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State of Minnesota
In Supreme Court

AMREYA RAHMETO SHEFA,

Respondent/Cross-Appellant,

VS.

ATTORNEY GENERAL KEITH ELLISON, IN HIS OFFICIAL CAPACITY,

Appellant/Cross-Respondent,

GOVERNOR TIM WALZ, IN HIS OFFICIAL CAPACITY,

Respondent/Cross-Appellant,

AND

CHIEF JUSTICE LORIE GILDEA, IN HER OFFICIAL CAPACITY,

Appellant/Cross-Respondent.

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AMICUS STATEMENT OF INTEREST

The Minnesota Association of Criminal Defense Lawyers (MACDL) is the Minnesota Chapter of the National Association of Criminal Defense Lawyers, the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to preserve the adversary system of justice; to foster excellent criminal defense lawyers; to ensure justice and due process for persons accused of crimes; and to improve criminal law, its practice and procedure.[1]

As criminal defense lawyers, MACDL's members are painfully familiar with the harshness and injustice endemic in our criminal legal system, its pervasive racial and economic disparities, and the limited availability of judicial "second look" mechanisms after a conviction is final. In many cases, the executive clemency process in Minnesota provides the only meaningful opportunity for relief for those serving disproportionately long and outdated sentences and/or who have demonstrated an extraordinary record of rehabilitation in prison, or who suffer life-limiting collateral consequences because of their prior conviction. As such, MACDL's interest is public in nature.

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[1] Pursuant to Minn.R.Civ.App.P. 129.03, MACDL states that a drafter of this brief, JaneAnne Murray, directs the Clemency Project (the "Project") at the University of Minnesota Law School ("Law School"), which has several clients with petitions pending before the Minnesota Board of Pardons. The Project did not represent Petitioner, but Petitioner was represented before the Pardon Board by another clinic at the Law School, the Binger Center for New Americans (the "BCNA"). The BCNA did not participate in drafting this brief. The drafters acknowledge the invaluable research and analysis of Scott Dewey, J.D., Ph.D., a historian at the Law School's library, Ingrid Hofeldt, a J.D. Candidate at the Law School, and Margaret Colgate Love, Executive Director of the Collateral Consequences Resource Center. No party's counsel authored this brief in whole or in part. Nor did anyone contribute monetarily to this brief.

SUMMARY OF ARGUMENT

When the Minnesota electorate voted in 1896 to amend the pardon provision in the Minnesota Constitution, it preserved the pardon power's character as an executive one to be exercised by the governor alone. This was in keeping both with the practice at the time in almost all of the states and the humanity principles underlying the power itself. As Alexander Hamilton observed in opposing an "advice and consent" procedure for its counterpart in the federal constitution (and upon which the Minnesota constitutional provision was based), "one [person] appears to be a more eligible dispenser of the mercy of government, than a body of [people]."[2]

In requiring that the governor's power be exercised "in conjunction with" a newly-formed Board of Pardons, of which the governor would be one member, nothing in the text of the amendment or indeed in its legislative history put the electorate on notice that in implementing legislation to be enacted the next year, this singular and personal act of executive empathy would be subject to a *unanimous* vote by all Pardon Board members – and thus a potential veto by one member. To the contrary, administrative boards were ubiquitous in early America in all walks of life – religious, educational, governmental and business – and early Americans were fully familiar with boards' traditional mode of operation, in keeping with prevailing republican norms: one person, one vote and majority rule.

[2] The Federalist No. 74 (Alexander Hamilton).

Moreover, the Minnesota electorate could look to the nine other states that had established constitutional pardon boards by 1896. Not one required unanimity of all members of the board before a pardon could issue, and in fact eight explicitly permitted a vote on a majority basis. These were the models before the people of Minnesota when it adopted its pardon board in 1896. In none could the will of simply one member of the pardon board veto any proposed grant.

Clemency was designed to be the "fail safe" of our criminal legal system.[3] But the 1897 Minnesota legislature's unconstitutional usurpation of the governor's clemency power by granting a veto power to any one member of the Board of Pardons has resulted in decades of parsimonious use of this important check on unduly punitive criminal laws and practices. We respectfully urge this Court to restore the Governor's constitutional clemency power to one that reflects the humanity principles underlying the decision of early Minnesotans to repose it individually in their governor, supported by a Board of Pardons created in the republican tradition.

