STATE OF MINNESOTA
IN SUPREME COURT

Nos. A25-0066; A25-0068

Steve Simon, Minnesota Secretary of State,

Petitioner,

vs.

Lisa Demuth,

Respondent (A25-0066).

Melissa Hortman, et al.,

Petitioners,

vs.

Lisa Demuth, Harry Niska, Paul Anderson,

Respondents (A25-0068).

AMICUS CURIAE BRIEF OF PROFESSOR ILAN WURMAN, MINNESOTA GUN OWNERS CAUCUS, CENTER OF THE AMERICAN EXPERIMENT, TAKECHARGE, AND MINNESOTA VOTERS ALLIANCE IN SUPPORT OF ALL RESPONDENTS

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AMICI CURIAE'S IDENTITY, INTEREST, POSITION, AND AUTHORITY TO FILE[1]

Professor Ilan Wurman is the Julius E. Davis Professor of Law at the University of Minnesota Law School, where he teaches federal constitutional law, administrative law, and statutory interpretation. He is interested in the sound development of these fields at both the federal and state levels. He participates as *amicus* in his personal capacity and his views do not necessarily reflect those of his academic institution.

Minnesota Gun Owners Caucus is a 501(c)(4) social welfare non-profit organization which advocates for Minnesotans' right to keep and bear arms. The Caucus is interested in this case because its work at the Minnesota legislature will be frustrated if minority parties are able to derail the legislative session by attacking a valid quorum.

Center of the American Experiment is a 501(c)(3) non-profit organization. It researches and produces papers on Minnesota's economy, education, health care, energy policy, public safety and state and local governance. It advances those solutions in part by drafting legislation and testifying before legislative committees. The Center is interested in this case because its work at the

[1] No party or counsel for a party authored this brief in whole or in part. No person or entity other than *amici curiae*, their members, or their counsel made monetary contributions to the preparation or submission of this brief. Minn. R. Civ. App. P. 129.03.

Minnesota legislature will be frustrated if minority parties are able to derail the legislative session by attacking a valid quorum.

TakeCharge is a 501(c)(3) non-profit organization committed to promoting the idea that the promise of America is available to everyone regardless of race or social station. TakeCharge is interested in this case because it believes the Minnesota Constitution's quorum rule is important in ensuring that the legislature works for the people by compromise instead of allowing a minority party to derail legitimate legislative work.

Minnesota Voters Alliance is a 501(c)(3) non-profit organization committed to safeguarding and improving our elections process. The Alliance is interested in this case because the outcome will affect when the governor must issue a writ of election for the House District 40B seat. *See* Order, *Minn. Voters All. v. Walz*, No. A25-0017, Jan. 17, 2025. The Alliance also believes the Minnesota Constitution's quorum rule is important in ensuring that the legislature works for the people by compromise instead of allowing a minority party to derail legitimate legislative work.

On January 17, 2025, the Court granted leave to file this brief.

ARGUMENT SUPPORTING RESPONDENTS

This Court, if it reaches the merits, should unequivocally hold in favor of the respondents because the structure of Minnesota's Constitution compels the conclusion that a quorum of the state house of representatives is at most a majority of individuals known to have been duly chosen and elected. Because there is currently one House seat in which a representative-elect has been found constitutionally ineligible, enjoined from taking the oath, and thus is not and cannot be a "member" of the House, *see* Order, *Minn. Voters All. v. Walz*, No. A25-0017, Jan. 17, 2025—a quorum of the 133 individuals known to have been duly elected to the state legislature is 67.

The Constitution provides that a quorum is a majority of "each house," and "each house" is "compose[d]" of "members" with certain "qualifications" who are "chosen" by the people. Minn. Const. art. IV, §§ 2, 4, 6. Under the Constitution, "each house" engages in numerous functions; for example, "each house" shall judge the qualifications of its members. *Id.* § 6. A hypothetical future representative to a now-unfilled seat has not yet been "chosen" by the electorate, is not a "member" of the house, and cannot exercise any of the functions the Constitution assigns to "each house." This conclusion, which follows inescapably from the Constitution's text and structure, is supported by the only available legislative history from the Constitutional Convention; by repeated decisions of this Court; by the settled interpretation of the federal

constitutional provision from which Minnesota's provision was drawn; and from Mason's manual on legislative procedure.

