No. A21-0830

State of Minnesota
In Supreme Court

AMREYA SHEFA,

Respondent / Cross-Appellant,

v.

GOVERNOR TIMOTHY WALZ, IN HIS OFFICIAL CAPACITY,

Respondent / Cross-Appellant,

and

ATTORNEY GENERAL KEITH ELLISON, IN HIS OFFICIAL CAPACITY,
AND CHIEF JUSTICE LORIE GILDEA, IN HER OFFICIAL CAPACITY,

Appellants / Cross-Respondents.

AMREYA SHEFA'S OPENING BRIEF

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STATEMENT OF THE ISSUES

1. Article V, § 7 of the Minnesota Constitution provides the Governor with power to grant pardons "in conjunction with" the Board of Pardons. Two Minnesota statutes—Sections 638.01 and 638.02, subd. 1—indicate "[t]he board may grant pardons and reprieves" (§ 638.01) and require "a unanimous vote of the board" for a pardon to take effect (§ 638.02, subd. 1). Was the district court correct that those statutes violate the language of Article V, § 7 and improperly limit the Governor's power?

Rulings Below: All parties moved for summary judgment. The district court concluded that the statutes are unconstitutional because they go too far in limiting the Governor's power. (App.13)

Most Apposite Authority:

- Minn. Const. art. V, § 7
- *State v. Meyer*, 37 N.W.2d 3 (Minn. 1949)
- *Butler Taconite v. Roemer*, 282 N.W.2d 867 (Minn. 1979)
- *Rhodes v. Walsh*, 57 N.W. 212, 214 (Minn. 1893)

2. The Minnesota Constitution requires that governmental power be divided into three departments and provides that no person belonging to one department may exercise the powers of another department except where "expressly provided" by the Constitution itself. Minn. Const. art III, § 1. Did the district court err in concluding that, because the Constitution makes the Chief Justice a member of the Board of Pardons, her exercise of executive function does not violate separation of powers?

Rulings Below: All parties moved for summary judgment. The district court concluded the Chief Justice's "participation" in the pardon process does not violate separation of powers because the Constitution expressly makes the Chief Justice a member of the Board of Pardons. (App.13-14)

Most Apposite Authority:

- Minn. Const. art. 3, § 1
- *State v. Brill*, 111 N.W. 639 (Minn. 1907)
- *State ex rel. Thompson v. Day*, 273 N.W. 684 (Minn. 1937)
- *Brayton v. Pawlenty*, 781 N.W.2d 357 (Minn. 2010)
- *Morrison v. Olson*, 487 U.S. 654 (1988)

3. The Governor was unable to grant Shefa's pardon request solely based of the unanimity requirement in § 638.02, subd. 1. Did the district court err in refusing to enjoin the Governor to reconsider Shefa's pardon despite finding the challenged statutes unconstitutional?

Rulings Below: All parties moved for summary judgment. The district court declined to require the Governor to reconsider Shefa's pardon application without the unanimity requirement. (App.14.)

Most Apposite Authority:

- *State v. Ali*, 855 N.W.2d 235 (Minn. 2014)

> "*Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel*."
>
> - *A. Hamilton*, The Federalist Papers: No. 74 (Mar. 25, 1788)

INTRODUCTION

Clemency is essential to democracy and provides a critical check by the executive on both the legislature and the judiciary. When the law works an unjust result, clemency may alleviate that cruelty. When a punishment is overly sanguinary, clemency may stem the tide. Our Nation's founders recognized as much and were careful to limit this "benign prerogative" only as far as necessary, and no further.

When the Minnesota Constitution was first adopted in 1857, the Governor had unfettered pardon authority. Then, in 1896, the people of Minnesota amended the Constitution to place limits on the Governor's power. None, including Shefa, disputes that.

But ***some*** limitation on the Governor's power does not mean that ***any*** limitation is constitutional. The framers of the constitutional amendment carefully curbed the Governor's power only as necessary to remove unilateral authority, and no further. They did not strip the Governor of all authority and vest sole power in the Board of Pardons.

Indeed, after the Constitution was amended, the relevant provision began "And he shall have power" and ended "to grant reprieves and pardons" after convictions. (*See* Add.15.) That language does not demonstrate an intent to remove all authority from the Governor and vest sole power with the Board, as argued by the Attorney General and Chief Justice. Such an interpretation denies plain English and defies common sense. Further, even after the 1896 amendment, that language outlining the Governor's pardon power remained within the section of the Constitution entitled: "Powers and duties of governor" (at the time, Article V, § 4). That is because the Governor retained separate power.

Instead of abolishing the Governor's power, the framers elevated the Governor from the Board, requiring only that the pardon power be exercised "in conjunction with" that Board. And because the Constitution empowers the Governor—apart from the Board—the legislature cannot demote the Governor to a mere co-equal Board member. The legislature cannot enact laws that make the Governor's vote mean nothing.

The challenged statutes do exactly that. This Court should affirm the district court's conclusion that those statutes are unconstitutional.

STATEMENT OF FACTS

I. Factual Background.

Nearly ten years ago, Shefa moved from Ethiopia to Minnesota with her children to live with her husband—the two had lived apart for the first six years of their marriage while Shefa raised their children alone. (Doc. 14, Ex. A, at 3 ¶¶ 1, 2.) But as Shefa learned all too quickly, her husband never intended to have and to hold. He wanted a slave.

A. Shefa's husband subjected her to an "unusually abusive atmosphere."

Shefa's husband was vicious. She cataloged some of the abuse he meted out in an affidavit filed in support of a U-Visa application in 2018:

Three days after Shefa arrived in the U.S., her husband "punched her in the face" when she declined to have anal sex, as it was against her cultural and religious beliefs. (Doc. 14, Ex. Q, at 13.) He forced her anyway (as he did many times after that). (*Id.*) Shefa's husband frequently beat her: "for not agreeing to sex"; if "he did not like the food" she prepared; "if the house was not cleaned to his liking"; because she was "nasty"; or because she would "talk or ask a question." (*Id.*)

As time went on, he became ever more violent, "often holding a knife to [Shefa] as he raped her." (*Id.*) Sometimes Shefa would pass out from the pain as he anally raped her with a dildo. (*Id.*) Other times

Shefa's husband raped her with his friends; she contracted HIV during one such encounter. (*Id*.) All along, "Shefa thought that she was going to die." (*Id*.) Shefa would later tell police she was "not even afraid of Allah" as she feared her husband. (Doc. 14, Ex. A, at 5 ¶ 8.)

That history of shocking violence and sexual abuse has been confirmed by every court before which Shefa has appeared:

- The criminal court concluded that the "physical evidence" corroborated Shefa's "reports of abuse"; the court verified Shefa's "allegations of sexual assault"; the court noted that Shefa's husband "and an unknown man had sex with each other and then sexually assaulted" her; and the court confirmed that Shefa was abused "on an on-going basis." (Doc. 14, Ex. A, at 4 ¶ 7; 6 ¶ 10; 10 ¶ 25; 18 ¶ 14 n.7.)

- The immigration court overseeing Shefa's proceedings found that her husband "frequently abused" and "frequently beat" her, that "[o]n two occasions" he forced her to "have sex with men [he] brought home," and that one such encounter left Shefa "HIV positive." (Doc. 14, Ex. I, at 6.)

- In granting Shefa bond, another immigration judge concluded her husband "physically and sexually assaulted [her] on a regular basis." (Doc. 14, Ex. Q, at 4.)

- The Eighth Circuit recognized that Shefa was subjected to an "***unusually abusive atmosphere***." (Doc. 14, Ex. K, at 3 (emphasis added).)

B. Shefa defended herself and killed her husband after he raped her and stabbed her with a knife.

Shefa did not simply "stab[] her husband to death." In December 2013, he raped her (as he had countless times before): he "made her

perform oral sex" and "penetrated her anus with a dildo." (Doc. 14, Ex. A, at 6 ¶ 13.) This time, when Shefa protested he slashed her hand with a knife, causing a "large cut" that shed a "significant amount of blood." (*Id*. at 7 ¶ 16; 10 ¶ 25; 11 ¶ 16; 13 ¶¶ 32 – 34.)