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[3] *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (clemency is the "fail safe" of our system).

ARGUMENT

I. Minnesota's Constitutional Pardon Provision, as Amended in 1896, Is Still One Exercised *Individually* by the Governor

Minnesota's constitutional pardon provision, as amended by the Minnesota electorate in 1896, squarely grants the pardon power to the Governor. As the language of the amendment presented to the electorate back then stated:

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

See Minn. Const. Art. V § 4 (as amended in 1896) (enumerating the powers of the governor) (emphasis added).[4] While this power is exercised "in conjunction with" the Board of Pardons, it remains a power that the Governor exercises in his/her individual capacity. As the District Court correctly concluded, "[t]he plain language of art. V, § 7 names the Governor separate and apart from the Board of Pardons, of which he is a member. Based on this plain language, and applying the canon against surplusage, the Governor has some pardon power or duty separate or apart from the Board of Pardons."[5]

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[4] Although the pardon power was later moved to its own dedicated section (Art. V. § 7), this was done for clarity purposes and had no legal effect. *See* Opening Brief of the Attorney General at 12.

[5] Decision of the Hon. Laura E. Nelson, entered in this case at the district court level on April 20, 2021, at 11.

The decision to situate the pardon power individually in the Governor rather than collectively in the Board of Pardons indicates an intention to remain true to the humanity principles undergirding the concept of the pardon power. Executive pardon power in the United States has its origins in English history as the "prerogative of mercy."[6] Despite egregious abuses, the pardon power not only survived through the colonial period but was incorporated into the U.S. Constitution with few limitations,[7] and in all but one of the constitutions of the original states and every newly admitted state thereafter.[8] The pardon power in the original Minnesota constitution was modeled on the U.S. Constitution.[9]

The Founders' reasons for granting "plenary"[10] pardon power to the president is instructive. The issue had been hotly contested. One of the main objections was to its "unqualified" power, which necessarily made it applicable in cases of treason.[11] These objections were addressed in part by the addition of an impeachment limitation, but also, as Alexander Hamilton argued in Federalist Paper No. 74, by reference to the humanistic principles underlying the pardon power. As Hamilton elaborates:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. . . . As the sense of responsibility is

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[6] *See Ex parte Garland*, 71 U.S. 333, 341 (1866).
[7] *See* U.S. Const. Art. II, Sec. 2 (exempting only "cases of impeachment"); *Schick v. Reed*, 419 U.S. 256, 263 (1974).
[8] Margaret Colgate Love, EXECUTIVE CLEMENCY IN THE UNITED STATES 5 (Oxford Research Encyclopedia 2018). The single exception is Connecticut, which has always provided the pardon by statute.
[9] *See* Opening Brief of Amreya Shefa at 28 (citing constitutional debates for proposition that the Minnesota pardon provision is based on the federal Constitution).
[10] *Schick*, 419 U.S. at 266.
[11] *See* Samuel E. Schoenburg, Note, *Clemency, War Powers, and Guantànamo*, 91 N.Y.U. L. REV. 917, 935 (2016).

> always strongest, in proportion as it is undivided, it may be inferred that *a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law*, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that *the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution*; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, *one man appears to be a more eligible dispenser of the mercy of government, than a body of men.*[12]

Hamilton's views were echoed in those of federalist and future Supreme Court Justice James Iredell, who similarly advocated that the power to be merciful be reposed in one individual:

> [T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice. *For this reason, such a power ought to exist somewhere; and where could it be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people*?[13]

The Supreme Court later acknowledged in interpreting the federal constitutional pardon provision, that the pardon power was "the 'private . . . act' of the executive

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[12] Federalist No. 74 (Alexander Hamilton) (emphasis added).

[13] *See Address by James Iredell, North Carolina Ratifying Convention* (July 28, 1788) reprinted in 4 THE FOUNDERS CONSTITUTION 17-18 (P. Kurland & R. Lerner ed. 1987) (emphasis added).

magistrate;"[14] in other words, the pardon provision, while "a part of the Constitutional scheme,"[15] was specifically designed to be a *human* decision unconstrained by law.

