Shefa's pardon.

STATEMENT OF FACTS

1. Shefa's conviction

In fear for her life, Shefa stabbed and killed her abusive husband. (Doc. 14, Ex. A FOF ¶¶ 8, 14, 16, 26, 32).[3] At her subsequent criminal trial, the trial court found that the evidence corroborated Shefa's claims that her husband sexually assaulted her the night he died and that the assault was part of a pattern of "on-going" abuse. (*Id.* COL ¶ 14 n.7, FOF ¶ 10.) Because Minnesota law includes a duty to retreat before perfecting a claim of self-defense, the trial court held Shefa had "exceed[ed] the degree of force required to defend herself" against her husband and found her guilty of first-degree manslaughter. (*Id.* COL ¶ 12; *id.* at 19.) At sentencing, the trial court recognized Shefa's case as "one of the most difficult of my legal career" and said the case was "the most difficult case that I have had in my time on the bench." (Doc. 14, Ex. B at 58:17–19.) Nevertheless, the trial court committed Shefa to the Commissioner of Corrections for a period of 86 months. (*Id.* 59:17–60:10.) Shefa completed the custodial portion of her sentence on September 10, 2018. (Doc. 13 ¶ 13.)

2. Shefa's immigration proceedings

During her sentence, Shefa, a citizen of Ethiopia, was charged as removable from the United States and taken into U.S. Immigration and Custom Enforcement ("ICE") custody. (Doc. 13 ¶ 14; Doc. 14, Ex. C.) Accordingly, when Shefa was released from state

[3] Doc. 14, Ex. A is the criminal trial court's Findings of Fact, Conclusions of Law, and Order. "FOF" refers to the Findings of Fact and "COL" refers to the Conclusions of Law.

prison, she was immediately detained by ICE. (Doc. 13 ¶ 14.)

Shefa filed a motion to terminate her removal proceedings on September 1, 2017. (*Id.* ¶ 15; Doc 14, Ex. D.) The Immigration Judge overseeing her proceedings denied that motion and concluded Shefa was removable. (Doc. 13 ¶ 15; Doc. 14, Ex. E.) Shefa then filed applications for withholding of removal and protection under the Convention Against Torture. (Doc. 13 ¶ 16; Doc. 14, Ex. F.) The basis of Shefa's application is her belief that her late husband's family, some of whom still reside in Ethiopia—where Shefa would be destined if removed—have sworn a blood oath to kill her in revenge for the loss of their family member. (Doc. 13 ¶ 16; *see also* Doc. 14, Ex. G.)

Shefa remained in ICE custody for almost two years awaiting the resolution of her immigration proceedings. (Doc. 13 ¶ 22.) She was released on bond in June 2020 pending final resolution of her immigration case, which remains pending. (*Id.*; Doc. 14, Ex. O.)

3. Pardons under Minnesota law

The Minnesota Constitution, as originally adopted, provided for the Governor to have pardon power. Minn. Const. art. V, § 4 (1857). In 1895, the Minnesota Legislature proposed an amendment to the Constitution, under which the Governor retained the power to pardon, but required that he or she act "in conjunction with" a Board of Pardons. 1895 Minn. Laws ch. 2, § 1. The amendment passed in 1896.

Article V of the Constitution is entitled "Executive Department" and provides that the Governor "in conjunction with" the Board "has power to grant reprieves and pardons." Minn. Const. art. V, § 7. The Board consists of "[t]he governor, the attorney general and the chief justice of the supreme court," and the Board's "powers and duties shall be defined

and regulated by law." *Id.*

In 1897, the Legislature enacted the predecessor to Section 638.02, subd. 1, which now provides that "[e]very pardon or commutation of sentence shall be in writing and shall have no force or effect unless granted by a unanimous vote of the board duly convened." 1897 Minn. Laws ch. 23, § 2 (codified at Minn. Stat. § 5425 (1905)); Minn. Stat. § 638.02, subd. 1. Minnesota law provides for "pardons absolute," commutations, and statutorily created "pardons extraordinary." Minn. Stat. § 638.02, subd. 2. This case involves a petition for a pardon absolute and commutation. (Doc. 13 ¶ 29; Doc. 14, Ex. Q.)

A petitioner may appear at one of the Board's biannual hearings. (Doc. 13 ¶ 6.) After hearing the petitioner's application, the three Board members cast their individual votes, either supporting or declining to support the petitioner's application. (*Id.*) If all three members of the Board vote in favor of an application, the Governor may grant the petition. Otherwise, given the statutory unanimity requirement and the Governor's duty to follow Minnesota statutes, the Governor may not do so.

Voting records for the Board meetings from June 2019, December 2019, and June 2020 demonstrate that twenty-seven applications for pardons were denied; of the twenty-seven, nine had the support of the Governor and one other Board member yet were denied given the statutory requirement of a unanimous vote. (Doc. 21 at Ex. 1.) Thus, one-third of these pardon denials (9 out of 27, or 33.3%) were attributable solely to the statutory unanimous vote requirement. (*Id.*)

4. Shefa's applications for a pardon and commutation

Shefa filed her first application for a pardon absolute and commutation in June 2018.

(Doc. 13 ¶ 24.) That application was screened by the Secretary of the Board and excluded from the hearing agenda. (*Id.*; Doc. 14, Ex. P.)

Shefa filed a second pardon application in December 2018. (Doc. 13 ¶ 25; Doc. 14, Ex. Q.) That application was first summarily denied, but the Board voted at its June 2019 hearing to consider Shefa's application on the merits. (Doc. 13 ¶ 28.) After receiving testimony from Shefa and members of the community, the hearing was continued. (*Id.*)

On June 12, 2020, Shefa again appeared before the Board. (Doc. 13 ¶ 32.) The Governor and Attorney General both voted to grant Shefa's pardon. (*Id.* ¶¶ 33–34.) The Chief Justice voted to deny Shefa's pardon. (*Id.* ¶ 35.) The Governor has affirmed that "[b]ut for the unanimous vote required by Minnesota Statutes, section 638.02, subdivision 1, and my constitutional duty to faithfully execute Minnesota law, I would have granted the pardon application, because I, as Governor, had voted to grant the pardon application in conjunction with a majority of the Board of Pardons." (Doc. 14, Ex. U.) Nevertheless, given the unconstitutional unanimous vote requirement, Shefa's pardon was denied. (Doc. 13 ¶ 36.)

5. Shefa files an action challenging the Statutes

After her pardon application was denied, on July 17, 2020, Shefa filed this action for declaratory and injunctive relief against the Governor and Appellants. (Doc. 1.) Shefa challenged the constitutionality of the Statutes for requiring a unanimous vote from the Board to effectuate any pardon. (*Id.*) All parties agreed to a stipulated factual record in this case and moved for summary judgment.

Shefa's motion for summary judgment asked the court to find the Statutes

unconstitutional and order the Governor to reconsider Shefa's previously denied pardon. (Doc. 18.) The Governor filed a motion for summary judgment arguing that the Statutes are unconstitutional and because the undisputed facts showed that the Governor had acted in conjunction with the Board to grant Shefa's pardon, asked the court to enter judgment allowing him to grant Shefa's pardon *nunc pro tunc*. (Doc. 20.) Appellants filed a motion for summary judgment arguing that the Statutes are constitutional and seeking dismissal of Shefa's complaint. (Doc. 25.)

6. The district court holds the Statutes unconstitutional

On April 20, 2021, the district court issued an order on the cross-motions for summary judgment finding the Statutes "unconstitutional based on the plain language of Minn. Const. art. V, § 7." (Doc. 50 at 1.) Specifically, the district court explained that Appellants argued that "art. V, § 7 endows the Governor with no power or duty separate and apart from the Governor's role as a member of the Board of Pardons." (*Id.* at 9.) The district court found that this interpretation "completely negates the words '[t]he governor in conjunction with'" and the fact that the Governor is mentioned "once individually and once as a member of the Board of Pardons" in Article V, § 7. (*Id.*) The district court recognized that, although the Constitution provides that the powers and duties of the Board "shall be defined and regulated by law," the "legislative process is constrained by the remainder of the constitutional text, which states that '[t]he governor in conjunction with the board of pardons has power to grant reprieves and pardons.'" (*Id.* at 6 (alteration in original).)