A lawful quorum now exists in the Minnesota House of Representatives, and members of the minority party, in coordination with executive officials of this state, are effectively proroguing a legitimate session of the state house. The Court should reject such an assault on democracy.

I. Text and structure.

Constitutional interpretation begins with the text and structure of the document. *Schowalter v. State*, 822 N.W.2d 292, 300 (Minn. 2012) ("When resolving a constitutional issue, we look first to the language of the constitution."); *Sheridan v. Comm'r of Revenue*, 963 N.W.2d 712, 719 n.7 (Minn. 2021) (it is this Court's duty "to correctly read, interpret, and apply the text of Minnesota's Constitution"). Here, the text and structure of the Minnesota Constitution compel the conclusion that a quorum is a majority of all duly elected and sworn members of the legislature or, at most, a majority of all members known to have been duly elected and who could lawfully be sworn in. A quorum does not require a majority of all *authorized seats* that may or may not *in the future* be filled with duly elected members.

Starting at the beginning: under the Minnesota Constitution, the legislature "consists of the senate and house of representatives." Minn. Const. art. IV, § 1. It next recognizes that there are "members who compose the senate and

house of representatives," the number of which shall be prescribed by law. *Id.* § 2. The Constitution then defines who said members are: representatives "chosen" by the people for a term of two years, and senators "chosen" by the people for a term of four years. *Id.* § 4. Such individuals also "shall be qualified voters" and "shall have resided" in the state and district for a designated period of time. *Id.* § 6. They must take the oath of office "before entering upon [their] duties." *Id.* § 8.

That alone resolves the central question in this case. The Quorum Clause provides that "[a] majority of each house constitutes a quorum to transact business." Minn. Const. art. IV, § 13. What constitutes "each house," a majority of which qualifies for a quorum? The preceding sections supply the answer. Each house is "compose[d]" of "members" who are "chosen" by the people every two or four years and have the requisite "qualifications." A hypothetical future representative to an unfilled seat has not been "chosen" by the people, has no "qualifications," cannot yet take the oath of office and exercise any "duties" of the office, and is not a "member" of either "house." The conclusion must be that the "house," Minn. Const. art. IV, § 13, currently consists of at most 133 duly elected members, of which 67 constitute a quorum.

Other structural features support this conclusion. Article IV provides that "each house" as a body shall engage in numerous duties and exercise various powers. It provides that "[e]ach house shall be the judge of the election returns

and eligibility of its own members." Minn. Const. art. IV, § 6. How is a nonexistent, hypothetical future legislator to judge the election returns and eligibility of other members? It is an absurdity.

The Constitution similarly provides, to name only a few such provisions, that "[e]ach house may determine the rules of its proceedings," that "[e]ach house shall be open to the public during its sessions," that "[e]ach house shall elect its presiding officer," and that bills shall be reported "in each house." Minn. Const. art. IV, §§ 7, 14, 15, 19. Nonexistent, hypothetical future members can do none of these things. To say the "house" consists—in any part—of such a nonexistent individual is an absurdity, an impossibility, even. Members of "each house" are also privileged from arrest. *Id.* § 10. A nonexistent hypothetical future legislator is not. And the Quorum Clause itself provides that a smaller number than a quorum may "compel the attendance of absent members." *Id.* § 13. How are the current 67 Republican members to compel the attendance of a nonexistent representative?

The petitioners' own textual arguments are unavailing. They point to provisions in the Constitution in which the drafters specified members "elected" or members "present." *See* Minn. Const. art. IV, § 22 ("No law shall be passed unless voted for by a majority of all the members elected to each house of the legislature."); *id.* art. VIII, § 1 ("No person shall be convicted [of impeachment] without the concurrence of two-thirds of the senators present."). Petitioners

summarize: "If the authors of the Constitution wanted to allow for a majority of the *elected* or *present* members to constitute a quorum to convene the House, it would have said so." Pet. ¶ 58 (A25-0068).