In 1897, when the legislature over-stepped when it passed enacting legislation vesting the pardon power in the Board of Pardons (Minn. Stat. § 638.01) and imposing a requirement – not specified in the amendment itself or indeed in any material presented to the electorate – that the Board of Pardons be unanimous before any grant of clemency could issue (and thus, that one individual, including one not appointed by the Governor, could veto the Governor's decision) (Minn. Stat. § 638.02) (collectively, the "Statutes"). In so doing, the legislature did violence to the humanity principles upon which the pardon power was founded.

II. The Governor's Pardon Power Must Be Exercised "In Conjunction With" the Pardon Board, but the Amended Constitutional Provision Did Not Require Board Unanimity

While the Minnesota electorate chose in 1896 to amend the Governor's previous plenary pardon power with a requirement that it be exercised "in conjunction with" the new Board of Pardons, nothing in the proposed amendment put the electorate on notice that this change might subject the Governor's power to a unanimity requirement. To the contrary, as more fully discussed below, boards were ubiquitous in early America in all walks of life – religious, educational, governmental and business – and early Americans were fully familiar with their traditional mode of operation: majority rule. Nothing in the

[14] *Burdick v. United States*, 236 U.S. 79, 90 (1915) (emphasis added).
[15] *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Holmes, J.).

pardon power amendment put the electorate on notice of the unanimity requirement added by the legislature the following year.

A. In the late 1800s, Boards – Whether Corporate, Educational, Religious or Municipal – Traditionally and By Default Operated by Majority Vote

The conclusion that the Minnesota electorate understood the word "board" in the phrase "board of pardons" to mean a group of individuals who operated on a majority-vote basis is underscored by a study of how boards – whether corporate, school, church, municipal – operated at the turn of the 20th Century.

From their earliest creation, governmental, corporate, and professional boards generally have acted and made decisions by majority rule. The ancient Athenian Board of Generals' decision to engage in the legendary Battle of Marathon was made by a majority vote in 490 B.C.E.[16] Boards remained democratic-republican in structure within themselves—one person, one vote, majority rule—through the ages, even in less democratic times and places. For instance, the church councils and College of Cardinals of the medieval Catholic Church operated by majority vote.[17] Even outside traditionally

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[16] N. G. L. Hammond, *Strategia and Hegemonia in Fifth-Century Athens*, 19 CLASSICAL Q. 111 (May 1969) (noting how the ancient Athenian polemarchos, a high-level military commander, acted as a tie-breaking vote between an evenly divided, ten-member Athenian Board of Generals before the Battle of Marathon in 490 B.C.E., *id.* at 122; military decisions regarding the Athenian military expedition to Sicily in 415-413 B.C.E. were made by a majority of two of three commanding generals, *id.* at 125); *see also* Michael H. Jameson, *Seniority in the Stratêgia*, 86 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASSN 63, 71 (1955) (regarding the Athenian Board of Generals, or Strategoi, "[T]here is no reason to doubt that majority decisions prevailed.").

[17] Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89, 162-166 (2004).

more democratic England, throughout medieval western Europe, local governmental decision-making frequently was done by town councils and boards of craft guilds whose members voted and decided by majority rule.[18] The early ancestors of modern business organizations that emerged in Tudor England similarly had boards that followed the republican model of the town councils and guilds.[19] Like other emerging British corporations of its day, when the Bank of England was established in 1694, its board of trustees already operated much like a modern corporate board of directors.[20] The Bank of England also pioneered use of the term "directors."[21]

The post-Revolutionary United States inherited English law and legal culture and generally remained close to them, including with regard to public and private corporations and similar institutions. Thus, the First Bank of the United States,

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[18] *Id.* at 140-155 (town councils), 155-162 (craft guilds). Gevurtz notes that these early boards and councils typically had even numbers of members—either 12, 24, or some other multiple of twelve. As with the twelve-member jury, this may have arisen from Christian tradition—the Twelve Apostles—or from ancient Germanic customs. It also increased the possibility of tie votes. Notably, the early Christian disciples used majority rule to choose between Matthias and Barsabas as to which man would replace Judas Iscariot as the Twelfth Apostle. NEW TESTAMENT, Acts 1:15-26.

[19] *See* Gevurtz, *Historical and Political Origins of the Corporate Board of Directors*, at 123-126 (discussing the Company of the Merchants of the Staple and the Company of Merchant Adventurers in the 1300s-1400s, predecessors to later British trading companies such as the East India Company, the South Sea Company, the Hudson's Bay Company, etc.).