Desperate, bleeding, and fearing for her life, Shefa tried to defend herself with another knife that was in the room. (Doc. 14, Ex. A, at 7 ¶ 14.) A "significant struggle"—more accurately, a fight to the death—ensued, during which Shefa "was injured" further by her husband (beyond the "large cut" he had already caused her), while she fended off his attacks. (*Id*. ¶ 15.) Ultimately, Shefa successfully defended herself—her husband was unable to kill her, though he did secure both knives and lock himself in the bathroom. (*Id*. at 8 ¶ 18; 9 ¶ 23.) Despite that, the first wound her husband suffered while Shefa defended herself was "unsurvivable." (*Id*. at 10 ¶ 24.)

Shefa immediately called the police. (*Id*. at 7 ¶ 16.) When officers arrived they properly identified Shefa—"hysterical," "crying," and covered in blood—as the victim. (*Id*. at 9 ¶ 20.) Shefa's husband was found dead in the bathtub, with both knives. (*Id*. at 9 ¶ 23.)

C. The criminal court convicted Shefa of first degree manslaughter despite corroborating her account.

Shefa—a Black woman and an immigrant—was charged with second degree murder for defending herself against her abuser and rapist. She received a bench trial in Hennepin County District Court. As noted above, the criminal court corroborated Shefa's harrowing account. (*Id*. at 6 ¶ 10; 10 ¶ 25; 18 ¶ 14 n.7.) In the court's words: "The evidence is clear that [Shefa] had no power in her relationship with [her husband] and no control over her most basic needs." (*Id*. at 5 ¶ 8.)

The Court found that Shefa had been acting in self-defense, but nevertheless concluded Shefa had "exceed[ed] the degree of force required to defend herself" against her husband's assault (*id*. at 18 ¶ 12), and convicted her of first degree manslaughter (Doc. 13, ¶ 10; Doc. 14, Ex. A, at 15–17 ¶¶ 7–9; Minn. Stat. § 609.20(1)).

At sentencing, the court recognized Shefa's as the "most difficult" case of her career, and said "[i]t certainly is the most difficult case that I have had in my time on the bench." (Doc. 14, Ex. B, at 58:17–19.) The court handed down a sentence of 86 months. (*Id*. at 59:22–60:5.) Shefa then served five years in prison at the Department of Corrections in Shakopee and was released on September 10, 2018. (Doc. 13, ¶ 13.) She was a model inmate. She did not commit a single infraction while in

prison and, except the incident with her husband, "[t]here are no other allegations that she is violent." (Doc. 14, Ex. O, at 4.) Yet Shefa's conviction cost her custody of her children. They are now being raised by her abuser's family, who forbid Shefa from having any contact with them whatsoever. (*Id*. at 5.)

Shefa appealed her conviction and sentence. In August 2016, this Court denied Shefa's petition for further review. Chief Justice Gildea signed the order denying the petition. (R.Add.1.[1])

D. Shefa now faces deportation to Ethiopia, where her husband's relatives wait to avenge his death.

Because of Shefa's manslaughter conviction, the Immigration and Customs Enforcement (ICE) charged Shefa as removable in February 2017, eighteen months before Shefa was released from prison. (Doc. 14, Ex. C.) Accordingly, when Shefa was released in September 2018, she was immediately taken into ICE custody pending her removal to Ethiopia. (Doc. 13, ¶ 14.) Shefa was then detained in Freeborn County Jail for nearly two more years. (Doc. 14, Ex. O, at 2.)

With removal to Ethiopia looming, Shefa filed applications for withholding of removal and protection under the Convention Against Torture. (Doc. 13, ¶ 16.) Shefa's applications are based on the threat to

[1] "R.Add." refers to Shefa's Addendum.

her life she faces if she returns to Ethiopia: members of her husband's family, who still reside in Ethiopia, have sworn a blood oath to avenge his death and kill her if she ever returns. (*Id.*) In March 2016, Shefa received a letter from her sister—who still lives in Ethiopia—explaining that her husband's family is "extremely angry" and have declared that if Shefa ever returns to Ethiopia they are "going to kill her." (Doc. 14, Ex. G, at 7.) Shefa's sister ended her letter: "We come and go in fear. You have to stay there. Try your very best to stay there. If you come to Ethiopia, they will certainly kill you. Don't come back." (*Id.*)

In Shefa's community in Ethiopia, where her husband's relatives live and where she will return if deported, such revenge killings—viewed as necessary to reclaim family honor—are common in response to a family member's death. The immigration court confirmed that "vengeance is a culturally accepted instrument for redressing injury and the men of the victim's side are duty bound to take vengeance against [the] killers or one of the killer's close relatives." (Doc. 14, Ex. I, at 10 (noting "blood feuds" and "revenge killings" are "culturally accepted" in many Ethiopian societies).)[2]

[2] That the relatives of Shefa's husband have sworn to kill her—an undisputed fact—sheds new light on the Chief Justice's argument that a pardon was inappropriate because of, "most importantly, the wishes of

At this point, Shefa's deportation to Ethiopia and into the hands of her husband's relatives looms on. A pardon of Shefa's conviction would end the threat of removal and ensure that she is not punished yet again for protecting herself against a serial rapist and abuser. Preventing such injustice is precisely what clemency is for.

II. Procedural History.

A. Shefa's pardon was denied because the Chief Justice voted against it.

On June 12, 2020, Shefa appeared before the Board of Pardons, seeking a pardon of her conviction for first degree manslaughter. (Doc. 13, ¶ 32.) The Governor and Attorney General, upon reviewing the undisputed evidence, recognized that she deserves relief and voted to grant her pardon application. (*Id*. ¶¶ 33-34.) The Chief Justice, however, voted against the application without further comment. (*Id*. ¶ 35.)

Given the unanimous vote required by Minn. Stat. § 638.02, subd. 1, the Chief Justice's vote stopped the Governor from granting Shefa's pardon—despite his and the Attorney General's recognition that granting her a pardon would best serve the interests of justice. (*Id*. ¶ 36.) In fact, the Governor has stated that, "[b]ut for the unanimous vote"

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the family members of the victim, . . . who continue to feel the loss of their brother and friend." (CJ Br. at 4.)

required under § 638.02, he "would have granted [Shefa's] pardon application." (Doc. 14, Ex. U.)

Thus, the same judicial officer who signed the order denying Shefa's request for judicial relief (R.Add.1) was authorized by statute to veto her request for executive clemency.

B. Shefa challenged the unanimity requirement, the Governor supported her position, and both sought a ruling in Shefa's favor.

Shefa filed this lawsuit shortly after her pardon was denied, asserting that Minn. Stat. § 638.02, subd. 1 is unconstitutional as applied here. Shefa named as defendants the Governor, the Attorney General, and the Chief Justice. (Doc. 1.) The parties acknowledged there were no factual disputes and agreed to a stipulated record and a briefing schedule for cross motions for summary judgment. (Doc. 10.)

In an unusual twist, the Governor (a named defendant) recognized the validity of Shefa's position and supported her request for relief, challenging the constitutionality of Minn. Stat. § 638.01—which writes the Governor out of the pardon process in any capacity except as a member of the Board of Pardons—as well Minn. Stat. § 638.02, subd. 1 (the unanimous vote requirement). (*See* Doc. 20.) Shefa adopted those positions. The district court correctly encapsulated her and the Governor's position as follows: "the Governor has pardon power separate

and apart from the Board of Pardons," rendering unconstitutional the challenged statutes because they go too far in limiting the Governor's power. (Add.4.)

Shefa and the Governor also challenged Minn. Stat. § 638.02, subd. 1 on the basis that the unilateral veto it provides to the Chief Justice—which is not "expressly provided" by the Constitution—violates the separation of powers doctrine. And, finally, Shefa requested that the Governor be enjoined to reconsider her pardon without the need to satisfy the unanimity requirement, and the Governor requested that Shefa's pardon be granted *nunc pro tunc.*

C. The Attorney General and Chief Justice argued constitutional language was meaningless.

Article V, § 7 of the Constitution states that "[t]he governor" has power to grant pardons "in conjunction with" the Board. Yet the Attorney General and Chief Justice—both represented before the district court by the Office of the Attorney General—argued the Constitution is "silent" on the division of power between the Governor and the Board and the "requirements" to issue a pardon. (Doc. 30, at 3; Doc. 45, at 2.)

To justify that position, counsel for the Attorney General and Chief Justice argued before the district court that the first five words of Article V, § 7—"The governor in conjunction with"—could be ignored

altogether. (R.Add.26, at 3-14.) Far from claiming "in conjunction with" was unambiguous and dispositive in their favor, counsel asserted that the constitutional scheme would be unchanged if the provision excised that language and simply read: "The board of pardons has power to grant reprieves and pardons." (*Id*.) As noted by the district court, counsel argued that "those words are meaningless." (*Id*. at 15-16; *see also* Add.11 (noting the Attorney General and Chief Justice argued "that removing '[t]he governor in conjunction with' language from art. V, § 7 would cause 'no' difference in the constitutional provision's meaning.").)