Yet these textual differences, if anything, support the proposition that a "majority of each house" is a majority of duly elected and sworn members, or at most a majority of persons known to have been duly elected and qualified. Each variation has an explanation. Article four, section twenty-two is an anti-majority-of-a-quorum provision. "[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body." *United States v. Ballin*, 144 U.S. 1, 6 (1892). If article four, section twenty-two had merely provided that a "majority of each house" was necessary to pass a bill, the implication might therefore have been that a majority *of a quorum* of each house was sufficient. Because a majority of each house is a quorum, and a quorum is sufficient to do a business, *after* a quorum is established a "majority of each house" for bill passage could easily be interpreted as a majority of a quorum. That, after all, is how the federal House of Representatives operates.

In Minnesota, a majority of a quorum in the House could be as small as 35 members under current law if there are no vacancies. The framers of the Minnesota Constitution wanted to ensure that an absolute majority of elected members—68 if there is a full crop, or 67 if, as now, there are 133 duly elected

and qualified members—rather than a mere 34 or 35 members would pass House bills. *See Ballin*, 144 U.S. at 6 (explaining that "in those States where the constitution provides that a majority of all the members elected to either house shall be necessary for the passage of any bill," the default majority-of-a-quorum rule does not apply).

This is exactly the mischief addressed in *State ex rel. Eastland v. Gould*, 31 Minn. 189, 17 N.W. 276 (1883). In *Gould*, an act establishing the municipal court of Moorhead received "in the house of representatives only 53 votes out of an entire membership of 103." *Id.* at 278. But the constitution required a two-thirds vote to pass that law. Minn. Const. art. VI § 1 (1857).[2] So the question was whether the House's vote, which was less than two-thirds of the members of the house, was sufficient to pass the law because it was two-thirds of a quorum. *Gould*, 17 N.W. at 277. The Court said no, and by analogy rejected the idea that a majority of a quorum would be enough generally to pass a bill under the Minnesota Constitution:

> *First*, that while a majority of the members of each house constitute a quorum, *no law*, however unimportant, can be passed without the votes of a majority, in each branch of the legislature, of *all the members elected* to that branch. *This is the general rule of legislation prescribed by the constitution.*

[2] Available at https://www.lrl.mn.gov/edocs/edocs?oclcnumber=00434237.

Id. at 277 (emphasis original). The Court emphasized that these provisions show that a two-third requirement is "of an extraordinary character," and thus "the two-thirds vote cannot be a mere two-thirds of a quorum, *i.e.*, of a majority." *Id.* So while a quorum is a majority of the duly elected and sworn members, the phrase "a majority of all the members elected" is an anti-majority-of-a-quorum provision, essential to ensure that 35 members cannot pass a bill; it does not at all affect the meaning of a "majority of each house" in the Quorum Clause.[3]

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[3] Respondents appear to interpret this Court's prior cases to require 68 affirmative votes to pass a bill. While it may be prudent not to pass bills while this dispute persists, we disagree with this view as a matter of constitutional interpretation. Under the present circumstances only 67 are required. Whether or not a vacancy in House District 40B has arisen, there are only 133 duly elected members who have been sworn in or could be. *See* Minn. H.J., 94th Leg., Reg. Sess. 3–5 (2025) (133 certificates of election presented); *see also* Order, *Minn. Voters All. v. Walz*, No. A25-0017, Jan. 17, 2025 (the original writ of election for House District 40B was issued "prematurely," and Minn. Stat. § 204D.19, subd. 4 "controls the issuance of a writ of special election" for House District 40B). Because Curtis Johnson cannot be seated, he is not a "member elected" to the legislature because "members" must have the requisite "qualifications," as noted previously. Additionally, someone who loses an election contest cannot become a "member" of the legislature. The relevant constitutional language is that a law requires the votes of "a majority of all the members elected," which most naturally refers to a majority of all the current *members*, who were elected. To treat the clause as requiring a majority of authorized seats would be reading additional words into the clause: for example, "a majority of *the number of* all the members *possibly* elected." But the relevant provision says nothing of the sort.