[20] Eugen von Philippovich, HISTORY OF THE BANK OF ENGLAND 284 (Christabel Meredith, transl. 1911), *available at* https://fraser.stlouisfed.org/files/docs/historical/nmc/nmc_591_1911.pdf (noting that like board members of modern corporations, trustees (directors) of the National Land Bank of England, associated with the Bank of England, from its establishment in 1695 were elected by a majority of shareholders and "were to make decisions by a majority of [trustees'] votes").

[21] Gevurtz, *Historical and Political Origins of the Corporate Board of Directors*, at 110.

established in 1791, was patterned after the Bank of England and similarly borrowed the term "director;" whereas the latter institution had 24 directors on its board, the former added a twenty-fifth member as a potential tie-breaker in votes.[22]

Towering figures of early American law reaffirmed the general default rule that corporate and other boards governed by majority rule. Chancellor Kent in his *Commentaries* discussed majority rule in the context of corporations as follows:

> The same principle prevails in these incorporated societies as in the community at large, and the acts of the majority, in cases within the charter powers, bind the whole. *The majority here means the major part of those who are present at a regular corporate meeting*. There is a distinction taken between a corporate act, to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act; but in the former a majority of the definite body must be present, and then a majority of the quorum may decide.[23]

Chief Justice Lemuel Shaw in a Massachusetts Supreme Court opinion, in the context of considering the validity of a transaction made by directors of an insolvent manufacturing corporation, noted:

> In ordinary cases, *when there is no other express provision*, a majority of the whole number of an aggregate body who may act together constitute a quorum, and *a majority of those present may decide any question upon which they can act*.[24]

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[22] *Id.* at 110.
[23] Eden Francis Thompson, AN ABRIDGMENT OF KENT'S COMMENTARIES ON AMERICAN LAW 134-135 (1886) (emphasis added).
[24] *Sargent v. Webster*, 13 Mass. 497 (Mass. Sup. Jud. Ct., 1847) (emphasis added).

The republican roots of board voting and decision-making deepened further in the United States throughout the nineteenth century. Although New York State's 1811 Corporation Law[25] – the first general incorporation statute in the United States – made no mention of either majority or unanimous voting, already from an early date, New York State established by law the general default rule of majority rule on boards in its Revised Statutes: "that when any power or duty is confided by law to three or more persons, it may be performed by a majority of such persons, upon a meeting of all, unless special provision is otherwise made."[26] New York's revised 1890 Corporation Law similarly established majority rule by quorum as a general default: "When the corporate powers of any corporation are to be exercised by any particular body or number of persons, a majority of such body or persons, if it be not otherwise provided by law, shall be a quorum; and every decision of a majority of such persons duly assembled as a board, shall be valid as a corporate act."[27]

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[25] 1811 N.Y. Laws LXVII. *See also* Gevurtz, *Historical and Political Origins of the Corporate Board of Directors*, at 108.
[26] *In re Fourth Avenue*, 11 Abb.Pr. 189 (NYS Sup. Ct. Gen'l Term, 1854) (adding further, "This was a familiar principle of law, known to those who framed the present Constitution, and long before adopted, as it was found necessary and beneficial in practice, and it had never been complained of. It cannot be supposed that the framers of the Constitution intended to repeal it in this case, by a covert means[.]"); *see also, e.g.*, *People ex rel. Hawes v. Walker*, 2 Abb.Pr. 421, 23 Barb. 304 (NYS Sup. Ct., 1856); *People ex rel. Andrews v. Fitch*, 9 A.D. 439, 441; 41 N.Y.S. 349, 351 (N.Y.S. Sup. Ct., App. Div., 1896); *People ex rel. Crawford v. Lothrop*, 3 Colo. 428, 453 (Colo. Sup. Ct., 1877) ("In the case of a corporation, if a corporate act is to be done, by a definite body, as by a board of directors or trustees, where the charter and by-laws are silent, a majority, at least, must be present to constitute a quorum, but a majority of that quorum may do the act."); *Schofield v. Village of Hudson*, 56 Ill. App. 191, 193 (Ill. App. Ct. 1894).
[27] New York State General Corporation Law, L. 1890, p. 1063, c. 563, § 17 (effective May 1, 1891).