In only cursory fashion, the Attorney General and Chief Justice also opposed Shefa's and the Governor's alternative requests for relief.

D. The district court concluded the challenged statutes go too far in limiting the Governor's power and are therefore unconstitutional.

The district court rejected the Attorney General and Chief Justice's invitation to rewrite the Constitution, emphasizing "the unremarkable presumption that every word in the [Constitution] has independent meaning, that no word was unnecessarily used, or needlessly added." (Add.11 (quotation omitted).)

Based on the Constitution's "plain language, and applying the canon against surplusage," the district court rightly concluded "the Governor has some pardon power or duty separate or apart from the

Board of Pardons." (Add.13.) Accordingly, the district court confirmed that the challenged statutes—"which give pardon power to the 'Board of Pardons' alone"—are unconstitutional. (Add.13.) The court granted summary judgment to Shefa and the Governor on those issues.

Although it found both challenged statutes unconstitutional, the district court did not fully analyze Shefa's and the Governor's separation of powers arguments. The district court noted that the "Chief Justice is specifically listed" in the Constitution as a member of the Board of Pardons and then concluded that "the Chief Justice's participation in the pardon process as a Board of Pardons member is clearly not a violation of the separation of powers." (*Id.*)

But that ruling misapprehends the basis of the claim. It is not the Chief Justice's ***participation*** in the pardon process that is problematic. Rather, it is the Chief Justice's authority to unilaterally veto any pardon for any reason that violates the separation of powers doctrine. It is that unilateral veto that that permits this member of the judiciary to exercise executive function. And while the Constitution lists the Chief Justice as a member of the Board of Pardons, it is the challenged statute—not an express grant through the Constitution itself—that mandates unanimity and thereby creates the veto. That is the basis of Shefa's claim that the unanimity requirement violates the separation of powers doctrine.

The district court also quickly disposed of Shefa's request that the Governor be enjoined to reconsider her pardon, and his request that Shefa's pardon be granted *nunc pro tunc*, concluding its "mandate extends only to addressing the issue of law put before it." (Add.14.)

E. This appeal follows.

Following the district court's opinion and order, and related entry of judgment, the Chief Justice—having first obtained independent counsel—noticed her appeal and filed with this Court a Petition for Accelerated Review. The Attorney General, Shefa, and the Governor then all filed notices of related appeals. On July 20, 2021, this Court granted the Chief Justice's petition and accepted accelerated review of this case.

STANDARD OF REVIEW

This Court assesses the constitutionality of a statute—a pure question of law—*de novo*. *State v. Bartylla*, 755 N.W.2d 8, 14 (Minn. 2008). The *de novo* standard of review applies both to the district court's finding that the challenged statutes violate the plain language of the Constitution and to the court's conclusion that § 638.02, subd. 1 does not violate the separation of powers doctrine.

To prevail in her challenge, Shefa must show that the statutes are unconstitutional "beyond a reasonable doubt." *Estate of Jones by Blume v. Kvamme*, 529 N.W.2d 335, 337 (Minn. 1995).

SUMMARY OF THE ARGUMENT

Shefa faces two possible futures, and the difference between them is stark.

In one, the district court's order is affirmed. Shefa will receive a pardon and may continue building her life here in Minnesota, where she is safe, with the hope of one day reuniting with her children.

The other possibility, in which the district court's order is reversed, is far more alarming. In that future, the challenged unanimity requirement remains, and the Chief Justice retains power to unilaterally foreclose Shefa's pardon. As a result, Shefa will almost certainly be deported to live the rest of her life—however short—waiting for her late husband's relatives to honor their blood oath to kill her.

This Court, in this case, now decides Shefa's fate. Given those consequences, it is fortunate the Constitution bids this Court to affirm.

1. The Constitution's Plain Language Unambiguously Compels This Court to Affirm.

Article V, § 7 grants the Governor pardon power apart from the Board of Pardons. That language does not condone statutes that make the Governor a mere co-equal member of the Board. *See State v. Meyer*, 37 N.W.2d 3, 14 (Minn. 1949) (no statute may "prevent the governor" from "granting a pardon or a reprieve."). And though the Attorney

General and Chief Justice may wish to ignore that language—as they did before the district court—such would be legal error of the highest order. *See Rhodes v. Walsh*, 57 N.W. 212, 214 (Minn. 1893) (rejecting as "unheard of" that the Constitution includes superfluous language, "for constitutions are framed in the most concise language possible.").

The framers could have excised the Governor from the pardon process. They chose elevated power instead. The challenged statutes violate that plain language and this Court should affirm on that basis.

2. If the Court Believes the Provision is Ambiguous, It Should Resolve the Ambiguity in Shefa's Favor.

Even if the Court believes that the "in conjunction with" language is sufficiently ambiguous to justify looking beyond Article V, § 7, it should find only yet another basis to affirm.

That "in conjunction with" does not create a partnership-of-equals is confirmed by the phrase's use in other Minnesota laws. *See*, *e.g.*, Minn. Stat. § 253D.30, subd. 2. And this is all fully consistent with the purpose of the constitutional provision at issue—Article V, § 7—which is intended to provide a workable system for clemency, not one in which individual Board members are empowered to veto any pardon for any reason.

3. A Unilateral Veto Exercised by the Chief Justice Is a Violation of the Separation of Powers Doctrine.

The Constitution places the Chief Justice on the Board—nothing more. But § 638.02, subd. 1 provides the Chief Justice a de-facto veto over the exercise of the executive pardon power through the unanimous vote requirement. Here, the Chief Justice exercised that veto—a creature of statute, not of the Constitution itself—to block Shefa's pardon. Critically, four years earlier, it was the Chief Justice who signed the order denying Shefa's petition for review of her conviction and sentence. (R.Add.1) Thus, the head of the judiciary was the spokesperson for the Supreme Court when it denied judicial relief, and hers was the only vote that mattered in precluding Shefa relief from the executive. Try as one might, it is difficult to conjure a more clear-cut separation of powers violation.

4. The Governor should reconsider Shefa's application.

Finally, the result of this case should not be that Shefa's application was wrongfully denied under unconstitutional statutes, but she has to ***reapply*** and wait another year to seek her pardon—a year that could lead to her deportation. Rather, the Governor should be enjoined to reconsider that application now.

ARGUMENT

I. The plain language of the Minnesota Constitution provides the Governor pardon power separate and apart from the Board and the challenged statutes violate that language.

With respect to clemency, the plain language of the Minnesota Constitution empowers the Governor apart from the Board. This is true despite that the framers knew how to raise the Board, or the other individual members, to be on equal footing with the Governor had they intended to do so. That they did not do so is dispositive.

This Court should affirm.

a. The Constitution empowers the Governor with clemency power apart from the Board.

When determining the meaning of language in the Minnesota Constitution, the "plain language" controls. *Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 618 (Minn. 2017). Thus none of the parties, or this Court, is "empowered to say" the framers of the Constitution "meant something they did not say." *State v. Holm*, 215 N.W. 200, 202 (Minn. 1927).

The plain language at issue here empowers the Governor with regard to pardons by naming that office twice—once individually ("The governor . . . has the power") and once as a member of the Board of Pardons. *See* Minn. Const. art. V, § 7. The Constitution has provided this

separate grant of power to the Governor, apart from the Board, ever since it was amended in the late 1800s. In fact, the Constitution's amended language from 1896 is even more explicit in elevating the Governor than the Constitution's modified language today:

> And ***he shall have power*** in conjunction with the board of pardons, of which the governor shall be ex-officio a member . . . to grant reprieves and pardons after conviction for offenses against the state.

(Add.15 (emphasis added).)

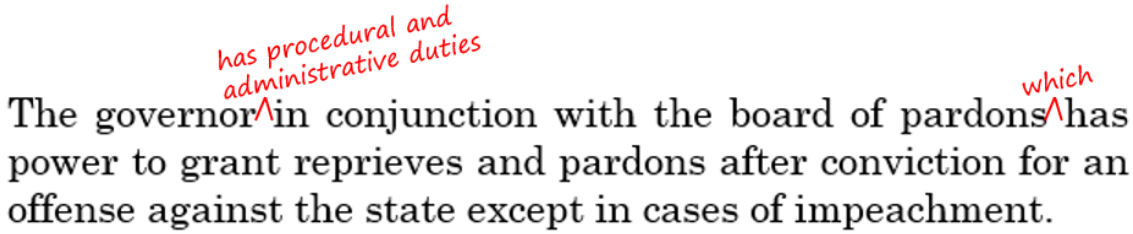
Had the framers instead intended to vest the pardon power solely with the Board—as do the challenged statutes—it would have required but the flourish of a quill:

> ~~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.