The district court did not find the Statutes unconstitutional based on the doctrine of

separations of powers. (*Id.* at 11–12.) The district court also declined to "address the argument that the correct interpretation of art. V, § 7 would require that a pardon be effective if the Governor and one other member of the Board . . . voted yes." (*Id.* at 11.)

On July 1, 2021, the district court issued an amended order that made clear that notwithstanding its order, "[t]he Board of Pardons' constitutional authority, as well as Minn. Stat. Chapter 638, remains in full force and effect, except for the second sentence of Minn. Stat. § 638.01 and Minn. Stat. § 638.02 subd. 1." (A.Add.2 ¶ 6.)[4] In addition, the district court clarified that the Board could continue to meet. (*Id.* ¶ 7.)

7. This Court accepts accelerated review

The district court entered judgment on July 6, 2021. (Doc. 65.) On July 20, 2021, this Court granted accelerated review. (Doc. 77.)

ARGUMENT

This case should be resolved as the district court resolved it, based on the plain language of the Constitution. When interpreting the Constitution, this Court "first examine[s] the language of the constitutional provision in question," *Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005), and strives "to give effect to the clear, explicit, unambiguous and ordinary meaning of the language." *Clark v. Pawlenty*, 755 N.W.2d 293, 304 (Minn. 2008) (citation omitted). Here, the plain language of the Constitution provides that "the governor in conjunction with the board" has the power to grant pardons. Minn. Const. art V, § 7. The Statutes directly contradict that plain language by purporting to vest

[4] "A.Add._" refers to the Addendum of Appellant Chief Justice Lorie Gildea.

the pardon power directly in the Board. These statutes also unconstitutionally restrict the Governor's power by requiring the Governor to act, not "in conjunction with" the Board, but unanimously with each Board member before granting a pardon.

As the district court correctly held, conditioning the grant of a pardon on the unanimous vote of the Board renders the language "the governor in conjunction with" surplusage. The canon against surplusage applies with special weight to questions of constitutional interpretation, because constitutions "are framed in the most concise language possible." *Rhodes v. Walsh*, 57 N.W. 212, 214 (Minn. 1893). On appeal, Appellants have no satisfactory explanation for why the framers would not have omitted the words "the governor in conjunction with" from the Constitution and simply said "the Board" if that is what they meant. There is none.

The plain text of the Constitution defines the relationship between the Governor and the Board. So long as the Governor acts "in conjunction" with the Board, the Governor is constitutionally empowered to grant pardons. When, as here, the Governor has voted with one other member of the Board to grant a pardon, the Governor has acted "in conjunction with" the Board. Although the Legislature is empowered to regulate the powers and duties of the Board, it is not permitted to regulate the Governor's pardon power, which is already defined by the Constitution. As this Court has explained, the Legislature may not "prevent" the Governor from exercising the pardon power in conjunction with the Board. *State v. Meyer*, 37 N.W.2d 3, 13 (Minn. 1949). Because this is precisely what the Statutes purport to do, they violate the Constitution's plain text. This case can and should be resolved on this basis alone.

Even if the Minnesota Constitution were ambiguous regarding the Governor's power to grant pardons, the purpose and intent of the Constitution show that the Governor's power may not be vested in the Board directly or subjected to a legislatively created unanimity requirement. To the extent a provision is ambiguous, this Court interprets the Constitution "in a way that forwards the apparent purpose for which the provision was adopted." *Kahn*, 701 N.W.2d at 825. The executive pardon power plays an essential role in Minnesota's constitutional scheme as recourse for the people against the overreach of criminal laws and a check on the legislative and judicial branches. Although Appellants spend considerable time in their briefs addressing the purpose of the 1896 **amendment**, they give no consideration whatsoever to the purpose of the Pardon Provision itself. Additional interpretive considerations, including the intent indicated by the framers of the provision and the people who ratified it, similarly require invalidating the Statutes. Further, neither the longstanding nature of the Statutes nor the proximity of their adoption to the ratification of the 1896 amendment insulates them from judicial review. The recognized tools of constitutional interpretation confirm that the Statutes are unconstitutional.

The Statutes must be invalidated for the additional reason that they violate the separation of powers enshrined in the Constitution. Minn. Const. art. III, § 1. The Statutes violate the separation-of-powers principle for two reasons: (1) because the Legislature has impermissibly encroached on the executive-branch powers; and (2) because the Statutes purport to give a judicial officer executive power beyond what is expressly provided in the Constitution.

For all these reasons, and the reasons set forth below, the Governor respectfully

requests that this Court affirm the decision of the district court declaring the Statutes unconstitutional and that this Court permit the Governor to grant Shefa's pardon.

I. Standard of Review

This Court reviews the grant or denial of a motion for summary judgment *de novo*. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998). Additionally, "[t]he constitutionality of a statute is a question of law that [this Court] reviews de novo." *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). A party challenging the constitutionality of a statute must "demonstrate[] that it is unconstitutional beyond a reasonable doubt." *Id.*

II. The Constitution vests the power to grant pardons to the Governor in conjunction with the Board and the Statutes violate the Constitution

When interpreting the Minnesota Constitution, this Court "first examine[s] the language of the constitutional provision in question to determine whether it is ambiguous." *Kahn*, 701 N.W.2d at 825. When constitutional language is unambiguous, it is effective as written and the court does not apply any other rules of construction. *See State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000); *see also State v. Holm*, 215 N.W. 200, 202 (Minn. 1927) ("We are not empowered to say that [the framers] meant something they did not say."). In interpreting the text of the Constitution, courts look to factors including dictionary definitions, the historical usage of the terms, and Supreme Court caselaw interpreting the provision. *Brooks*, 604 N.W.2d at 352.

This case can and should be resolved based on the plain text of the Constitution. Article V, § 7 vests "the governor in conjunction with" the Board with power to grant pardons. The Statutes directly conflict with the Constitution because they purport to give

the pardon power to "the Board" alone. As the district court reasoned, this interpretation would render the phrase "the governor in conjunction with" surplusage. Under the plain text, the Constitution does not provide the other members of the Board with coequal powers to the Governor. Further, the Legislature may not restrict the **Governor's** power under the guise of regulating the powers and duties of the **Board**.

A. The Statutes directly conflict with the plain language of the Constitution

The plain language of the Constitution demonstrates that the Statutes are unconstitutional. Article V, § 7 vests the Governor with the pardon power, to be exercised in conjunction with the Board. Article V, § 7 states in full:

> 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.

The Pardon Provision vests "[t]he governor in conjunction with the board"—not the Board itself—with the power to pardon. *Id.* The Statutes directly contradict the Constitution because they purport to grant the pardon power to the Board rather than the Governor. The Statutes are thus contrary to the careful balance of power struck in the Constitution, purporting to empower the Board with the same authority to grant pardons that the Constitution vests in the Governor. This contradiction is illustrated in the table below:

Minn. Const. art. V, § 7 (sentence 3)	**Minn. Stat. § 638.02, subd. 1 (sentence 1)**
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.	**The Board of Pardons may grant an absolute or a conditional pardon**, but every conditional pardon shall state the terms and conditions on which it was granted.

Minn. Const. art. V, § 7 (sentence 3)	Minn. Stat. § 638.01 (sentence 2)
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.	**The board may grant pardons and reprieves** and commute the sentence of any person convicted of any offense against the laws of the state, in the manner and under the conditions and rules hereinafter prescribed, but not otherwise.