Similarly. the Rhode Island Supreme Court had this to say in a case involving report of commissioners appointed to partition an estate:

> We do not think the report of the commissioners was invalid merely because it was not unanimous. *We think the true rule is, that where three or more persons are charged with a judicial or quasi judicial function under an authority derived*, not from the parties in interest merely, but *from a law or statute of the state*, though all must hear and deliberate together, *a majority may decide, unless it is otherwise provided*. The counsel for the defendants admit that this is a rule when the power to be exercised is of a public nature[.]"[28]

A leading treatise throughout the nineteenth century on American corporation law similarly emphasized, "Corporations are subject to the emphatically republican principle (supposing that charter to be silent), that the whole are bound by the acts of the majority, when those acts are conformable to the articles of the constitution."[29]

As a result, already by the early 1800s if not even sooner in America, it was generally understood regarding corporations that "[t]he board would usually have the authority, by majority rule, to write the corporation's bylaws, and generally run the firm."[30] From back then through the present, "American corporation statutes [have] provide[d], ... that a corporation shall be managed by or under the direction of its board of directors," which has become a "universal norm in American corporate law" as well as the "prevailing model of corporate governance around the world."[31] "The second

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[28] *Townsend v. Hazard*, 9 R.I. 436, 442 (R.I. Sup. Ct., 1870) (emphasis added).
[29] Joseph K. Angell & Samuel Ames, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 534, Chap. XIV, § 499 (1882); see also *id.* at 537, § 501.
[30] Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 J. ECON. HIST. 645, 652 (Sept. 2008).
[31] Gevurtz, *Historical and Political Origins of the Corporate Board of Directors*, at 92.

concept underlying th[is] board-centered model of corporate governance is that a group composed of peers acting together makes the decisions"[32] – by one person, one vote majority rule unless otherwise clearly specified. Importantly, the governance model of corporations existed in multiple other contexts that would impact the electorate of Minnesota, e.g., religious,[33] educational,[34] and municipal.[35] In short, early Americans were well-acquainted with the majority-vote corporate governance structure.

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[32] *Id.* at 94.

[33] *See, e.g.*, Paul G. Kauper & Stephen C. Ellis, *Religious Corporations and the Law*, 71 Mich. L. Rev. 1499, 1505-1516 (1973) (discussing the emergence of ecclesiastical corporations in America from colonial times through the early twentieth century); Bruce B. Jackson, *Secularization by Incorporation: Religious Organizations and Corporate Identity*, 11 UNC L. Rev. 90, 101-106 (2012).

[34] *See, e.g.*, James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 Emory L.J. 617, 629-637 (1985) (discussing the emergence of religious and non-religious charitable corporations in nineteenth-century America, including the incorporation of colleges, libraries, and other eleemosynary institutions); Annette Atkins, *Learning in the Land of Lakes: Minnesota's Education History*, MNopedia, Minnesota Historical Society, http://www.mnopedia.org/learning-land-lakes-minnesota-s-education-history (accessed August 18, 2021); Paul Theobald, *Country School Curriculum and Governance: The One-Room School Experience in the Nineteenth-Century Midwest*, 101 Am. J. Educ. 116 (Feb. 1993); *see also* Emil A. Ricci, College and University Governance in the United States: An Historical Survey (1999), unpublished paper, *available at* https://www.newfoundations.com/History/HEGovernance.html.

[35] *See, e.g.*, Howard D. Kramer, *Early Municipal and State Boards of Health*, 24 Bull. Hist. Medicine 503 (Nov.-Dec. 1950). James Fishman offers this classic quotation from Alexis DeTocqueville regarding charitable and public-purpose boards, corporations, and associations in the United States generally:

> Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books, to send missionaries to the antipodes; in this

B. No State Board of Pardons Enacted Prior to 1896 Required Unanimity

Critically, the majority-rule requirement was included explicitly in eight of the nine constitutional pardon boards created by other states prior to Minnesota's amendment of Article V of its Constitution in 1896; only one other state's constitution, South Dakota's, was silent on this point. Like Minnesota, all nine of these state constitutional pardon boards were composed of high-level government officials. And while the operation and structure of these boards differed from the Minnesota one, in no state was the vote of one member alone permitted to veto a pardon grant of the governor.[36] These were the models before the people of Minnesota when it adopted its pardon board in 1896.