But the framers did not excise that language. Instead, they ensured the Governor retained power separate and apart from the Board.

The Chief Justice concedes that the Constitution distinguishes the Governor from the other members of the Board—she writes that the Governor possesses "duties relating to granting pardons that differ from the other two members of the board" which are "separately called out in the constitution." (CJ Br. at 16-17.) That is ***precisely*** the point.

The Chief Justice attempts to minimize her concession, arguing those duties are merely "procedural and administrative" in nature. (*Id.* at 16.) But that distinction finds no support in the text. And as much as one may like to redline the Constitution as follows—



—that prerogative belongs only to the people of Minnesota.

The Constitution provides a separate grant of power to the Governor and the legislature is not at liberty to ignore that. *See Meyer*, 37 N.W.2d at 14 (***no*** statute may "prevent ***the governor***" from "granting a pardon or a reprieve." (emphasis added)). The challenged statutes override the Constitution's grant of separate power to the Governor and are thus unconstitutional.

b. The language empowering the Governor cannot be ignored.

It is foundational that "no section of a constitution should be considered superfluous." *Butler Taconite v. Roemer*, 282 N.W.2d 867, 870 (Minn. 1979); *see also Rice v. Connolly*, 488 N.W.2d 241, 246-47 (Minn. 1992); Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all of its provisions."). And yet, before the district court, the

Attorney General and Chief Justice argued that the first five words of Article V, § 7—"The governor in conjunction with"—are meaningless and can simply be ignored. (Add.10-11 (noting their interpretation "completely negates the words '[t]he governor in conjunction with.'").)

The district court applied the "canon against surplusage," refused to strike words from the Constitution, and correctly concluded "the Governor has some pardon power or duty separate or apart from the Board of Pardons." (Add.13.)

The Chief Justice is mistaken in arguing that the district court erred in applying the canon against surplusage. That canon applies here with full force because, again, sections of the Constitution cannot simply be discarded and ignored. *Roemer*, 282 N.W.2d at 870. As this Court has recognized, that the Constitution contains superfluous language is an "unheard of" proposition, "for constitutions are framed in the most concise language possible." *Rhodes*, 57 N.W. at 214.

This is not a situation where the framers were "repeat[ing] themselves" or "include[d] words that add nothing of substance." (*See* CJ Br. at 15-16.) That point is clearly elucidated by *In re Krogstad*, the only case offered by the Attorney General and Chief Justice in arguing (incorrectly) that the district court was wrong to apply the canon against surplusage. (*See* CJ Br. at 15.) First, *Krogstad* involved interpretation of

a statute, 958 N.W.2d 331, 333 (Minn. 2021)—the Attorney General and Chief Justice do not offer any cases concluding that words in the ***Minnesota Constitution*** may be redundant and simply ignored. And in *Krogstad*, while the Court questioned whether a single word ("several") was unnecessary given that the statute pluralized "defendants," the Court nevertheless held that "several" was not surplus because "each word must be given a distinct and non-identical meaning." *Id.* at 335.

Here, the Attorney General and Chief Justice sought to ignore an entire clause of the Constitution—critical language elevating the Governor—which brings the canon against surplusage squarely into focus. *See Roemer*, 282 N.W.2d at 870; *Rhodes*, 57 N.W. at 214. The district court was correct to apply it.

This Court should affirm, without the need to reach any other question presented here, because the plain language of the Constitution empowers the Governor apart from the Board, and that language cannot be ignored.

c. When the Constitution was amended in 1896, the pardon power remained in Article V, § 4, which defined the "Powers and duties of governor."

Confirming that the 1896 amendment did not seek to strip the Governor of all power and vest sole power in the Board, the language adopted in 1896 left the pardon power within Article V, § 4—the section

establishing the Governor's "[p]owers and duties." (*See* Add.15.) The pardon power was not broken out into its own section, Article V, § 7, until the Constitution was reorganized in 1974. *See*, *e.g.*, Minn. Const'l Study Comm'n, *Final Report and Committee Reports*, *Executive Branch Committee Report*, at 21 (1973) (confirming that, as of 1973, the "Pardon Board" remained under "Article V, Sec. 4"); *Meyer*, 37 N.W.2d at 12 n.9 (noting that, as of 1949, the pardon power remained in Article V, § 4).)

And as the Attorney General has emphasized, that 1974 reorganization "from the original 1896 amendment" was meant only to improve clarity of language and "did not change its legal effect." (AG Br. at 6 (citing *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 159 (Minn. 2017)).) Thus the 1974 reconstruction did not alter that the Constitution's grant of the pardon power is embodied within the Governor's powers and duties. And that structure cements that the Governor has power separate and apart from the Board. *See Hagen v. Steven Scott Mgmt., Inc.*, --- N.W.2d ----, 2021 WL 3522236, at *4 (Minn. Aug. 21, 2021) (noting that "text, ***structure***, and punctuation" are assessed before ambiguity is determined (emphasis added)).

The Chief Justice's argument that the Constitution's structure supports her position (CJ Br. at 12-13) simply misapprehends the facts.

d. "In conjunction with" is not the phrase the framers used to create joint power—they would have used "advice and consent" or extended express veto power to the Board if that was their intention.

The Constitution "must be read as a whole so as to harmonize its various parts." *State v. Houndersheldt*, 186 N.W. 234, 236 (Minn. 1922). This is also true even if the language is not ambiguous. *State v. Prigge*, 907 N.W.2d 635, 640 (Minn. 2018); *State v. Lessley*, 779 N.W.2d 825, 832 (Minn. 2010) (this Court "first examine[s] language itself ***and its context***" (emphasis added)); AG Br. at 18-19 ("context is a primary determinant of meaning").

Had the framers intended to make the Governor a mere co-equal member of the Board without separate power, they would have used the phrase that creates joint power: "advice and consent." As Alexander Hamilton long ago explained, "advice and consent" is the phrase used to create "joint possession of the power in question[.]" *A. Hamilton*, The Federalist Papers: No. 75 (Mar. 26, 1788).

This is apparent in both the Minnesota and U.S. Constitutions, which employ "advice and consent" in precisely that manner. *See*, *e.g.*, U.S. Const. art. II, § 2, cl. 2 (limiting the President's power to make treaties and appoint officers by requiring "the Advice and Consent of the Senate"). Indeed, the Minnesota Constitution conditions the Governor's

power to appoint certain legal officers, creating joint power between the Governor and the Senate, by requiring the "advice and consent of the senate" to act. *See* Minn. Const. art. V, § 3. The Constitution included "advice and consent" as of the 1896 amendment, and that language appeared in the exact same section as the "in conjunction with" language at issue here. (*See* Add.15.)

As this Court has emphasized, "when different words are used in the same context, we may assume the words have different meanings." *State v. Culver*, 941 N.W.2d 134, 139 (Minn. 2020). By that well-accepted canon of interpretation, the phrase "in conjunction with" must mean something different than "advice and consent" and joint power.

The framers also could have provided the other Board members with express veto power; they knew precisely how and did so elsewhere in the Constitution. *See* Minn. Const. art. IV, §§ 23, 24 (providing the Governor a "veto" over specific legislative acts). But, of course, Article V does not extend to the Attorney General or Chief Justice a similar express veto with regard to the pardon power.

In limiting the Governor's unilateral pardon power, the framers specifically avoided language that would create equal power and instead chose "in conjunction with." That choice matters and should end this dispute in Shefa's favor. This Court should affirm.

II. The Attorney General's and Chief Justice's new plain language arguments do not warrant reversal.

In the district court, the Attorney General and Chief Justice argued that "[t]he governor in conjunction with" was meaningless surplus that can be ignored. They cannot now shift their position and argue that same language has plain meaning that is somehow dispositive in their favor. But even if these shifting positions are considered, still the Court should affirm.

a. The Attorney General and Chief Justice previously argued the words "The governor in conjunction with" are meaningless—they cannot now shift away from that position.

Before the district court, the Attorney General and Chief Justice argued in their briefs that the Constitution is "silent" on the allocation of power between the Governor and the Board and the necessary requirements "to issue a pardon." (Doc. 30, at 2-3; Doc. 45, at 2.)