The statutes directly contravene the Constitution by providing "the Board," instead of the "governor in conjunction with the board," with the authority to grant a pardon. Laws in direct conflict with the Constitution must be invalidated. *See, e.g.*, *Tuttle v. Strout*, 7 Minn. 465, 467 (1862) (invalidating a statute that was in "direct conflict" with Constitution); *State v. Fairmont Creamery Co.*, 202 N.W. 714, 719 (Minn. 1925) ("If the Legislature transgresses its constitutional limits the courts must say so, for they must ascertain and apply the law, and a statute not within constitutional limits is not law.").

B. The district court correctly concluded that "the governor in conjunction with the board" cannot mean "the board"

When interpreting a constitution, courts begin "with the unremarkable presumption that every word in the document has independent meaning, that no word was unnecessarily used, or needlessly added." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 496 (2005) (internal quotations omitted); *see also Rhodes*, 57 N.W. at 214 (applying the canon against surplusage to an issue of constitutional interpretation).

In Article V, § 7, the Governor is mentioned twice—once individually and once as a member of the Board. Appellants nevertheless argue that the 1896 amendment to the Constitution "vest[ed]" the pardon power solely in the Board, not the Governor. (AG Br. at 2; CJ Br. at 13.) As the district court correctly held, however, "[t]his interpretation of

art. V, § 7 completely negates the words '[t]he governor in conjunction with.'" (A.Add.10–11.) At the hearing before the district court, Appellants admitted their interpretation that "governor in conjunction with" was surplusage:

> The Court: . . . . So let's look at the constitution, let's look at that provision that says the Governor in conjunction with the Board of Pardons. Do you know what I'm talking about?
>
> [Appellants' counsel]: Yep.
>
> The Court: Okay. Now, looking at that, and then striking the words the governor in conjunction with and just starting with it saying the Board of Pardons, based on your interpretation of the constitution, would those two versions have any different meaning or effect?
>
> [Appellants' counsel]: No.

(Doc. 75 at 25:8–14.)[5]

The district court properly found that the "governor in conjunction with" is not and cannot be mere surplusage that the Legislature can ignore when crafting laws related to pardons. (A.Add.13.) As the district court stated, "[t]he drafters of the Minnesota Constitution could have removed the language 'the governor in conjunction with' in art. V, § 7 but chose not to do so." (A.Add.12.) Because "[t]he second sentence of Minn. Stat. § 638.01 and Minn. Stat. § 638.02, subd. 1 effectively read that language out of the Constitution" the district court held that the Statutes are unconstitutional. (*Id.*)

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[5] To the extent that Appellants now argue that the phrase "the governor in conjunction with" is **not** surplusage, the Court should reject their improper attempt to shift or reverse positions on appeal. *See, e.g.*, *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017) (refusing to consider an argument presented for the first time on appeal); *Burke v. Burke*, 297 N.W. 340, 341 (Minn. 1941) ("On appeal, litigants may not so shift, to say nothing of reversing, their position.").

The Chief Justice does not deny that her interpretation of Article V, § 7 renders the phrase "the governor in conjunction with" surplusage. (CJ Br. at 15.) Instead, the Chief Justice argues that the surplusage canon is not an absolute rule and is context dependent. (*Id.* (citing *In re Krogstad*, 958 N.W.2d 331, 335 (Minn. 2021) (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 176 (2012))). But the Chief Justice does not explain what about the "context" of Article V, § 7 supports the implication that the words "the governor in conjunction with" are intentionally redundant. *Cf.* Scalia & Garner at 177 (suggesting "[e]xecute and perform," "[r]est, residue, and remainder," "peace and quiet," and "indemnify and hold harmless" as examples of "doublets and triplets . . . in legalese" that may justify disregarding the surplusage canon). Further, *Krogstad* involved a question of statutory (not constitutional) interpretation. 958 N.W.2d at 335. By contrast, as this Court has explained, constitutions "are framed in the most concise language possible," making the canon against surplusage particularly significant in constitutional interpretation. *Rhodes*, 57 N.W. at 214. Indeed, just two years before the 29th Legislature enacted H.F. 375, placing the amendment on the 1896 ballot, this Court referred to the prospect of surplusage in a state constitution as "a transaction unheard of in any other instance." *Id.*

Equally unavailing is the Chief Justice's argument that the Governor is mentioned in the third sentence of Article V, § 7 because the governor "has procedural and administrative duties relating to granting pardons that differ from the other two members of the board." (CJ Br. at 16.) The third sentence of Article V, § 7 does not provide that the "the governor in conjunction with the board has **procedural and administrative duties**

relating to granting pardons." Simply put, there is no question as to what power the Governor "has" under the Constitution: it is expressly the power to **grant pardons** when he or she acts in conjunction with the Board. Minn. Const. art. V, § 7.

Further, the "procedural and administrative duties" that the Chief Justice cites are creatures of statutes and rules, not the Constitution. Although the Chief Justice emphasizes that the governor "supervises" the Commissioner of Corrections, (CJ Br. at 15)—who under current law is the Board's secretary—between 1921 and 1959, the Board was authorized by statute to appoint its own secretary. *See* 1921 Minn. Laws chap. 427, § 1; 1959 Minn. Laws chap. 263, § 13. Statutorily conferred "administrative duties" that the Governor may have do not alter the fact that the Constitution vests the "power to grant reprieves and pardons" in the Governor in conjunction with the Board, not in the Board directly.

The Attorney General's assertion that "the challenged statutes do not read the 'Governor in conjunction with' language out of the Constitution," (AG Br. at 19), is equally unavailing. The argument appears to be that the second sentence of Article V, § 7, which allows the Legislature to regulate the Board's powers and duties, permits the Legislature to make the phrase "the governor in conjunction with" surplusage. This argument is circular. It assumes that any law the Legislature passes pursuant to its ability to regulate the Board's powers and duties is constitutional. This is not the law because the Legislature's power to legislate is subject to the rest of the Constitution, including the third sentence of Article V, § 7 providing the Governor with the power to grant pardons when he or she acts in conjunction with the Board.

Other textual tools confirm that the pardon power resides with the Governor, to be exercised in conjunction with the Board. This Court applies the rules of grammar to questions of textual interpretation. *See, e.g.*, *State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015); *see also City of Golden Valley v. Wiebesick,* 899 N.W.2d 152, 172 (Minn. 2017) (Anderson, J., dissenting) (applying "basic rules of grammar" to a question of constitutional interpretation). The third sentence of Article V, § 7 states that the Governor "has" the constitutional "power to grant reprieves and pardons." "Has" is singular and agrees with the singular subject, "[t]he governor." Therefore, the sentence makes grammatical sense only if **the Governor** in conjunction with the Board—as opposed to each of the Board's individual members collectively acting unanimously—"has" the power to grant pardons.

Additionally, contrary to the Chief Justice's arguments, the structure of the Constitution does not support her textual interpretation. The Chief Justice notes that "[b]efore the 1896 amendment to the constitution, the power to pardon was included in the constitution's listing of the governor's powers." (CJ Br. at 12.) The 1896 amendment, however, did not alter the structure of the constitution; it kept the power to pardon in Article V, § 4, along with a list of other gubernatorial powers. *See* Minn. Const. art. V, § 4 (1896); 1895 Minn. Laws, chap. 2 (proposing "an amendment to section four (4) of article five (5) of the constitution"). After the 1974 amendments to the Constitution, the power to pardon now appears in its own separate section of Article V, but as this Court has reiterated, the 1974 amendments were stylistic, not substantive. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 617 n.7 (Minn. 2017). This Court's precedent precludes any argument

that the listing of "[p]owers and duties of [the] governor" in the current Article V, § 3 is exhaustive.

C. The Constitution permits the Governor to grant pardons when the Governor acts "in conjunction with" the Board, and that power cannot be conditioned on the unanimous consent of each Board member

Although Appellants imply otherwise, (CJ Br. at 15; AG Br. at 12), the district court did not hold and Respondents do not argue that the Governor may exercise the pardon power alone, without any involvement by the Board. Provided the Governor acts "in conjunction with" the Board, however, the Governor has power to grant pardons. Minn. Const. art. V, § 7. The Governor acted "in conjunction with" the Board in this case because the Governor voted together with another member of the Board in favor of Shefa's pardon.