As noted in the Opening Brief for Petitioner Amreya Shefa ("Shefa Brief"), in the three decades preceding the creation of the Minnesota Pardon Board four states, Nevada

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> manner they found hospitals, prisons, and schools. If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

2 A. DeTocqueville, Democracy in America, 106 (P. Bradley ed. 1966), quoted in Fishman, *Development of Nonprofit Corporation Law*, at 617.

[36] In the eight states that expressly established majority rule on their pardon boards, this was explicit; in South Dakota, this relationship arguably was implicit, in light of the long-established American tradition of majority rule on boards and commissions described in section 2, *supra*. *See also* Christen Jensen, THE PARDONING POWER IN THE UNITED STATES 16 (Chicago University Press 1922) ("PARDONING POWER") (listing Minnesota and two states that formed pardon boards after Minnesota, North Dakota and Connecticut, as the only ones requiring unanimous action, and thus, implicitly that South Dakota only required at most a majority vote).

Florida, Idaho and Utah, followed a model first established by New Jersey before the Civil War: removing the pardon power from the governor and vesting it in a pardon board, of which the governor was one member. Shefa Brief at 40. In these state constitutions, governors had no power to pardon apart from their membership on the pardon board. The relevant provisions are set forth below:

> **New Jersey Constitution of 1844, Art. V, Sec. 10**:
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> The governor, or person administering the government, the chancellor, and the six judges of the court of errors and appeals, *or a major part of them*, of whom the governor or person administering the government shall be one, may remit fines and forfeitures, and grant pardons after conviction, in all cases except impeachment. (Emphasis added).
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> **Nevada Constitution of 1964, Article V, Sec. 14**:
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> The Governor, Justices of the Supreme Court, and Attorney General, *or a major part of them*, of whom the Governor shall be one, may, upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments, and grant pardons, after convictions, in all cases, except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons. (Emphasis added).
>
> **Florida Constitution of 1868, Art. V, Sec. 12:**
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> The Governor, Justices of the Supreme Court, and Attorney-General, *or a major part of them*, of whom the Governor shall be one, may, upon such conditions, and with such limitations and restrictions as they may deem proper, remit fines and forfeitures, commute punishment, and grant pardons after conviction, in all cases, except treason and impeachment, subject to such regulations as may be provided by law relative to the manner of applying for pardons. (Emphasis added).

Idaho Constitution of 1889, Art. IV, Sec. 7:

The governor, secretary of state, and attorney general shall constitute a board to be known as the board of pardons. Said board, *or a majority thereof*, shall have the power to remit fines and forfeitures, and to grant commutations and pardons after conviction and judgment, either absolutely or upon such conditions as they may impose, in all cases of offenses against the state except treason or conviction on impeachment. The legislature shall by law prescribe the session of said board and the manner in which application shall be made and regulate the proceedings thereon; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, *except by the decision of a majority of said board*, after a full hearing in open session, and until previous notice of the time and place of such hearing and the release applied for shall have been given by publication in some newspaper of general circulation at least once a week for four weeks. The proceedings and decision of the board shall be reduced to writing and with their reasons for their action in each case, and the dissent of any member who may disagree, signed by him, and filed, with all papers used upon the hearing, in the office of the secretary of state. (Emphasis added).

Utah Constitution of 1895, Art. VII, Sec. 13:

Until otherwise provided by law, the governor, justices of the supreme court, and attorney-general shall constitute a board of pardons, *a majority of whom*, including the governor, upon such conditions and with such limitations and restrictions as they deem proper, may remit fines and forfeitures, commute punishments, and grant pardons after convictions in all cases except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons; but no fine or forfeiture shall be remitted and no commutation or pardon granted except after a full hearing before the board, in open session, after previous notice of the time and place of such hearing has been given. The proceedings and decisions of the board, with the reasons therefor in each case, together with the dissent of any member who may disagree, shall be reduced to writing and filed, with all the papers used upon the hearing, in the office of the secretary of state. (Emphasis added).

Thus, in all five of these boards, cases were decided by majority vote, and in four states the governor had to be part of the majority.[37] Importantly, while a pardon could only be granted by majority vote, a pardon could not be denied by the negative vote of a single board member (unless, in three, that negative vote was the governor's).