During oral argument, counsel for the Attorney General and Chief Justice justified that position—and put the issue beyond doubt—by emphasizing that "striking the words the Governor in conjunction with," and starting with "the Board of Pardons" instead, would make no difference whatsoever:

> THE COURT: Let['s] do it again. 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?
>
> MR. VOIGT: 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?
>
> MR. VOIGT: No.

(R.Add.26, at 3-20.) The district court was right to roundly reject those arguments. (Add.12-13.)

Having lost in the district court, the Attorney General and Chief Justice now argue this Court's analysis "should begin and end with the plain meaning of 'conjunction'" (CJ Br. at 11; *see also* AG Br. at 3)—the very same word they previously argued was "meaningless."

These new plain language arguments should be rejected out of hand because a party may not shift its legal theory on appeal:

- "A party cannot shift his position on appeal. To permit him to do so would be unfair to the opposite party and turn the appellate court into a court of first instance. It is a general rule, of wide and frequent application, that a case will be considered on appeal in accordance with the theory on which the action was conducted on the trial, both as regards the law and the facts." *Denoyer v. Ry. Transfer Co.*, 141 N.W. 175, 176 (Minn. 1913).

- "On appeal, litigants may not so shift, to say nothing of reversing, their position." *Burke v. Burke*, 297 N.W. 340, 341 (Minn. 1941).

- "Parties on appeal are bound by the theory upon which the case was tried. This theory becomes the 'law of the case,' and a party cannot shift positions and adopt a new theory on appeal." *Gillen v. Comm'r of Tax'n*, 232 N.W.2d 894, 898 (Minn. 1975).

There is overwhelming support for this well-established proposition, going all the way back to 1895. *See*, *e.g.*, *State v. Ali*, 895 N.W.2d 237, 246 (Minn. 2017); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Urb v. Cont'l Convention & Show Mgmt.*, 68 N.W.2d 633, 635 (Minn. 1955); *Lohman v. Edgewater Holding Co.*, 33 N.W.2d 842, 846 (Minn. 1948); *Gandrud v. Hansen*, 10 N.W.2d 372, 373 (Minn. 1943); *Steward v. Nutrena Feed Mills*, 244 N.W. 813, 815 (Minn. 1932); *Hove v. Bankers' Exch. Bank*, 77 N.W. 967, 967 (Minn. 1899); *Peteler Portable Ry. Mfg. Co. v. Nw. Adamant Mfg. Co.*, 61 N.W. 1024, 1024 (Minn. 1895).

This Court should honor that settled law and preclude the Attorney General and Chief Justice from offering new legal theories, on a dispositive issue, for the first time before this Court. They did not argue below that the plain meaning of "in conjunction with" was dispositive in their favor. They cannot do so now.

b. The Attorney General's and Chief Justice's new plain language arguments are without merit—"in conjunction with" does not strip the Governor of all power or create joint power.

Even if the Court considers the new plain language arguments the Attorney General and Chief Justice cobbled together—contradicting 125 years of black-letter law—those arguments fail.

The Attorney General and Chief Justice are wrong to suggest that the phrase "in conjunction with" removes all power from the Governor and instead "place[s] that power with the board of pardons." (CJ Br. at 3; *see also* AG Br. at 2.) To confirm the point, the Court need look no further than the definitions of "conjunction" they put forward: "in conjunction with" means the same thing as "in association with." (AG Br. at 11 (defining "conjunction" to mean "association"); CJ Br. at 11 (same).) Black's Law Dictionary defines "association" as "[a] gathering of people for a common purpose; the persons so joined." *Black's Law Dictionary* (11th ed. 2019).

That the Governor is joined with the Board in a "common purpose" in no way requires a finding that the Governor has ***no*** power and that ***all*** power is instead vested in the Board. And even if that were a reasonable reading of the language (it's not), that would not be the only reasonable interpretation. Such definitions certainly do not make the

district court's decision unreasonable.

The structure of the sentence also supports the district court's conclusion, providing that the Governor "has" the power, to be exercised in conjunction with the Board. This Court applies basic grammatical rules in aid of textual interpretation. *See, e.g.*, *State v. Schmid*, 859 N.W.2d 816, 820 (Minn. 2015). The verb "has" is singular just as is the subject to which it applies: "[t]he governor." This sentence only makes sense if it is "[t]he governor" who "has" the power to pardon. And, as noted above, *see supra* at Section I(c), the Chief Justice is simply wrong to argue the structure of the Constitution undermines Shefa's case. That structure ***supports*** Shefa's position.

Moreover, that the Governor has independent pardon power aligns precisely with this Court's jurisprudence. The only time this Court has ever truly engaged with the constitutional language outlining the pardon power, the Court found the challenged statute constitutional only because it did not "prevent ***the governor***" from "granting a pardon or a reprieve." *Meyer*, 37 N.W.2d at 14. And although *Meyer* also discussed the power of the Board, *id.*, still the Court recognized the Governor holds distinct power. Neither the Attorney General nor the Chief Justice even attempt to refute that important point.

Given the Constitution's plain language, this Court should affirm.

III. If ambiguous, "in conjunction with" should be construed consistently with the Constitution as a whole and Minnesota law in general—doing so supports affirmance.

The language of Article V, § 7 is only susceptible to one reasonable interpretation—as elevating the Governor from the Board of Pardons.

But if the Court permits the Attorney General and Chief Justice to shift their positions to argue the plain language of "in conjunction with" supports them (as opposed to constituting meaningless surplus), ***and*** if the Court believes their reading of "in conjunction with" as removing all power from the Governor is reasonable, then still there remains work to do. For in that instance, Article V, § 7 is susceptible to two reasonable interpretations and is thus ambiguous. *See Harris v. Cnty of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004).

Even if the relevant language is ambiguous, however, upon examination the result is the same and this Court should affirm.

a. "In conjunction with" does not create joint power when used in Minnesota statutes.

The Attorney General and Chief Justice do not offer any cases in which this Court has assessed the meaning of ambiguous constitutional language by rifling through random newspaper clippings to determine what newspapermen thought about it. But this Court has previously determined the meaning of ambiguous language by looking beyond the

Constitution to other enactments of Minnesota law. As the Court has recognized, "Minnesota statues" necessarily "inform" the interpretation of ambiguous constitutional language. *Lessley*, 779 N.W.2d at 837.

That "in conjunction with" does not create joint, equal power is borne out by its routine use in Minnesota statutes. The Minnesota statute concerning provisional discharge plans for the release of convicted "sexually dangerous person[s]" or those "with a sexual psychopathic personality" provides a pertinent example. *See* Minn. Stat. § 253D.30, subd. 2. That statute requires that any "provisional discharge plan shall be developed, implemented, and monitored by the executive director ***in conjunction with*** the committed person and other appropriate persons." *Id*. (emphasis added). It would be patently unreasonable to read that statute as empowering a convicted offender to unilaterally veto the implementation or monitoring of an applicable discharge plan because they enjoy joint, equal power with the director.

That is not the only example. The phrase "in conjunction with" is used exactly the same way in the following statutes, too:

- A social service agency shall create independent living plans for foster children "in conjunction with the child and other appropriate parties" (Minn. Stat. § 260C.451, subd. 2).

- The Advisory Council on Rare Diseases is required to evaluate resources "in conjunction with the state's medical

schools, the state's schools of public health, and hospitals in the state" (Minn. Stat. § 137.68, subd. 4).

- The Commissioner of the Pollution Control Agency is directed to review the impact of antifreeze disposal "in conjunction with industry organizations" (Minn. Stat. § 115A.916(e)).

It would not be reasonable to read those provisions as creating joint, equal power, for instance, between foster children and social service agencies with regard to the children's independent living plans.

Just as with those statutes, so too here. Requiring that the Governor grant pardons "in conjunction with" the Board does not extend to those Board members executive power equal to the Governor's own authority or permit the legislature to strip the Governor of all power.

b. Interpreting "in conjunction with" in a manner that specifically empowers the Governor is consistent with the purpose of Article V, § 7 and the purpose of the 1896 amendment.

Both the Attorney General and Chief Justice argue that the purpose of the 1896 amendment favors their interpretations of the meaning of "in conjunction with." First, they are wrong that the purpose of the ***amendment***—rather than the constitutional ***provision***—is the proper focus. *See Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005). And Shefa's interpretation fully squares with the purpose of Article V, § 7 (a workable clemency system). Second, even if the purpose of the

1896 amendment were the proper lens, still Shefa has the better of this argument, because the purpose of that amendment was only to divest the Governor of ***sole*** authority. The purpose was not to divest the Governor of ***all*** authority.