Interpreting an identical provision of the Pennsylvania Constitution, that state's highest court held that the phrase "majority of the members elected" meant "a majority of the members elected, living, sworn, and seated," and

As for the impeachment provision, that parallels the federal Constitution's impeachment clause. U.S. Const. art. I, § 3, para. 6 (". . . . And no Person shall be convicted without the Concurrence of two thirds of the Members present."). As an initial matter, petitioners' gloss on this provision creates a misimpression. They write in reference to this clause: "If the authors of the Constitution wanted to allow for a majority of . . . *present* members to constitute a quorum to convene the House, it would have said so." Pet. ¶ 58 (A25-0068). But the clause says *members present*, not *present members*. Petitioners appear to be

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noted that this interpretation "finds considerable support in the published decisions of American courts construing that phrase or portions thereof." *Zemprelli v. Daniels*, 436 A.2d 1165, 1172 (Pa. 1981). This Court's own cases are consistent. In 1858 this Court held, "[t]he effect of the provision is to count every member of the body that does not vote affirmatively as voting against the passage of the act." *Bd. of Sup'rs of Ramsey Cnty. v. Heenan*, 2 Minn. 330, 334 (1858). Of course, someone who has resigned, died, or lost an election contest is not and cannot be a "member" of the body. *See* Minn. Stat. § 204D.19, subd. 4; *id.* § 351.02(7). An unfilled seat is not counted "as voting against the passage of the act." In the *Gould* case, the Court explained that the requirement was for a "vote in each house of a majority of all the members thereof," 17 N.W. at 278—not all authorized members, but actual members. And in 1935, in a case about a municipal vote requirement, the Court cited *Heenan* for the proposition that under the relevant constitutional provision, "a majority of the quorum would not suffice." *State ex rel. Peterson v. Hoppe*, 194 Minn. 186, 190–91, 260 N.W. 215, 218 (1935). Just so. Distinguishing a majority of a quorum and a majority of elected members does not require treating the latter as including authorized but unfilled seats.

This issue need not be decided here, though, and in any event, the respondents' view is better than that of the petitioners because petitioners get the meanings of the "members elected" and "majority of each house" provisions exactly backwards.

attempting to create the impression that there is a specific part of the Constitution that references "present members," as in, currently serving members. But the constitutional phrase refers to members *present in the chamber when the vote in question occurs*.

And that, too, is explicable. Impeachment is such an awesome power that it is highly likely that without specifying "members present," a question would have occurred whether impeachment required two-thirds of the entire body's membership or two-thirds of a quorum—the same question that would have arisen with passing ordinary bills. Indeed, in *Gould*, this Court held that laws requiring a two-thirds vote are "extraordinary measures" requiring support from two-thirds of the entire duly elected membership. 17 N.W. at 277. Given the potential ambiguity, it was sensible for the framers to clarify in express language that, for impeachment, only two-thirds of "members present" were required when that was the intent. In any event, this difference in language is immaterial because a quorum is not constituted by a majority of "members present"; the whole point of a quorum is to determine how many members *must* be present to transact business.

In short, neither textual addition would have been necessary or sensible in the Quorum Clause. In that clause, "each house" is the sum total of duly "chosen" and elected "members" who have been sworn in, or at most the sum of all persons known to have been duly elected and who *could* be sworn in.