The other four states with constitutional pardon boards – Pennsylvania, Louisiana, Montana and South Dakota – established what have been called "gatekeeper" boards:[38] the governor alone remained responsible for granting pardons, but controls were imposed on the governor's actions through a separate board. The relevant provisions are set forth below:

> **Pennsylvania Constitution of 1873, Art. IV, Sec. 9:**
>
> He [the Governor] shall have power to remit fines and forfeitures, to grant reprieves, commutations of sentence and pardons, except in cases of impeachment; but no pardon shall be granted, nor sentence commuted, *except upon the recommendation in writing of the Lieutenant Governor, Secretary of the Commonwealth, Attorney General and Secretary of Internal Affairs, or any three of them*, after full hearing, upon due public notice and in open session, and such recommendation, with the reasons therefor at length, shall be recorded and filed in the office of the Secretary of the Commonwealth. (Emphasis added).
>
> **Louisiana Constitution of 1879, Art 66**
>
> The Governor shall have the power to grant reprieves for all offenses against the State, and, except in cases of impeachment or treason, shall, *upon the recommendation in writing of the Lieutenant*

[37] The one state that did not require the governor to be part of the approving majority was Idaho. Note that while a pardon might be granted in Idaho without the governor's approval, a pardon supported by the governor could not be denied by the vote of a single board member, as would be the case with a valid unanimity requirement.
[38] *See* Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. St. Thomas L.J. 730, 746 (2012).

Governor, Attorney General and presiding judge of the court before which conviction was had, or of any two of them, have power to grant pardons, commute sentences and remit fines and forfeitures after conviction. (Emphasis added).

Montana Constitution of 1889, Art. VII, Sec. 9:

The Governor shall have the power to grant pardons, absolute or conditional, and to remit fines and forfeitures, and to grant commutation of punishments and respites after conviction and judgment for any offenses committed against the criminal laws of this State; *Provided, however,* [emphasis in original] That before granting pardons, remitting fines and forfeitures, or commuting punishments, *the action of the Governor concerning the same shall be approved by a Board, or a majority thereof*, composed of the Secretary of State, Attorney General and State Auditor, who shall be known as the Board of Pardons. [. . .] But no fine or forfeitures shall be remitted, and no commutation or pardon granted, *except upon the approval of a majority of said Board* after a full hearing in open session [. . .]. (Emphasis added).

South Dakota Constitution of 1889, Art. IV, Sec. 5:

The Governor shall have the power to remit fines and forfeitures, to grant reprieves, commutations and pardons after conviction for all offenses except treason and cases of impeachment; provided, that in all cases where the sentence of the court is capital punishment, imprisonment for life or for a longer term than two years, or a fine exceeding $200, no pardon shall be granted, sentence commuted or fine remitted *except upon the recommendation in writing of a board of pardons, consisting of the presiding Judge, Secretary of State and Attorney General,* after full hearing in open session, and such recommendation, with the reasons therefor, shall be filed in the office of the Secretary of State [. . .]. (Emphasis added).[39]

[39] In addition to being uniquely silent on the matter of unanimity versus majority rule in the period before 1896, South Dakota was also unique in its two-tiered pardon power: the governor kept full, unilateral power to grant pardons for lesser offenses, while the state's new pardon board was limited to considering only pardons of more serious offenses.

These boards, which were usually composed of high officials but did not include the governor, had to approve a pardon before it could be granted by the governor. In three of the boards, a majority vote was explicitly specified. In one, South Dakota, the voting procedure was not specified. In the very first comprehensive academic study of American state pardon boards in 1922, however, the author, Christen Jensen listed no state that had created a pardon board prior to Minnesota in 1896 as requiring a unanimous vote.[40] Thus, even under this gatekeeper model, the negative vote of a single member of the board was not sufficient to veto a governor's pardon decision.[41]

In short, explicitly in eight of the nine states that had established constitutional pardon boards before the Minnesota amendment of 1896; and implicitly in the ninth state, South Dakota, a pardon could issue only if authorized by a pardon board majority. In

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[40] *See* PARDONING POWER at 16 (listing Minnesota and two states that formed pardon boards after Minnesota, North Dakota and Connecticut, as the ones requiring unanimous action, and not including South Dakota in this list).