The phrase "in conjunction with" is defined to mean "together with" or "being joined together in an association." Black's Law Dictionary 765 (6th ed. 1990). The numerous dictionaries cited by Appellants, historical and contemporary, all contain essentially this same definition. (*See* AG Br. at 11; CJ Br. at 11–12.) But acting "together with," or being "joined together in an association," in no way requires unanimous consent. Rather, so long as the Governor acts "together with" the Board, he "has power" to grant pardons under the plain language of the Constitution. The Attorney General not only agrees with this proposition, but also agrees to this reading being mandatory given the Constitution's plain text: "Under the plain language of the constitutional text, the Governor only has power to grant pardons 'in conjunction with'—that is, 'together' or 'in combination with'—the Board." (AG Br. at 12.)

Furthermore, the plain meaning of the term "board" in Article V, § 7 is the entity as

a whole—not each individual member. The common understanding (both now and at the time of the amendment) is that the action of the entity means the action of a majority of its members. *Sargent v. Webster*, 54 Mass. (13 Met.) 497, 504 (1847) ("In ordinary cases . . . a majority of the whole number of an aggregate body, who may act together, constitute a quorum, and a majority of those present decide any question upon which they can act."); *see also* John Locke, *Second Treatise of Government* § 95 (Mark Goldie ed., Oxford Univ. Press 2016) (1689) ("When any number of men have **so consented to make one Community or Government**, they are thereby presently incorporated, and make **one Body politick**, wherein the **Majority** have a right to act and conclude the rest." (emphasis in original)). Appellants recognize this fact, noting that the constitutional text does not "mandate[] unanimity." (CJ Br. at 14; AG at 10, 12.)

Any contrary position would lead to absurd results. For example, Article VI, § 5 of the Constitution states that "the compensation of all judges shall be prescribed by the legislature and shall not be diminished during their term of office." No one would read the term "legislature" in that provision to mean that, in order to set compensation for judges, each of the individual 67 members of the Senate and each of the individual 134 members of the House of Representatives must vote unanimously. Rather, the Legislature sets compensation by a majority vote. *See State ex rel. Gardner v. Holm*, 62 N.W.2d 52, 59 (Minn. 1954).

So too with the Board. By declaring that the Governor must act "in conjunction with" the Board, the Constitution's plain terms set the standard for how the Governor must act in relation to the Board and defines the balance of power between the Governor and the

remaining members of the Board.

Attempting to override that constitutional balance, the Legislature has attempted to grant Appellants a unilateral veto over pardons. Under the Statutes, if any individual member of the Board votes no, the pardon must be denied. The Constitution, however, singles out the Governor as exercising the pardon power under the Constitution, so long as he or she acts in conjunction with the Board. Under the Constitution, the Governor's vote is the only one that is indispensable. Indeed, the drafters of the 1896 amendment **could** have expressly provided a judicial veto power in the Pardon Provision, and they certainly knew how to do so. The Governor's own veto power over legislative action was a ready exemplar. *See* Minn. Const. art. IV, §§ 23, 24. But the framers intentionally chose not to include a veto power for Appellants in the Pardon Provision.

D. The Legislature's power to define and regulate the powers and duties of the *Board* does not permit the Legislature to define and regulate the *Governor's* pardon power

Appellants rely heavily on the second sentence of Article V, § 7, which provides that the Legislature may define and regulate the "powers and duties" of the Board. (CJ Br. at 13–14; AG Br. at 12–14.) No matter how the Legislature defines the "powers and duties" **of the Board**, however, it can neither define nor regulate the powers and duties **of the Governor**, which are already defined and regulated by the Constitution itself to include the "power to grant reprieves and pardons." The Attorney General argues the Legislature can precisely do that, claiming "[t]he Legislature has the authority to set" the "Governor's constitutional pardon powers." (AG Br. at 14.) But there is no need for legislative enactment to define or regulate how the Governor may exercise the power he or she "has"

to grant pardons, because the Constitution already specifies that the Governor "has power" when he or she acts "in conjunction with" the Board.

Nor can the Legislature define and regulate "powers and duties" of the Board in such a way as to restrict **the Governor's** power by purporting to prevent him or her from granting pardons when he or she acts "in conjunction with" the Board under the Constitution. Minn. Const. art. V, § 7. This Court has already addressed this issue, explaining that the Legislature cannot "prevent the governor" from granting a pardon, *Meyer*, 37 N.W.2d at 13, with a law that "abrogates, restricts, or removes" the pardon power, *id.* (quoting *Ware v. Sanders*, 124 N.W. 1081, 1085 (Iowa 1910)). In *Meyer*, this Court explained that a statute cannot "**prevent the governor** or the state board of pardons from granting a pardon." *Id.* (emphasis added). This Court therefore realized the unique role of the Governor, who may not be **prevented** by statute from exercising the power to pardon when acting in conjunction with the Board.

The Chief Justice's characterization of *Meyer's* holding as "dicta," (CJ Br. at 16 n.4), does not withstand scrutiny. The question presented in *Meyer* was whether a legislative enactment "interfere[d] with the pardoning power vested" in the Constitution. 37 N.W.2d at 13. In other words, the question presented was analogous to the one here. The Court answered the question by analyzing the Pardon Provision and determined that the legislation at issue did not prevent the "governor or the board" from granting pardons.[6]

[6] By contrast, in *Gardner*, cited by the Chief Justice for the proposition that "the pardon power is vested in the board," (CJ Br. at 13), the issue presented was the Governor's authority to fix compensation for judges. 62 N.W.2d at 59. It is *Gardner*, not *Meyer*, that

This same principle—that the Statutes have "prevent[ed] the governor" from granting pardons when he or she acts in conjunction with the Board—requires the Statutes to be held unconstitutional.

The Attorney General does not even cite *Meyer* in his brief. Instead, the Attorney General claims that in *Morgan v. State*, 384 N.W.2d 458 (Minn. 1986), this Court "implicitly recognized" that the "text of the constitutional amendment plainly vest[s] pardon power in the Board, with no independent, residual constitutional authority for the Governor." (AG Br. at 12.) Unlike *Meyer*, however, *Morgan* did not analyze the Pardon Provision, nor whether a legislative enactment violated it. Instead, in *Morgan*, a post-conviction petitioner vaguely argued that his sentence "should be reduced to serve the public interest." 384 N.W.2d at 461. In response, the Court stated that "[w]hile we commend [petitioner]'s efforts at personal and social change, we conclude he must direct this equitable argument to the State Board of Pardons. That body alone has the authority to reduce his sentence or to release him in the public interest." *Id.* That case, unlike *Meyer*, did not analyze the Pardon Provision nor decide whether it is the Board, or the Governor in conjunction with the Board, that holds the power to grant pardons.

* * *

As the district court correctly concluded, the plain text of the Constitution answers the question presented in this case. The Constitution provides that "the governor in conjunction with the board" has the power to pardon, which is in direct conflict with the

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contains only dicta as to the Governor's role in the pardon process.

Statutes' grant of that power directly and exclusively to the Board. Provided the Governor acts in conjunction with the Board, the Legislature cannot prevent him or her from exercising the constitutionally conferred pardon power. Because the Statutes do just that, they are unconstitutional.