II. Legislative history and precedent.

The only relevant portions of the legislative history of Minnesota's constitutional convention support the textual and structural conclusion that each house constitutes only duly chosen, elected, and sworn members. On July 30, 1857, Mr. Stannard offered an amendment to make a quorum "[a] majority of all the members elected." T.F. Andrews, Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota 208 (Saint Paul, MN: George W. Moore 1858). Mr. Hudson responded that such provision "is already contained in the" relevant language. *Id.* Mr. Stannard then stated, "That section says a *majority of each House*, and that is the reason why I want my amendment adopted. I want a quorum to consist of a majority of all the members elected, and not a majority of those who happen to be present. . . ." *Id.* at 209. To which Mr. Morgan responded, "I conceive that the word 'majority' means a majority of the members sworn in. The section says, a majority of each House, not a majority of those present. There can be no other meaning attached to it . . . ." *Id.* Mr. Secombe criticized the amendment as potentially authorizing exactly what the petitioners here have tried to do: "remaining out of either House" to defeat a quorum. *Id.* The amendment was then not agreed to.

Tellingly, *no one* suggested that a quorum had to be calculated out of all seats *authorized*. Both sides of the debate argued entirely within the context of members actually elected and sworn. The person moving for the change

distinguished between members "elected" and those who happened to be "present." Of course, a hypothetical future legislator has been neither elected, nor is present. Additionally, the only express statement on the matter equated a "majority of each house" with a majority of members "sworn in," and the speaker appears to have been suggesting that the existing language and amended language carried the same meaning. Whether "each house" refers only to members lawfully sworn in on the appointed day—which would create a denominator of 67 members for the current legislative session—or all who were duly elected and *could* be lawfully sworn in during the session, the respondents in this action have a majority of the "house" and therefore a quorum.

This Court's precedents further support respondents' interpretation. Petitioners quite rightly point to *State v. Wagener*, in which this Court interpreted the constitutional provision that each bill must be read three times unless "two-thirds of the house" dispense with the rule. 153 N.W. 749 (Minn. 1915); *see* Minn. Const. art. IV, § 19. The Court held that "two-thirds of the house" was equivalent to "two-thirds of the whole *membership* of the house."[4] *Wagener*, 153 N.W. at 750 (emphasis added). Just so. The whole "membership"

[4] The Court was once again concerned about attempts to make a two-thirds vote "of a quorum of the house," not of its "whole membership." *Wagener*, 153 N.W. at 750; *accord Gould*, 17 N.W. at 277.

of the house is the sum total of its *existing members*: those representatives already duly "chosen" by the people and sworn in. *See Hoppe*, 194 Minn. at 191–92 ("[T]he phrase 'a majority of the members' c[annot] mean more than a majority of those constituting the actual membership of the body at the time; so that, if the full membership is sixteen but at a given time has been in fact reduced by the resignation of one, there are but fifteen members." (quoting *State ex rel. Wilson v. Willis*, 47 Mont. 548, 552 (1913))). There is absolutely no reason to think that this Court meant by this that the whole membership of the house was the total of *authorized* or *possible* members.

III. Federal analogs.

The settled interpretation of the analogous provision in the U.S. Constitution supports respondents' interpretation. The federal Constitution provides:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

U.S. Const. art. I, § 5, para. 1. "A quorum has long been defined as a majority of the whole number of the House, and the whole number of the House has long been viewed as the number of Members elected, sworn, and living," the Congressional Research Service has explained. "Whenever the death, resignation, disqualification, or expulsion of a Member results in a vacancy, the whole

number of the House is adjusted." Congressional Research Service, Voting and Quorum Procedures in the House of Representatives 13 (updated Mar. 20, 2023).

Minnesota's provision is almost identical, providing for judging qualifications of members in an earlier section, and providing for compelling the attendance of absent members in the same section. It follows that the interpretation of its federal counterpart should bear heavily on the meaning of the state equivalent. *See McCaughtry v. City of Red Wing*, 816 N.W.2d 636, 641 (Minn. 2012); *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005) (Minnesota uses "restraint and some delicacy" when deciding whether to depart from "identical or substantially similar" provisions of the federal constitution).