The purpose of the relevant provision of Article V, § 7 is to empower the Governor to grant pardons "in conjunction with" the Board. It makes sense that the power to pardon would be lodged with the top official in the executive department, as this Court has consistently recognized that the power to pardon is an executive function in Minnesota. *See State v. Wolfer*, 138 N.W. 315, 317 (Minn. 1912) (recognizing "the executive power of pardon"); *Meyer*, 37 N.W.2d at 13 ("A pardon is the exercise of executive clemency."); *Matter of Welfare of L.J.S.*, 539 N.W.2d 408, 411 (Minn. Ct. App. 1995) (it is "well-established" that clemency power is an executive function in Minnesota); *State v. Brill*, 111 N.W. 639, 642 (Minn. 1907) (the Minnesota Constitution vests "the executive power . . . to the executive department" and "in the Governor"); *see also United States v. Benz*, 282 U.S. 304, 311 (1931) ("To cut short a sentence by an act of clemency is an exercise of executive power").

The importance of this provision—providing for clemency and mercy in the event criminal laws or punishments overreach—is

paramount, as the Court noted in *Meyer* with its focus on precluding statutes from improperly restricting the Governor's power. 37 NW2d at 13-14. Shefa's position would ensure this essential democratic function is not encumbered by the unilateral vetoes of the other Board members. The Attorney General and Chief Justice do not even attempt to square their positions with the purpose of the constitutional provision at issue.

And even if the 1896 ***amendment*** were the proper focus, which is not the case, that too aligns with Shefa's position. The Attorney General and Chief Justice have mischaracterized the purpose of the 1896 amendment, arguing the intent was to strip the Governor of all power and vest all power in the Board. That is not accurate. The stated purpose of the amendment was to "deprive the governor of the power to ***alone*** grant pardons and reprieve, which he now enjoys, and to create a board of pardons." (Add.15 (emphasis added).) Limiting the Governor's pardon power, and creating the Board, does not mean the Governor has no power and the Board has it all.

Further, that statement of purpose the Attorney General and Chief Justice devote so much time to discussing was explicit in promoting the amendment's intention of "defining the ***authority and duties*** of the governor in relation to pardons for criminal offenses[.]" (Add.15 (emphasis added).) Had the framer's intention been to make the

Governor equal to the Board, there would have been no need to define that office's "authority and duties" through the Constitution. The Board's powers and duties are regulated by law, not the Constitution. The Attorney General and Chief Justice also ignore this point entirely.

While the framers intended to limit the Governor's power, ***some*** limitation does not condone ***any*** limitation. There is no evidence from the provision at issue, or the 1896 amendment's statement of purpose, that the intent was to remove all power from the Governor and vest it in the Board. This Court should not arbitrarily jump to that conclusion based on the *ipse dixit* of the Attorney General and Chief Justice.

c. In the late 1800s, four other states created pardon boards that included the governor—unlike Minnesota, they all expressly stripped the governor of independent power.

The reality of the 1896 amendment is that it was not created in a vacuum. The framers were well aware of what other states were doing as they experimented with different limitations of the executive pardon power after the civil war. Even inmates from the Stillwater prison knew what other states were doing, and one begged Minnesota—in one of the articles cited by the Chief Justice—to "wheel into line" with a system that afforded greater opportunities for clemency. (*See* full scan of A.Add.19.)

And like all great lawyers and legislators, the framers did not invent the wheel when they did not have to. The Minnesota Constitution was largely based on the Federal Constitution and other state constitutions. Smith, *The debates and proceedings of the Minnesota Constitutional convention* 378 (1857) (noting that the Pardon Provision is based on the federal Constitution).

From 1868 through 1895, four states—Florida, Idaho, Nevada, and Utah—created pardon boards that included the governor and then fully vested the executive pardon power within those boards. But unlike Minnesota, each of those states expressly stripped their governors of all power to vest it in their boards. *See* Fla. Const. art. V, § 12 (1868) ("The Governor, Justices of the Supreme Court, and Attorney-General, or a major part of them, of whom the Governor shall be one, may . . . grant pardons after conviction"); Idaho Const. art. IV, § 7 (1889) ("Said board, or a majority thereof, shall have the power"); Nev. Const. art. V, § 14 (1889) ("The Governor, Justices of the Supreme Court, and Attorney General, or a major part of them, of whom the Governor shall be one, may . . . grant pardons"); Utah Const. art. VII, § 12 (1895) ("the governor, justices of the supreme court, and attorney-general shall constitute a board of pardons, a majority of whom, including the governor . . . [may] grant pardons").

The Minnesota framers had all of those examples at their fingertips had they wanted to excise the Governor from the process and vest sole authority in the Board. They did something decidedly different, however, because that was never their intention.

d. The date of enactment for the challenged statutes does not warrant reversal, nor does acquiescence from prior government officials.

Unable to conjure logical arguments based in the text of the Constitution itself—there being no arguments that would align their positions with the purpose of the relevant provision—the Attorney General and Chief Justice resort to arguing timelines. They assert that, because the challenged statutes were enacted one year after the 1896 amendment and have been on the books for 124 years, those statutes simply ***must*** be constitutional. But without any textual support for their positions, the Attorney General and Chief Justice cannot resort to claiming the statutes, simply because they exist, are "dispositive" proof of their own constitutional validity. (*See* AG Br. at 16.)

That laws may self-confirm their own constitutionality based on timing alone is a troubling proposition. It is true that the legislature is presumed to create constitutional laws. But when it does not, as here, Courts do not simply confirm constitutionality because the legislature acted in the first place. So when this Court has relied on the long-

standing history of some law as supporting its constitutionality, such consideration has occurred only after the Court first anchors its analysis in the text of the Constitution and Minnesota law. For example, in *Clark v. Pawlenty*, the Court looked to the "practical construction of the constitution" only ***after*** ensuring its analysis would not create "conflicting interpretations" with other sections of the Constitution itself. 755 N.W.2d 293, 305-06 (Minn. 2008). The same is true for *Lessley*, in which the Court looked to historical practice only ***after*** analyzing the language at issue and its context within the Constitution as a whole as well as other Minnesota statutes. 779 N.W.2d at 832-38.

Simply put, without more, that these laws are old does not mean they are constitutional. There must be some additional support from the text of the Constitution or Minnesota law. Here, there is none.

The Attorney General and Chief Justice also act as if the statutes have existed for 124 years without raising any doubts, extolling the number of Board of Pardons members and legislators who previously failed to raise challenges to those laws. (AG Br. at 17-18; CJ Br. at 27-29.) But this ignores that over the years there has been significant uncertainty surrounding Minnesota's current clemency system.

For instance, the *Meyer* Court certainly did not believe this was a decided issue and all power rests with the Board; it specifically held the

Governor legitimately has some power—and thus received special reference—apart from the Board. 37 N.W.2d at 14.

And all must recognize that, at times, long-established practices are wrong. Slavery is an easy example, which enjoyed certain legal protections from the Nation's founding through 1863. The application of the Confrontation Clause is another good illustration. In 1980, the Supreme Court analyzed the "historical evidence" surrounding application of the Confrontation Clause to conclude that, so long as the statement of an unavailable witness has the necessary "indicia of reliability," it may be admitted. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Many years later, Justice Scalia wrote that the *Roberts* Court had it wrong, had gone astray, and had produced a test that "departs from the historical principles" surrounding the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 60 (2004). Even though that *Roberts* test was applicable for decades, it was still erroneous and legally unsupported.

That a law is old does not necessitate a finding that it is constitutional. *University 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."); *see also Clark*, 755 N.W.2d at 306.

This Court should reject the Attorney General's and Chief Justice's attempt to forestall a legally correct conclusion here through a demand for blind adherence to tradition.

e. This Court has never before considered whether the pardon power is vested exclusively in the Board.

Despite this Court's prior recognition that the Governor possesses some power apart from the Board, *see Meyer*, 37 N.W.2d at 12-14, both the Attorney General and Chief Justice state in their briefs that this Court has previously determined the pardon power is vested exclusively in the Board. (CJ Br. at 13 ("The pardon power is vested in the board, as this Court has recognized"); AG Br. at 12 (asserting the Board "alone" has the authority to pardon).) Those representations are divorced from reality.