[41] A fifth state, Delaware, approved a gatekeeper board in 1897, the year after Minnesota approved its unique scheme. The Delaware board operated much like the Pennsylvania board, allowing the governor to approve a pardon only with permission of a majority of the board, but not permitting the vote of a single member to block a pardon.
See **Delaware Constitution of 1897, Article VII – Pardons**:

> Sec. 1: The Governor shall have power to remit fines and forfeitures and to grant reprieves, commutations of sentence and pardons, except in cases of impeachment; but no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon *the recommendation in writing of a majority of the Board of Pardons after full hearing*; and such recommendation, with the reasons therefor at length, shall be filed in the office of the Secretary of State, who shall forthwith notify the Governor thereof. [. . .].
> Sec. 2: The Board of Pardons shall be composed of the Chancellor, Lieutenant-Governor, Secretary of State, State Treasurer and Auditor of Accounts. [. . .]

(Emphasis added).

none of them, however, could a single member of the board other than the governor (if on the board), or a board minority, stop a pardon from being issued.[42]

These were all the models of constitutional pardon boards available for consideration by constitutional reformers in Minnesota in the late 1800s and the Minnesota electorate when it voted in 1896 to add a pardon board to the provision situating responsibility for pardoning in the governor personally. At that time, Americans knew well how boards and majority voting worked. The establishment of boards and the utilization of majority voting were both in keeping with America's culture of republican institutions and practices that had evolved since the American Revolution, and, indeed, even before, during colonial times. One-person-one vote and majority voting had become ingrained in the whole culture.

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[42] A handful of additional states during this period established statutory advisory boards to assist the governor in carrying out his pardoning responsibilities, but none of these statutory boards constrained the governor's constitutional power as did the nine boards discussed in the text. North Dakota was the last state to write a pardon board into its state constitution; the 1889 original constitution was amended in 1900, using language very closely following that in the Minnesota constitutional amendment of 1896, although North Dakota expanded Minnesota's three-person board to five with the addition of two governor-appointed lay citizens. Like South Dakota and Minnesota, North Dakota's constitution was silent on the matter of unanimity or majority rule. Christen Jensen, as noted above, indicated that North Dakota apparently followed Minnesota's example by statutorily requiring board unanimity to grant pardons. This meant that by the early twentieth century, of the many states that had introduced pardon boards either constitutionally or statutorily, only three—a small minority—had (statutory, not constitutional) unanimity requirements: Minnesota, North Dakota. *See* PARDONING POWER AT 16; *see also* Amendments to the North Dakota Constitution, Article III, Sec. 76 (1900) (creating a Minnesota-style pardon board including the governor as a member ex officio).

The adoption the following year in 1897 of the statute conditioning the governor's power to pardon on the agreement of the other two board members imported hard legal limits on the governor's power into a constitutional scheme that by its terms did not provide any, as more fully set forth in Petitioner Shefa's and the Governor's Opening Briefs. Significantly for purposes of this amicus contribution, the unanimity rule imposed stricter limits on the governor's power to approve a pardon than those applicable to his counterparts in any of the nine other board states, where majority rule governed the board's operations. That is, in eight of the other nine board states whose examples were before the Minnesota legislature in 1897 (and, again, implicitly in the ninth), a governor could never be held hostage by the refusal of a single board member to approve a pardon. Not only was Minnesota's statutory unanimity unauthorized by the constitutional language, it resulted in giving Minnesota's governor less authority to pardon than the governor in any of the other board states.

It was also, as noted above, antithetical to the republican foundations of American civic and business life. And it was antithetical to the spirit animating the concept of executive pardon power in general: to give effect to feelings of empathy and mercy towards a fellow "human creature."[43]

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[43] *See* Federalist No. 74.

CONCLUSION

For the foregoing reasons, Amicus Curiae Minnesota Association of Criminal Defense Lawyers 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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CERTIFICATE OF COMPLIANCE
WITH MINN. R. APP. P. 132.01, subd. 3

The undersigned certifies that the brief of Attorneys for Amicus Curiae Minnesota Association of Criminal Defense Lawyers submitted herein contains 6689 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, Version 2107, Build 14228.20226, which was the word processing system used to prepare this brief.

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