The U.S. Senate, which is governed by the same federal provision, long ago may have treated a quorum as constituting a majority of authorized senators. *See* Cong. Globe, 38th Cong., 1st sess. 2050–52 (May 3, 1864); Cong. Globe, 38th Cong., 1st sess. 2082–87 (May 4, 1864) (discussing this point).[5] But even here the precedents were mixed; on January 4, 1790, the Senate apparently treated 12 of 24 authorized Senators as constituting a quorum, even though that is not a majority, because one seat had been "vacated" by the death of a

[5] The Library of Congress publishes the Congressional Globe for the 38th Congress, May 1864: https://www.congress.gov/congressional-globe/congress-38-session-1-part-3.pdf (opens .pdf).

Senator. Cong. Globe, 38th Cong. 1st sess. 2084 (May 4, 1864). If the vacancy is discounted, then 12 would be a majority, suggesting a quorum was determined without considering the vacancy. And if the relevant denominator was 24, then that would stand for the proposition that fifty percent qualifies as a "majority" for purposes of a quorum of authorized members. Likewise, the 67 members currently sworn in are fifty percent of the total authorized membership of the Minnesota house of representatives.

This confusion led the Senate to debate the issue in 1864 after several states had seceded from the Union and their members had left the halls of Congress. Why should they count for purposes of a quorum? By a vote of 26 to 11, the remaining U.S. Senators overwhelmingly voted for the proposition that the best construction of the federal Constitution's quorum clause was that it referred to a majority of Senators "duly chosen." Cong. Globe, 38th Cong., 1st sess. 2087 (May 4, 1864). Their arguments paralleled many of the same arguments respondents make in this case, including, for example, the proposition that the existence of a house of real and elected members is presupposed in the clause respecting judging the qualifications of members. *Id.* at 2084. Additionally, the U.S. Constitution provides that "two thirds of both houses" must vote on a constitutional amendment, and the Senate had previously concluded that this meant two-thirds of duly elected members, not of all possible members authorized by the Constitution. *Id.* at 2085.

It is unclear whether the matter was ever debated or material in the House of Representatives prior to 1861, when the House similarly resolved the constitutional question in favor of a majority of members actually known to have been elected. *See* Cong. Globe, 37th Cong., 1st sess. 210 (July 1861).[6] The Speaker of the House concluded that, because the Constitution provided that the House "shall be composed of members chosen every second year," *see* U.S. Const. art. I, § 5, a quorum was a majority of members "chosen" or duly elected to the House. The Speaker declined to rule on whether the denominator comprised only those sworn in, or those known to have been elected, as either way a quorum existed; but the Speaker announced that his view was that a majority of those known to have been chosen was necessary. No dissents are noted in the *Globe*.

In short, it has long been held, at least since the Civil War for the Senate, and possibly longer for the House, that "[e]ach house" in the federal Constitution's Quorum Clause meant the total of duly chosen or elected members who are actually part of the body. Minnesota's Quorum Clause is written almost identically, and the interpretation of its federal counterpart is significant and persuasive evidence of the true meaning of Minnesota's provision. *See*

[6] The Library of Congress also publishes the Congressional Globe for the 37th Congress, July 1861: https://www.congress.gov/congressional-globe/congress-37-session-1.pdf (opens .pdf).

McCaughtry, 816 N.W.2d at 641; *Kahn*, 701 N.W.2d at 828.

IV. Mason's manual.

Petitioners rely on Mason's Manual of Legislative Procedure. Rule 5.04 of the rules of the Minnesota House of Representatives provides that this manual "governs the House in all applicable cases if it is not inconsistent with these Rules, the Joint Rules of the Senate and House of Representatives, or established custom and usage."[7] By the plain terms of this rule, the manual cannot supersede an analysis of the text, structure, and history of Minnesota's Constitution. But, in any event, it supports respondents' interpretation.

At least since the 1943 edition, probably since the first edition in 1935,[8] and until the 2020 edition, the manual had provided that vacancies are to be subtracted for purposes of computing a quorum. The 1943 edition provided, "The general rule is that a majority of the authorized membership of a body constituted of a definite number of members, constitutes a quorum for the purpose of transacting business." Paul Mason, Manual of Legislative Procedure for State Legislatures and other Legislative Bodies 316 (Sacramento, CA: California State Printing Office 1943). It then said more specifically: "In reckoning a quorum the general rule is that the total number of all the membership of the

[7] Available at https://www.house.mn.gov/cco/rules/permrule/permrule.asp.