First, at oral argument before the district court, counsel for the Attorney General and Chief Justice asserted there is ***no*** case law "helpful" to addressing the issues presented here because all of the cases that tangentially concern the Board arose "in very, very different contexts that don't lend themselves to this issue." (R.Add.33, at 5-17.)

The Attorney General now ignores *Meyer*, and his position before the district court, to argue that *Morgan v. State* confirms that the 1896 amendment vested full power in the Board. 384 N.W.2d 458, 461 (Minn.

1986). Not so. Only a cursory review of *Morgan* reveals the Court was not analyzing the meaning of Article V, § 7—it only noted certain arguments should be directed at the Board. Any commentary about the Board's power was pure dicta that had nothing to do with the Court's ruling.

The Chief Justice also overlooks *Meyer* (aside from a footnote incorrectly calling its holding dicta) and ignores her position below to argue the issues presented here have been answered in her favor, relying on *State ex rel. Gardner v. Holm*. But as with *Morgan*, any discussion by the Court of the Board's power in *Holm* was pure dicta that had no bearing on the Court's ruling. 62 N.W.2d 52, 62 (Minn. 1954). The Court was not assessing the meaning of Article V, § 4 (which then embodied the pardon power), but whether the Governor must sign an act of the legislature in prescribing the salaries for judges. *Id*. at 53.

At bottom, *Morgan* and *Holm* are inapplicable. This Court has never decided whether the pardon power is exclusively granted to the Board. It has held only that the Constitution endows the Governor with some separate power—Shefa's argument here. *See Meyer*, 37 N.W.2d at 12-14.

f. The Chief Justice's non-record evidence does not support reversal.

The Chief Justice relies on clippings from newspaper articles that are outside of the record to support her position. But those random clippings do not warrant reversal (if they are even considered).

First, this Court may take judicial notice of "public records" that are outside the record on appeal only in very limited circumstances that do not extend to clippings of newspaper articles. *See*, *e.g.*, *Cole's Wexford Hotel, Inc. v. UPMC*, 127 F. Supp. 3d 387, 417 n.14 (W.D. Pa. 2015) (refusing to consider newspaper articles on motion to dismiss, noting that "newspaper articles are publicly available, but they are not 'matters of public record'"); *JNL Mgmt., LLC v. Hackensack Univ. Med. Ctr.*, 2019 WL 1951123, at *4 (D.N.J. May 2, 2019) (same); *In re Asea Intern. Inc. Sec. Litig.*, 2007 WL 2306586, at *9 (E.D. Pa. 2007) (same); *Sargeant v. Serrani*, 866 F. Supp. 657, 665 (D. Conn. 1994) (rejecting that a "newspaper article constitutes a public record" because that "generally pertains to records that are on file with a public agency"). So even if the Court were willing to consider these hearsay documents for the truth of the matter asserted, a dubious proposition, the Court should reject these newspaper clippings because they are not public ***records***.

Second, these newspapers clippings should be rejected because there has been no opportunity to analyze the relevance or the weight of these documents in the district court: "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988); *see also Giersdorf v. A & M Const., Inc.*, 820 N.W.2d 16, 23 (Minn. 2012) ("[T]he scope of our review is limited to the record before us on appeal"). The Chief Justice knows this better than most. *See Wiebesick*, 899 N.W.2d at 169 (Gildea, C.J., *concurring*) ("An appellate court . . . may not consider matters not produced and received in evidence below."); *Rew v. Bergstrom*, 845 N.W.2d 764, 800 (Minn. 2014) (Gildea, C.J., *concurring*).

Third, even if considered, upon examination the Chief Justice's newspaper clippings do not support her position that the 1896 amendment stripped the Governor of all power. This is best exemplified by Governor McGill's words from 1889, which the Chief Justice recasts as a request "that the legislature remove the pardoning power from the governor and place it in the hands of a pardon board." (CJ. Br. at 19.) But Governor McGill did not ask for all power to be stripped from the Governor and vested solely in a board. Instead, he called for a "pardon board similar to the Pennsylvania one." (A.Add.20.)

That Pennsylvania board of pardons does not share equal power with Pennsylvania's Governor, who retains authority to grant pardons upon a majority recommendation from the board:

> In all criminal cases except impeachment the Governor shall have power . . . to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons.

Penn. Const. art. IV, § 9(a). A unanimous vote is required only in the extraordinary circumstances of "the case of a sentence of death or life imprisonment." *Id*. And, notably, there are no judicial officers on Pennsylvania's board. Penn. Const. art. IV, § 9(b).[3]

That was the board of pardons Governor McGill was calling for. Precisely the type that would be constitutional under the interpretation adopted by Shefa, the Governor, and the district court. So even if the Court considers this non-record evidence, from 130 years in the past Governor McGill asks this Court to affirm.

The other newspaper clippings the Chief Justice offers similarly align with Shefa's position (or are simply inapposite):

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[3] Pennsylvania's Constitution was amended to adopt Penn. Const. art. IV, § 9 in November 1872, which "remains in place today." *See* Pennsylvania Government Website, *History of the Board of Pardons*, available at https://www.bop.pa.gov/Board-Information/Pages/History.aspx (last visit Aug. 8, 2021).

- Governor Pillsbury demanded a board of pardons nearly twenty years before the amendment because he was too busy to give pardon applications "the time and attention they demand." (A.Add.17.) But the legislature did not listen; the Governor's office remained involved with pardons even after the amendment. This article means nothing here.

- Far from establishing that the "unanimity requirement" was "viewed as proper," the 1888 *Daily Globe* article noted that the "creation of a board of pardons, taking from the governor that function" was an example of "radical legislation," not a mainstream (or proper) view. (*See* full scan of A.Add.18.)

- The "Plea for a Board of Pardons" from *The Prison Mirror* in 1888 demanded ***greater*** access to pardons—not a system in which more individuals could unilaterally veto a petition. The complaint was that, "although the prosecution and judge have only fulfilled their duties," still "many, many of the inmates here to-day are in reality serving unjust and prolonged sentences." (*See* full scan of A.Add.19.) That writer would cringe at the unanimous vote requirement enacted in 1897.

- The article in *The North* asked that the "Pardoning Power Remain Where it Now Is" because the pardon power is an executive function "all over the civilized world." (A.Add.21.) That specifically supports Shefa's position.

- *The Representative* did not say anything about vesting sole power in the Board, simply that it was in favor of removing the Governor's unfettered power over pardons. (A.Add.22.) That aligns exactly with Shefa's position, too.

- *The Minnesota Tribune*'s inclusion of Governor Clough's commentary is a stark reminder of what clemency is ***not*** supposed to be. Governor Clough commented that "Pardons are exceptional acts of public officials, and should be reduced to a minimum." (*See* full scan of A.Add.23.) Minimizing clemency runs directly counter to its purpose as a check on the legislature and the judiciary and the plain language of the Minnesota Constitution.

- *The Saint Paul Globe* article from 1897 indicated only that it was "claimed" that the amendment took the pardon "powers from the governor." (A.Add.24.) That is "claimed" in this lawsuit, as well. That does not make it so.

- Finally, the *Minneapolis Tribune* article from 1897 incorrectly indicated that the legislature had "passed an act creating a board of pardons." (*See* full scan of A.Add.25.) That is wrong by all accounts—the Constitution created the Board. This questionable article does not conclusively define the power distribution between Governor and Board.

None of that non-record evidence establishes that the Constitution—which expressly empowers the Governor apart from the Board—somehow really vested all power in the Board and left the Governor empty-handed.[4]

IV. Section 638.02, subd. 2 violates the Constitution's guarantee of separation of governmental power by allowing the Chief Justice to unilaterally block the exercise of a purely executive function.

There is another, independent reason to hold that § 638.02, subd. 1 is unconstitutional—the unanimous vote required to grant a pardon, and related grant of unilateral veto power to the Chief Justice, violates the Constitution's demand for separation of powers.

The Constitution divides the powers of state government into three separate departments and, in order to preserve that separation of

[4] From a policy perspective, it does not make sense that this Court would look to periodicals to assess what the Constitution means. Should hypothetical amendments from 2021 come under fire, it would be a travesty should the correct meaning be divined from responses published on Twitter, over Instagram, or through serial blog posts.

powers, unequivocally forbids any member of the judiciary from exercising "any of the powers properly belonging" to the executive department: "[n]o 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." Minn. Const. art III, § 1 (emphasis added). The challenged unanimity requirement violates these principles and must be rejected.

a. The pardon power is an executive function and the Chief Justice's ability to unilaterally deny any pardon comes from statute.