III. Even if Article V, § 7 were ambiguous (it is not), the purpose and intent of the Pardon Provision confirms that the pardon power rests with the Governor in conjunction with the Board

This Court need not look beyond the plain text of the Constitution to resolve this case. Regardless, even if the Pardon Provision were ambiguous regarding the Governor's power to grant pardons, the purpose and intent of the Pardon Provision demonstrates that the Governor's pardon power may not be vested in the Board directly or subjected to a legislatively created unanimity requirement. The executive pardon power plays an essential role in Minnesota's constitutional scheme as a recourse against overreach of criminal laws and a check on the legislative and judicial branches. The Pardon Provision must be interpreted to advance this purpose, and the Legislature's unanimity requirement conflicts with the proper interpretation of the Constitution. Additional interpretive considerations, to the extent the Court considers them, offer no refuge to Appellants. The legislative history confirms that the Governor has the power to grant pardons in conjunction with the Board, not the Board itself. Moreover, a practical construction of the Constitution is given only limited weight in the interpretive process, and this Court has repeatedly explained that just because an unchallenged statute has violated the Constitution for over a hundred years does not mean it may do so indefinitely. And finally, the proximity of time between the passage of a constitutional provision and the passage of a statute cannot render a statute impervious

to constitutional scrutiny.

A. The purpose of the Pardon Provision necessitates invalidating the statutorily created unanimity requirement

All parties agree that in the event of any uncertainty, courts must interpret "the state constitution in a way that advances the apparent purpose for which the provision was adopted." *Kahn*, 701 N.W.2d at 825; (AG Br. at 20; CJ Br. at 18). Courts look to the founding period of the constitutional provision "to ascertain the mischief addressed and the remedy sought by the particular provision." *Kahn*, 701 N.W.2d at 825; *see also State v. Khalil*, 956 N.W.2d 627, 640 n.10 (Minn. 2021) (if the text is unclear, courts consider the "purpose" and "policy issue to be remedied"). Indeed, "if the meaning be at all doubtful, the doubt should be resolved, whenever reasonably possible to do so, in a way to forward the evident purpose with which the provision was adopted." *Reed v. Bjornson*, 253 N.W. 102, 104 (Minn. 1934). Consideration of the purpose behind the Pardon Provision shows that the Governor's pardon power should be unfettered by legislative enactments so as not to defeat the core exercise of the executive pardon power of mercy.

1. The purpose of the Pardon Provision is to provide Minnesotans an avenue for executive clemency

Pardons play an essential part in Minnesota's system of government. The purpose of a pardon is twofold: (1) it offers Minnesotans an avenue for grace and mercy from the consequences of criminal convictions; and (2) it serves as a check by the executive on potentially harsh criminal laws passed by the legislative branch, which are in turn administered by the judicial branch. As the United States Supreme Court has explained, throughout the history of the common law, pardons have been viewed as an important

avenue of grace from the executive and as one of the essential checks and balances in our structure of government:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

Ex parte Grossman, 267 U.S. 87, 120–21 (1925); *see also* Francis H. Smith, *The Debates and Proceedings of the Minnesota Constitutional Convention* 378 (1857) (noting that the Pardon Provision is based on the federal Constitution). The pardon's "part [in] the Constitutional scheme," *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Holmes, J.), is both longstanding and essential. As Alexander Hamilton explained in the Federalist No. 74, "without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."

Numerous Minnesota cases recognize pardons under Article V, § 7 as an executive power. *See, e.g.*, *Meyer*, 37 N.W.2d at 13 ("A pardon is the exercise of executive clemency."); *State v. Wolfer*, 138 N.W. 315, 317 (Minn. 1912) (recognizing "the executive pardon power"); *Matter of Welfare of L.J.S.*, 539 N.W.2d 408, 411 (Minn. App. 1995) ("[T]he well-established executive . . . pardon authority impinge[s] on a court's sentencing powers."); *see also United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (Marshall, C.J.) ("A pardon is an act of grace, proceeding from the power entrusted with the execution

of the laws.").[7] As discussed above, the Court has directly considered whether a statutory enactment violates the Pardon Provision only once—in *Meyer*, 37 N.W.2d at 13–14. In determining if a statute violated the Pardon Provision, *Meyer* focused on the purpose of pardons as an "exercise of the sovereign's prerogative of mercy" and concluded that a statute which "prevented" or made it harder to exercise the executive pardon power would be unconstitutional. *Id.*

The record here underscores this Court's concern that the pardon power may not be "prevented" by statute. *Id.* While the Court upheld the statute in *Meyer* because it did not "prevent the governor or the state board of pardons from granting a pardon," the operation of the Statutes undercuts the purpose of the Pardon Provision by "prevent[ing] the governor" from granting a pardon in this case and many others. The Board's voting history demonstrates that the unanimity requirement routinely restricts the Governor's power in conjunction with the Board to grant pardons. The official voting records from the June 2019, December 2019, and June 2020 Board meetings show that for one third of denied applications (9 out of 27 denials, or 33.33%) the Governor voted with one other member of the Board in support of the pardon, but it was nonetheless denied. (Doc. 21 at Ex. 1.)

Because the Legislature's enactment of an unanimity requirement has prevented the Governor in conjunction with the Board from granting pardons, the Statutes conflict with the Pardon Provision, which must be interpreted to protect people from draconian or unjust

[7] The Chief Justice acknowledges that the pardon power is an executive function. (CJ Br. at 16.)

criminal laws or punishments by enabling executive "mercy." *Meyer*, 37 N.W.2d at 13. The unanimity requirement improperly interferes with the pardon power because it prevents the exercise of grace by the executive as well as the executive branch's ability to act as a check on the other branches of government. Put differently, the "mischief addressed" by the Pardon Provision is the very real risk that criminal laws, left unchecked, can result in unduly harsh punishments and have lasting collateral consequences. The "remedy sought" by the Pardon Provision is an avenue for grace and clemency available to the public and an executive check on the other branches. *See Kahn*, 701 N.W.2d at 825.

2. The Legislative power to define and regulate the Board must be narrowly construed and further the purpose of the Pardon Provision, not undercut it

Appellants turn this analysis on its head, focusing not at all on the mischief that the Pardon Provision seeks to address or on the role of pardons as a remedy for harsh criminal law, but instead focusing solely on the purpose of the 1896 constitutional **amendment**. (AG Br. at 14–16; CJ Br. at 18–30.) Focusing exclusively on the purpose of the amendment is to interpret the Constitution wearing blinders. The purpose of Article V, § 7 is to confer the executive power to pardon, not to grant the Legislature the ability to prevent pardons from issuing. Interpreting the Constitution to permit the statutorily created unanimity requirement eviscerates, rather than furthers, the purpose of the Pardon Provision, because it gives the Legislature the ability to set the terms upon which the executive pardon power may be used to check the Legislature's acts.

Appellants spend considerable time arguing that the purpose of the Pardon Provision is to prohibit the Governor from granting pardons on his own. (AG Br. at 19–20; CJ Br. at

20–21.) This is a red herring. The Governor has always maintained that he can only grant pardons "in conjunction with" the Board.

The only other "purpose" of the Pardon Provision Appellants identify is allowing the Legislature to define the "powers and duties" of the Board. (AG Br. 14–16; CJ Br. 18–30.) But this "purpose" identified by Appellants does nothing to advance the goals of the Pardon Provision and threatens to undermine the entire pardon process. Providing the Legislature with unfettered discretion to determine when the executive branch can issue pardons does not advance the purpose of pardons; it neither provides an avenue for grace nor serves as a check on the legislative and judicial branches.

Appellants' misunderstanding of the purpose inquiry results in their briefs reading as if this case involved a core **legislative** function in which the Legislature's judgment is supreme, as opposed to a case about furthering the traditional **executive** power of clemency. (*See* AG Br. at 21 ("The Legislature, though, has determined how pardons should be granted . . . ."); *see also* CJ Br. at 14–15 n.3 (referring to the Legislature's "broad powers").) The Attorney General's attempted analogy to core legislative functions such as the taxation power is particularly telling, (*see* AG Br. at 21), as adopting this interpretation of Article V would allow a total Legislative takeover of the executive pardon power. The problem for the Attorney General is that, unlike the "taxation power,"—which is "peculiarly a legislative function" where "courts are very deferential in their review," *Minn. Automatic Merch. Council v. Salomone*, 682 N.W.2d 557, 561 (Minn. 2004)—the pardon power is a traditional "executive" function. *See Meyer*, 37 N.W.2d 13 ("A pardon is the exercise of executive clemency.").