[8] Counsel could not locate a copy of the first edition.

body be taken as the basis. When there is a vacancy, unless a special provision is applicable, a quorum will consist of the majority of members *remaining qualified*." *Id.* at 318 (emphasis added). By the 2010 edition, the point was supplied more succinctly: "The total membership of a body is to be taken as the basis for computing a quorum, but when there is a vacancy, unless a special provision is applicable, a quorum will consist of the majority of the members remaining qualified." Paul Mason, Mason's Manual of Legislative Procedure 332 (National Conference of State Legislatures 2010).

Yet in 2020, after some eight decades of consistency, the new editors of the manual modified the relevant rule such that there are now "majority" and "minority" rules related to a quorum. The edition now claims that the rule by which vacancies are subtracted from the denominator is the "minority" rule. The "majority" rule, according to the 2020 edition, was for the first time described as follows:

> The majority of legislative bodies follow the quorum rule stated by Cushing: "... the number of which such assembly may consist and not the number of which it does in fact consist, at the time in question, is the number of the assembly, and the number necessary to constitute a quorum is to be reckoned accordingly."

Paul Mason, Mason's Manual of Legislative Procedure 350 (National Conference of State Legislatures 2020). That is the passage quoted by petitioners in their petitions and briefs. *See* Pet'r's Mem. Supp. Writ Quo Warranto 8 (A25-0066); Pet. ¶ 60 (A25-0068).

As an initial matter, the manual does not say whether *Minnesota* requires the majority rule or the minority rule; that can only be answered by a textual and structural analysis of the State Constitution's text, which was supplied above. Moreover, a review of the judicial citations in Mason's reveals that the true majority rule is in fact the one that had been reported in Mason's for over eighty years.[9]

More still, the new edition expressly states that the so-called "majority" rule derives from Cushing, which is a treatise from *before the Civil War*. The passage in question appears to have first appeared in the 1856 edition. *See* Luther Stearns Cushing, Lex Parliamentaria Americana: Elements of the Law and Practice of Legislative Assemblies in the United States of America 100 (Boston: Little, Brown and Company 1856). The only authorities for this proposition in Cushing's text were the then-existing rules of the U.S. House and Senate. Yet whatever the rule may have been prior to the Civil War, there can be no question that the debates in Congress as a result of secession definitively settled the constitutional meaning of the term. It is simply inexplicable why the 2020

[9] As indicated in an appendix to this brief, of the fifteen cited cases, six do not involve any vacancies at all, but rather involve the question addressed in *Gould*, whether a majority of a quorum or a majority of all elected members is required. Two other cases are also irrelevant. Of the remaining eight, four support the rule of respondents that disqualified members or vacant seats are not to be counted. Only three do support including vacancies, but only when the language specifies "members elected," which Minnesota's Quorum Clause does not include.

editors of Mason's manual adopted a pre-Civil War rule from an 1856 treatise and altered eight decades of Mason's own conclusion on the question.

Regardless, whatever Mason's manual says on the matter is far less relevant than the overwhelming evidence from the text, structure, and history of this state's Constitution and the precedent of this Court.

CONCLUSION

Text, structure, history, and precedent all support the conclusion that a quorum of "each house" is a majority of members duly "chosen" by the people and qualified to act as members, *now*. That excludes nonexistent hypothetical future holders of a seat that is not filled because there is currently no eligible representative. The respondents are duly constituted legislative officers. The Court should hold in their favor and dismiss petitioners' quo warranto action.