The power to pardon is an executive function, and yet § 638.02, subd. 1—through its requirement for unanimity—imbues the Chief Justice with power equal to the Governor to unilaterally deny any pardon application regardless of the Governor's position. By making the Chief Justice and the Governor equals with respect to granting pardons, the statute vests the Chief Justice with executive power and allows the Chief Justice to encroach on powers properly vested in the executive.

Additional language from the Constitution makes untenable any argument that the Chief Justice's ability to exercise or block the Governor's executive power to pardon is "expressly provided" by the Constitution itself. The Constitution ***specifically*** and ***explicitly*** notes that the powers of the Board—including the Chief Justice—are to be

established by the legislature and not the Constitution. *See* Minn. Const. art. V, § 7 (the "powers and duties" of the Board of Pardons "shall be defined and regulated by law."). Providing that the legislature may regulate the Board of Pardons is a far cry from offering express authority for a member of the judicial department to exercise executive authority on equal footing with the Governor.

Moreover, because it is Article V (which concerns the executive department) that establishes the Board, even if Article V, § 7 ***did*** provide the Chief Justice some authority—which it does not—that power "must be narrowly construed to prevent an unwarranted usurpation" of power. *See Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 194 (Minn. 1991). Narrowly construed, as required, "in conjunction with" does ***not*** create co-equal power through the mechanism of a unilateral veto or "expressly provide" the Chief Justice with executive authority. The Chief Justice's authority to exercise executive function thus comes via statute.

b. The unanimity requirement's grant of power to the Chief Justice is unconstitutional.

The district court concluded, incorrectly, that simply because "the role of the Chief Justice as a member of the Board of Pardons is expressly provided for in the Constitution, there is no violation of the separation of powers doctrine" when the statutes give her unilateral

authority over executive function. (Add.13 n.5.) That conclusion is erroneous because the legislature does not have carte blanche to enact any laws it may choose—giving the Chief Justice any powers imaginable—simply because the Constitution creates the Board.

To be sure, courts regularly reject legislation—like Section 638.02—that tends to lower the structural barriers between departments. *See Brill*, 111 N.W. at 647 ("Any legislation, therefore, authorizing an invasion of this design, and conferring upon the judiciary the exercise of powers belonging to either of the other departments, cannot be regarded as valid."); *see also State ex rel. Thompson v. Day*, 273 N.W. 684, 686 (Minn. 1937) (rejecting the argument that the Constitution allows "that the Governor may exercise a power properly belonging to the judicial branch.").

The concerns motivating those decisions are at their highest when it is members of the judiciary that are so empowered, as here, given the critical state interest in an impartial judiciary. "[I]t is apparent that the founders of our system of government intended to confine the courts to their judicial duties, and thus prevent them from becoming involved in the turmoil of political life." *Brill*, 111 N.W. at 650-51. The court in *Brill* went on to describe the potential damage to the judiciary if judges act outside of their judicial scope:

> The disposition to impose such nonjudicial functions upon the judges is manifestly due to the public confidence in their fairness and disinterestedness, and to the belief that they will not be influenced by selfish, unworthy, or partisan motives. It is possible that for a time the public would be benefited by the performance of such functions by the court, but the inevitable result in the end would be to lessen its efficiency and prestige as the guardian and conservator of the Constitution and laws and the rights of individuals under the law.

Id. at 651. And so the Court in *Brill* struck down as unconstitutional the legislation under challenge because the statutes "assume to impose upon the members of the judiciary powers and functions which are by the Constitution of the state assigned to another department of the government"—the executive. *Id*.; *see also id*. at 649 ("neither the executive nor the legislative branches of the government can constitutionally assign to the judiciary any duties but such as are properly judicial").

The United States Supreme Court has established the same when addressing the separation of powers under the Federal Constitution, which mirrors that in the Minnesota Constitution, declaring that "separation between the Judiciary and the other branches of the Federal Government" must be maintained "by ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches." *Morrison v. Olson*, 487 U.S. 654, 680-81 (1988).

The Chief Justice's ability to wield the executive clemency power—or at least unilaterally block the exercise of that power—is the precise inter-department encroachment that endangers the checks and balances necessary to maintain our system of government. *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 powers which that instrument places with the Governor as the chief executive officer of the state."); *Brill*, 111 N.W. at 651; *State ex rel. Atty. Gen. v. Young*, 9 N.W. 737, 755 (Minn. 1881) (a statute which provided for the adjustment of the Minnesota state railroad bonds was held void because it attempted to delegate legislative power to the judiciary).

The compelling concerns at issue here were recognized by Chief Justice Oscar R. Knutson and reproduced in the Executive Branch Committee's Final Report from 1973. Chief Justice Knutson wrote:

> [I]t probably would be best to go back to the original constitutional provision and have the pardoning power rest in the governor alone. As a matter of fact, historically, the pardoning power has been considered mainly an executive function. I suppose if anyone is to be eliminated, it should be the chief justice of the supreme court, ***as pardoning is really not a judicial function***. It is the court's responsibility to determine whether a person has had a fair trial, but after a case has been affirmed by the supreme court it becomes somewhat difficult for the chief justice to pass on an application for a pardon or a reprieve.

See Minn. Const'l Study Comm'n, *Final Report and Committee Reports*, *Executive Branch Committee Report*, at 21 (1973) (emphasis added).[5]

Chief Justice Knutson was spot-on—his fears have come to fruition in this case. It was the Chief Justice who signed the order denying Shefa's petition for review of her conviction and sentence in August 2016. (R.Add.1.) Four years later, it was the Chief Justice who unilaterally denied Shefa's pardon application. (Doc. 13, ¶¶ 35-36.)

The Constitution does not empower the Chief Justice to unilaterally wield that executive function, and thus her authority to act as the final arbiter of both Shefa's conviction and her pardon application—through power derived from statute—violates the Constitution's demand for separation of powers. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 364-65 (Minn. 1930) ("The Legislature cannot change our constitutional form of government by enacting laws which would destroy the independence of either department or permit

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[5] This apparently comports with the Chief Justice's own views. In a 2015 article the Governor cited before the district court (*see* Doc. 20, at 7-8), the Chief Justice noted that serving on the Board of Pardons is different from "deciding a case" as a Justice of this Court, and is more "akin to serving as a juror." Andy Mannix & Briana Bierschbach, *Far From Grace: How Minnesota Radically Changed the Way it Forgives Criminals*, MinnPost (July 30, 2015), *available at* https://www.minnpost.com/politics-policy/2015/07/far-grace-how-minnesota-radically-changed-way-it-forgives-criminals/.

one of the departments to coerce or control another department in the exercise of its constitutional powers.").

This Court should reverse the district court's finding on this point, and reaffirm the Constitution's iron-clad demand for the separation of powers.

V. The Governor should reconsider Shefa's pardon because the unanimity requirement is unconstitutional.

To the extent the Court affirms the district court's conclusion that the challenged statutes are unconstitutional, the Governor should be enjoined to reconsider Shefa's pardon application. This is only proper, for when this Court strikes down an act as unconstitutional, remand follows so that error can be corrected. *See*, *e.g.*, *State v. Ali*, 855 N.W.2d 235, 240 (Minn. 2014) (Gildea, C.J.) (vacating sentence handed down under "unconstitutional" requirement and "remand[ing] for resentencing" to alleviate that error).

CONCLUSION

The "benign prerogative" of pardoning should be carefully circumscribed and not unduly fettered. Otherwise clemency fails to serve as an executive check on the legislature and judiciary when criminal punishments overreach. The legislative acts challenged here are prime examples—the legislature went too far and gutted the Governor's power.

Shefa respectfully requests that the Court: (1) affirm the district court and declare that Minn. Stat. §§ 638.01 and 638.02, subd. 1 violate the plain language of the Minnesota Constitution elevating the Governor with respect to the pardon power; (2) reverse the district court and hold that Minn. Stat. § 638.02, subd. 1 violates the separation of powers doctrine by extending to the Chief Justice executive power in a manner not expressly provided by the Constitution itself; and (3) reverse the district court and enjoin the Governor to reconsider Shefa's pardon without application of the unconstitutional unanimity requirement.

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CERTIFICATE OF COMPLIANCE WITH
MINN. R. APP. P. 131.01, subd. 4(d)(7)(B) and 132.01, subd. 3

The undersigned certifies that Amreya Shefa's Opening Brief contains 12,542 words and complies with the word count, typeface, and volume limitations of Rules 131.01, subd.4 and 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.

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