To prevent this precise outcome, this Court has repeatedly recognized that the power of one branch must be "narrowly construed" when it is conferred in an article of the Constitution that defines the power of another branch. *See, e.g.*, *Dayton*, 903 N.W.2d at 617. The Legislature's power to define and regulate the powers and duties of the Board here, which is in Article V of the Constitution that governs executive powers, therefore must be "narrowly construed" to "prevent an unwarranted usurpation" by the Legislature of powers granted to the Governor. *See id.*

Although Appellants recognize the need to read the constitutional provision "as a whole," (AG Br. at 18; *see also* CJ Br. at 13), they fail to consider the purpose of Article V, § 7 as a cohesive provision. Giving a purposive interpretation to the entirety of the Pardon Provision requires understanding that the Legislature's power to define and regulate the Board's powers and duties must **further** the executive power the Governor "has" to "grant reprieves and pardons." Numerous other provisions in Chapter 638 do precisely that. *See, e.g.*, Minn. Stat. §§ 638.03 (allowing Board to issue warrants to carry pardons into effect); 638.08 (allowing Board to issue process to require any person or officer to appear before it). The key distinction is that, while the Legislature may define the powers and duties of the Board to **facilitate** the pardon power, it may not "prevent the governor" from granting a pardon with enactments that "prevent" the pardon power, as the Statutes do in this case. *See Meyer*, 37 N.W.2d at 13.

B. Legislative history confirms that the Governor has power to grant pardons in conjunction with the Board, not the Board itself

To the extent the Court considers legislative history related to the 1896 amendment,

that history similarly confirms that the Statutes are unconstitutional. Appellants ignore the title of the Act proposing the amendment and the language of the amendment on the ballot itself. *See, e.g.*, *State v. Nw. States Portland Cement Co.*, 103 N.W.2d 225, 227–28 n.2 (Minn. 1960) ("Statutory titles . . . may be considered for the purpose of ascertaining the legislature's intent"); *Reed*, 253 N.W. at 104 ("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**.") (emphasis added).

The amendment which created the Board of Pardons was approved by the Legislature in 1895, to be submitted to the electorate in 1896. 1895 Minn. Laws ch. 2. The language that the Legislature used indicates that while the Governor's power to pardon was qualified by the creation of the Board, the amendment was not to affect a complete transfer of power from the Governor to the Board. The title of the act was:

> An Act providing for an amendment to section (4) of article (5) of the constitution of the state of Minnesota, **defining the authority and duties of the governor in relation to pardons** for criminal offenses **and creating a board of pardons.**

Id. (emphasis added). The plain language of the act indicates that the proposed amendment had two distinct aims: (1) to "defin[e] the authority and duties of **the governor** in relation to pardons for criminal offenses" and (2) to "creat[e] a board of pardons." *Id.* (emphasis added). This is confirmed by the language of the bill authorizing the 1896 constitutional amendment, which expressly provides "**[the Governor] shall have the power** in conjunction with the board of pardons . . . to grant reprieves and pardons:" *Id.* (emphasis added). And the title of the act is identical to the language that was ultimately placed on

the ballot for the voters (except it removed the words "An Act providing for").

Appellants put significant weight on the Attorney General's statement regarding the 1896 amendment, but this statement could not and does not take the Governor's constitutional power and vest it in the Board. Instead, consistent with the title of the act, the language of the bill authorizing the constitutional amendment, and the language of the proposed amendment placed on the ballot, the Attorney General's statement confirms that the 1896 amendment was to "deprive the governor of the power **to alone** grant pardons and reprieves, which he now enjoys, and to create a board of pardons consisting of the governor, the attorney general and the chief justice of the supreme court." (Doc. 32 (emphasis added).) This statement is consistent with the Governor's position in this case: The Governor does not have a unilateral pardon power without acting in conjunction with the Board. It does not follow, however, that the Legislature can wrest the pardon power from the Governor and give it entirely to the Board.

Additionally, the Chief Justice spends over ten pages of her brief recounting newspaper articles and secondary sources discussing the 1896 amendment to the Constitution related to pardons, (CJ Br. at 18–30),[8] but these sources again ignore the

[8] The Chief Justice cites nine newspaper articles or editorials as purported evidence of the purpose of the Pardon Provision. (CJ Br. at 18–25.) She cites no authority for considering newspaper articles consisting of hearsay as evidence of legislative history. In any event, these newspaper articles are not part of the record below thus should not be considered on appeal. *See, e.g.*, *Wiebesick*, 899 N.W.2d at 169 (Gildea, C.J., concurring in part and concurring in the judgment) ("I do not join the opinion's reliance upon the U.S. Census Bureau data, supra at 167 n.15. This data is not in the record and we should not rely on matters outside the record to decide this case." (citing *Thiele v. Stich*, 425 N.W.2d 580, 582–83 (Minn. 1988) ("An appellate court . . . may not consider matters not produced

relevant inquiry here, which is the purpose of the Pardon Provision, not the 1896 amendment in isolation.

The Chief Justice also relies heavily on William Anderson's *History of the Constitution of Minnesota*. (CJ Br. at 26.) Specifically, the Chief Justice cites a "table in appendix 3" of Anderson's book, which includes a heading stating, "Purpose of Amendment," and under it states the 1896 amendment was "[t]o take power from the governor and to confer it on a pardon board." (*Id.*) To be clear, this table does not purport to provide a legal analysis of the substance of any constitutional amendments. *Cf.* William Anderson, *A History of the Constitution of Minnesota* 281 (1921). Although it provides a brief one-line description of every amendment, it does not cite any authority for its characterization of the pardon amendment or any other amendment. *Id.* Rather, the appendix containing the purported description simply provides statistical data on the amendments. *Id.* This stray snippet from Anderson's book, which does not carry force of law, should be afforded no weight in the Court's analysis.[9]

C. A practical construction of the Constitution cannot rewrite its plain terms, and is entitled to little weight in the circumstances of this case

Appellants rely on a "practical construction" of the Constitution to justify why the

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and received in evidence below."))).

[9] The same is true for the Chief Justice's citation to the language on the Minnesota Legislative Reference Library's website and the 2019-2020 *Minnesota Legislative Manual*, (CJ Br. at 26), which cite to and appear to be copied from Anderson's book. *See* Off. of the Minn. Sec'y of State, *The Minnesota Legislative Manual* (2019–2020 ed.); Minn. Legis. Reference Libr., *State Constitutional Amendments Considered*, http://www.lrl.mn.gov/mngov/constitutionalamendments (last visited Aug. 18, 2021).

Statutes are constitutional. (AG Br. at 14–18; CJ Br. at 14, 18–30.) They contend that "a practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people for many years, is always entitled to receive great consideration from the courts," (AG Br. at 16 (quoting *Clark*, 755 N.W.2d at 306); *see also* CJ Br. at 14 (citing *State v. Peterson*, 198 N.W. 1011, 1012 (Minn. 1924))), and argue that the fact that the unanimity requirement has been on the books for many years or the closeness in time between its passage and the Constitutional amendment makes the Statutes constitutional. (*Id.*)

As an initial matter, practical construction of the Constitution is given only limited weight in the interpretive process. *State v. Lessley*, 779 N.W.2d 825, 838 (Minn. 2010) (analyzing practical construction considerations only after examining the text and whether a statute furthers a constitutional provision's purpose and relevant caselaw); *State ex rel. Univ. of Minn. v. Chase*, 220 N.W. 951, 956 (Minn. 1928) ("A practical construction of anything written—Constitution, statute or contract—is but an aid to interpretation, not to be resorted to unless such an aid is required."). To the extent this Court considers a practical construction relevant to the question of whether the Statutes are constitutional, it must recognize that practical construction is not definitive.