Date: January 21, 2025

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APPENDIX ON CASES CITED IN MASON'S MANUAL

As noted in the brief, fifteen judicial cases are cited in the relevant paragraph in the 2020 edition of Mason's manual. Six of these cases do not involve empty seats at all, but rather involve the question addressed in *Gould*, whether a majority of a quorum or a majority of all elected members is required. None addressed what would happen if there were a disqualified member or vacancy. *See City of Evanston v. O'Leary*, 70 Ill. App. 124 (Ill. App. Ct. 1897); *State ex rel. Garland v. Guillory*, 166 So. 94 (La. 1936); *Warnock v. City of Lafayette*, 4 La. Ann. 419 (1849); *City of N. Platte v. N. Platte Water-Works Co.*, 76 N.W. 906 (Neb. 1898); *State v. Dickie*, 47 Iowa 629, 631 (1878); *State v. Deliesseline*, 12 S.C.L. 52, 60 (S.C. Const. App. 1821). Also irrelevant is *Barry v. New Haven*, 171 S.W. 1012 (Ky. 1915), where there was one vacancy on a five-member board, but all four remaining members were present and voted in favor of the action in question. These cases raise no issues relevant to the case here.

Of the remaining eight cases, four explicitly support the rule that disqualified members or vacant seats are not to be counted, whether the provision involved "members elected" or more generally involved the "membership" of the body. *See Zemprelli*, 436 A.2d 1165 (citing multiple other jurisdictions for this rule); *People ex rel. Funk v. Wright*, 71 P. 365, 366 (Colo. 1902) (holding that the five elected and remaining members out of a board normally composed of eight members "constituted the council," which at that time was "a body of five

members"); *State ex rel. Atty. Gen. v. Orr*, 56 N.E. 14 (Ohio 1899) (after one member became disqualified, only nine members remained, of which five constituted a quorum); *State ex rel. Hatfield v. Farrar*, 109 S.E. 240 (W. Va. 1921).

In contrast, only three cases specifically stood for the proposition that where a majority of "members elected" was required, that meant a majority of all authorized seats. *See McCracken v. San Francisco*, 16 Cal. 591 (1860); *Pollasky v. Schmid*, 87 N.W. 1030, 1032 (Mich. 1901); *Marionneaux v. Hines*, No. 2005-OC-1191 (La. 2005). Putting aside the fact that the *Hines* court plainly misinterpreted *Garland*, none of these cases is material here because the Minnesota Constitution does not specify that a quorum is a majority of all "members elected." Thus even if discounting disqualifications and vacancies is the "minority" rule, it is the rule that Minnesota's Constitution adopts.

Indeed, the final case makes this exact point. In *Pollard v. Gregg*, 90 A. 176, 177 (N.H. 1914), a provision of the state constitution provided that a quorum was a "majority of the members of the house of representatives," but when "less than two thirds of the representatives elected" were present, the house needed "the assent of two thirds of those members." The court explained that there was a "clear distinction" in the text between "the members of the house" and the "representatives elected." *Id.* "The former expression refers to those members elected who are qualified and recognized as constituting the body of the house for the transaction of business, and does not include deceased persons,

or persons who have resigned, or who have been removed since their election as representatives." *Id.* As a result, the framers of the constitution clearly intended "that a quorum of the house should consist of a majority of the members elected, who, when the point is raised, are not disqualified to act as members." *Id.* So even though there were 405 authorized seats in the House, four deaths, a resignation, and an expulsion decreased the active membership to 399, and a quorum was reduced to 200, so a law was validly passed with 201 members present. *See id.*

And of these cases, *Farrar* is the most similar. There, a bipartisan board was composed of three members of each party. *Farrar*, 109 S.E. at 240–41. One removed himself from the state. *Id.* at 241. The three members of the other party proceeded to conduct business. *Id.* The court agreed that the three would constitute a quorum, but only if there were a judicial adjudication that one member had been disqualified. *Id.* at 241–42.

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January 21, 2025

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I hereby certify that this document is being filed, and also served on all parties who are E-MACS service recipients by authorized use of the Court's electronic filing system, prior to 12 noon on January 21, 2025, per the Court's order. To the extent there are others not signed up for E-MACS service at the time of filing, a separate affidavit of service will be filed.

Date: January 21, 2025

/s/ James V. F. Dickey

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