Appellants repeatedly stress the fact that the Legislature passed the unanimity requirement in 1897, essentially arguing that a statute that has violated the Constitution for over a hundred years must be permitted to do so indefinitely. (AG Br. at 16–18; CJ Br. at 30.) But this Court has rejected this line of argument: "'When the meaning and scope of a constitutional provision are clear **it cannot be overthrown by legislative action**, **although**

several times repeated and never before challenged.' The delay in presenting the question is no excuse for not giving it full consideration and determining it in accordance with the true meaning of the Constitution." *Chase*, 220 N.W. at 957 (emphasis added) (quoting *Fairbank v. United States*, 181 U.S. 283, 311 (1901)); *see also Powell v. McCormack*, 395 U.S. 486, 546–47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."). Courts have long recognized that usurpations of constitutional power must be carefully scrutinized, and there is no exception for statutes that were passed long ago. *Louisville & Nashville R.R. Co. v. Kentucky*, 161 U.S. 677, 690 (1896) ("A power is frequently yielded to merely because it is claimed, and it may be exercised for a long time in violation of the constitutional prohibition . . . . But these circumstances certainly cannot be allowed to sanction a clear infraction of the constitution.").

Enforcement of these rules is essential to the functioning of our system of law. If courts were required to perpetuate misinterpretations of constitutional provisions "simply because of [their] extended duration," then "a Constitution could be amended without consulting the people." *Chase*, 220 N.W. at 957. Appellants seek precisely that outcome here. The Constitution states "the governor in conjunction with the board has power to grant reprieves and pardons," but Appellants want to amend that language to instead read "the board has power to grant reprieves and pardons." Such a result is not permitted, as shown by courts enforcing constitutional limitations on statutes of comparable longevity. *See, e.g., State ex rel. Peterson v. Quinlivan*, 268 N.W. 858, 860 (Minn. 1936) (holding that longstanding "statutes passed under a misconception of

fundamental law" were unconstitutional even when followed "[f]or long" by constitutional officers).

Moreover, allowing infringing but longstanding laws to stand would threaten many modern rights and liberties, as such rights are often premised on decisions holding longstanding statutes invalid. *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender discrimination) (holding 1884 statute providing for female-only enrollment in a nursing program violated the Equal Protection Clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy) (holding state statute that proscribed contraceptive use for "over 80 years" violated the right of privacy grounded in various provisions of the federal Constitution). Indeed, in *Plessy v. Ferguson*, the United States Supreme Court justified upholding a Louisiana law requiring segregated railroad cars by analogizing to "the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned." 163 U.S. 537, 550–51 (1896). Congress' longstanding tolerance of segregation did not make it any less repugnant to the Constitution. *See Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954) (overruling *Plessy*); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (concluding school segregation in the District of Columbia violated the Fifth Amendment).

Appellants also emphasize that the statutory unanimity requirement was passed at the first legislative session after voters approved the constitutional amendment as "shed[ding] significant light on the original understanding of the 1896 amendment." (AG Br. at 15–16; CJ Br. at 14.) But the proximity in time between the passage of a

constitutional provision and the passage of a statute does not render a statute impervious to constitutional scrutiny. If that were the case, the Legislature would be allowed to enact legislation contrary to the language of the Constitution at its whim.

The U.S. Supreme Court rejected Appellants' line of argument in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The Supreme Court held that the Judiciary Act of 1789, 1 Stat. 73—a law passed just **one year** after the federal Constitution's ratification in 1788—was unconstitutional. 5 U.S. at 139. The Judiciary Act was passed by the first Congress, composed of numerous founders who were intimately involved in the creation and ratification of the Constitution. The Court was not swayed by the fact that the Judiciary Act had been drafted soon after the Constitutional provisions that it violated. Instead, the Supreme Court held that Congress had overstepped its bounds by contradicting the distribution of jurisdiction between the Supreme Court and inferior federal courts. Upholding the act would have rendered the constitutional distribution of jurisdiction "mere surplusage, . . . entirely without meaning." *Id.* at 174. If the legislature were permitted to redistribute powers set forth in the Constitution, then the distribution of power, "made in the constitution, is form without substance." *Id.*; *see also Van Orden v. Perry*, 545 U.S. 677, 726 (2005) (Stevens, J., dissenting) ("The first Congress was—just as the present Congress is—capable of passing unconstitutional legislation."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (explaining that the "court of history" has concluded that the Sedition Act of 1798, 1 Stat. 596, flagrantly violated the First Amendment even though it was enacted less than ten years after the ratification of the Bill of Rights).

Marbury applies as forcefully today as the day it was written. If the Legislature can

authorize the Board to usurp the Governor's "power to grant reprieves and pardons" in conjunction with the Board, then the language granting the Governor that power in conjunction with the Board is "form without substance" and "entirely without meaning." *Marbury*, 5 U.S. at 174.

IV. The Legislature's imposition of the statutorily created unanimity requirement violates the Constitution's separation-of-powers doctrine

This Court may affirm the trial court's grant of summary judgment "if it can be sustained on any grounds." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). If this Court concludes that the Statutes do not conflict with Article V, § 7, it should nevertheless affirm the district court's decision because the Statutes violate the Constitution's separation-of-powers doctrine.

"The separation of powers doctrine is based on the principle that when the government's power is concentrated in one of its branches, tyranny and corruption will result." *Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999). Minnesota's Constitution protects separation of powers in Article III, § 1: "The powers of government shall be divided into three distinct departments: legislative, executive and judicial. 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." The Statutes violate the separation of powers in at least two independent ways: (1) through the Legislature's encroachment onto executive-branch powers; and (2) by granting the judiciary a unilateral veto over pardons.

A. The Legislature conditioning the Governor's ability to act in conjunction with the Board on the unanimous vote of each Board member impermissibly intrudes upon executive power

This Court has "long recognized that where the constitution commits a matter to one branch of government, the constitution prohibits the other branches from invading that sphere or interfering with the coordinate branch's exercise of its authority." *In re Civ. Commitment of Giem*, 742 N.W.2d 422, 429 (Minn. 2007). Just as Article V, § 7 prohibits statutes that prevent the Governor's ability to grant pardons, *Meyer*, 37 N.W.2d at 14, Article III, § 1 precludes the Legislature from interfering with the Governor's exercise of the executive pardon power. *See, e.g.*, *Giem*, 742 N.W.2d at 429; *see also Sanborn v. Comm'rs of Rice Cty.*, 9 Minn. 273, 278 (Minn. 1864) ("Each department of government is strictly confined within its appropriate sphere, and an attempt to exercise any power properly belonging to either of the other departments, is not only unauthorized, but positively forbidden.").

This Court has expressly recognized that the Legislature may not interfere with the Governor's exercise of the pardon power. In *State v. Stern*, the Court upheld the use of a pardoned conviction to form the basis of a harsher punishment for a second offense, explaining that "'[i]t was solely within the province of the Legislature to attach such greater criminality to the second offense from the mere fact of a conviction for a first." 297 N.W. 321, 323 (Minn. 1941) (citation omitted). In observing that the Governor could not interfere with the Legislature's ability to set punishments for new crimes, this Court explained that "the Executive by the exercise of the pardoning power could no more interfere with that

exercise of legislative power than the Legislature could interfere with the power to pardon.'" *Id.*

The principle that courts must strike down infringements upon the Governor's power is longstanding. In *State ex rel. Childs v. Griffen*, 72 N.W. 117, 118 (Minn. 1897), for example, this Court invalidated a statute that attempted to require the Governor to appoint to the state board of pharmacy only persons who had been selected by a state pharmaceutical association. *Id.* This Court held this was an "unwarrantable interference with the constitutional prerogative of the chief executive in the exercise of the power granted to him" and declared the statute unconstitutional. *Id.*

The undisputed record in Shefa's case demonstrates that, but for the unconstitutional unanimity requirement created by the Legislature, her pardon would have been granted. (Doc. 14, Ex. U.) She is not alone; in the past several years, one third of all pardon denials have resulted from the unanimity requirement, despite the Governor acting in conjunction with the Board to grant them. (Doc. 21, Ex. 1.) As was the case in *Griffen*, such an encroachment by the Legislature cannot stand. 72 N.W. at 118.

B. The Statutes violate the separation of powers by granting the judicial branch a power not "expressly provided" by the Constitution

The Constitution expressly provides that the Chief Justice, as a judicial officer, serves on the Board as one of its members, but it does not expressly provide that the Chief Justice wields a unilateral veto power over pardons.[10] Minn. Const. art. III, § 1. The effect

[10] Nor can Appellants argue, as they seemed to suggest in the district court, (Doc. 25 at 10), that the Chief Justice may exercise a unilateral veto power over the executive clemency power that is **not** "expressly provided" because the **Legislature's** power to

of the statutory unanimity requirement is a unilateral judicial veto over an executive function. This structure violates the Constitution. *See State ex rel. Decker v. Montague*, 262 N.W. 684, 689 (Minn. 1935) ("The constitutional separation of authority (Minn. Const. art. 3, § 1) forbids judicial interference with the exercise of the powers which that instrument places with the Governor as the chief executive officer of the state.").

This Court has emphasized, and the Chief Justice acknowledges, that a pardon is "the exercise of **executive** clemency." (CJ Br. at 16 (emphasis added) (quoting *Meyer*, 37 N.W.2d at 13).) By composing the Board as the Governor, Attorney General, and Chief Justice, the Constitution ensured that two executive officers, who are elected to **political** office (a potent check against abuses of the pardon power), would have power to act together to grant pardons. As discussed above, when the Governor and another member of the Board vote to support a pardon, the Governor acts "in conjunction with" the Board.

In the constitutional scheme, executive department officers are empowered to exercise freely the prerogative of executive clemency. *See Meyer*, 37 N.W.2d at 13. If a judicial officer has the power—acting alone—to negate the exercise of the executive pardon power, the executive branch's check against the other branches is undone. By purporting to vest the power to pardon in the Board and attempting to redefine the "in conjunction with" relationship into a unanimous relationship, the Legislature

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define the powers and duties of the Board is expressly provided in the Constitution. This argument is tantamount to claiming that all laws passed by the Legislature are "expressly provided" because they are passed pursuant to the Legislature's constitutionally conferred power to legislate. By this logic, statutes could never violate the separation of powers.

impermissibly granted the Chief Justice the ability to wield veto power that is not "expressly provided" for in the Constitution.

The Legislature has thus impermissibly impinged upon the Governor's constitutional and executive power and vested the judicial branch with executive power not "expressly provided" in the constitution. Minn. Const. art. III, § 1. This Court must therefore hold that the Statutes "violate[] separation of powers and [are] unconstitutional." *Holmberg*, 588 N.W.2d at 726.

C. The district court incorrectly found that the Statutes do not violate the separation-of-powers doctrine

The district court did not thoroughly analyze whether the Statutes violate the separation-of-powers doctrine. (A.Add.13–14.) Rather, the district court noted after declaring the Statutes unconstitutional under their plain language that it did not find the Statutes violated the Constitution's separation-of-powers doctrine. (*Id.*) The Court stated, "[t]he Chief Justice is specifically listed in the Minnesota Constitution as a member of the Board of Pardons" and therefore "the Chief Justice's participation in the pardon process as a Board of Pardon member is clearly not a violation of the separation of powers because it is explicitly provided for in the Minnesota Constitutional." (*Id.*)

No party disputes that the Chief Justice is listed as a member of the Board in Article V, § 7. But nowhere does Article V, § 7 expressly provide that the Chief Justice may unilaterally veto a pardon. As discussed above, one of the purposes of the Pardon Power is to establish a check by the executive on harsh criminal laws enforced by the judiciary. By imposing an unanimity requirement preventing the power of the executive to grant pardons,

the Statutes restrict the executive branch's power. This is because they provide a judicial officer with power equal to the Governor to unilaterally deny any pardon application, even when the Governor acts in conjunction with the Board to grant the pardon, as here. Additionally, as discussed above, had the framers intended to provide the Chief Justice with a unilateral veto power they knew precisely how to do so and did in other provisions of the Constitution. They did not in the Pardon Provision.

By making the Chief Justice and the Governor equals with respect to granting pardons, the statutes impermissibly vest the Chief Justice with executive authority not provided by the Constitution and encroach on authority expressly granted to the executive. Providing that the Legislature may regulate the powers and duties of the Board is not the same as expressly providing that a member of the judiciary may exercise executive authority on equal footing as the Governor. The Statutes thus must be held unconstitutional for violating the Constitution's separation-of-powers doctrine.

V. This Court should declare that the Governor in conjunction with the Board has power to grant Shefa's pardon

The Governor acted "in conjunction with" the Board when he voted together with another member of the Board in favor of Shefa's pardon. As such, the Governor "has power" to grant Shefa's pardon. Minn. Const. art. V, § 7. The undisputed record shows that the sole reason the Governor did not grant the pardon was out of deference to the judicial process. (Doc. 14, Ex. U.) The Governor accordingly asked the district court, and now renews his request in this Court, to rule that he "has power" under the Constitution to grant the pardon without any further action of the Board, *nunc pro tunc*, effective as of

June 12, 2020.

The district court declined to address the Governor's request, stating that "the Court does not address the argument that the correct interpretation of Article V, § 7 would require that a pardon be effective if the Governor and one other member of the Board of Pardons voted yes." (A.Add.13.) The district court's decision not to rule on the constitutional question before it, whether the Governor "has power" to grant Shefa's pardon, was incorrect. The judicial branch, and particularly this Court, has the final authority on the meaning of the Minnesota Constitution and has both the power and the duty to state what the law is. *See, e.g.*, *Cruz-Guzman v. State*, 916 N.W.2d 1, 9–10 (Minn. 2018) ("It is, emphatically, the province and duty of the judicial department, to say what the law is.") (quoting *Marbury*, 5 U.S. at 177)).

It appears the district court was hesitant to rule on the Governor's request for relief out of concern that doing so would be tantamount to rewriting the Statutes. (A.Add.14.) To be clear, the Governor is not requesting that the Court rewrite any statutes. Doing so is neither permitted nor required in this case. The Statutes must be held unconstitutional as inconsistent with the Constitution, for all the reasons stated above. No statute needs to be in place for the Governor to exercise the power the Constitution vests in him. *See State v. M.A.P.*, 281 N.W.2d 334, 337 (Minn. 1979) (explaining that this Court can exercise its constitutional authority "to take jurisdiction in those situations where in the interests of justice the merits should be heard," even absent a statute authorizing review); *see also Quinlivan*, 268 N.W. at 862 ("It is but axiomatic that, if [a right] be granted by a Constitution, it cannot be diminished by a statute."). The Governor therefore respectfully

requests that the Court apply the Constitution's plain language to the facts of this case. The Board met, considered Shefa's pardon petition, and the Governor acted in conjunction with the Board when he along with one other member of the Board voted to grant the petition. As a result, the Governor "has power to grant" the pardon.

CONCLUSION

For the foregoing reasons, the Governor respectfully requests that the Court declare that the Statutes are unconstitutional and find that when the Governor acts in conjunction with the Board, such as here, the Governor may grant pardons.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 132.01, subd. 3

The undersigned certifies that the brief of Attorneys for Appellant/Cross-Respondent Governor Tim Walz submitted herein contains 13,430 words and complies with the word count, typeface, and volume limitations of Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. This brief was prepared using a proportional spaced font size of 13 point. The word count is stated in reliance on Microsoft Word 365, the word processing system used to prepare this brief.

/s/ Barry M. Landy
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