No. 122802

IN THE
SUPREME COURT OF ILLINOIS

ERIC GREGG, Plaintiff-Appellant, v. BRUCE RAUNER, Governor of Illinois, Defendant-Appellee.	) Petition for Leave to Appeal) from the Appellate Court,) Fifth District, No. 5-16-0474))) There heard on appeal from the) Circuit Court of the First Judicial) Circuit, Saline County, Illinois,) No. 15-L-29))) The Honorable) TODD D. LAMBERT,) Judge Presiding.

BRIEF OF DEFENDANT-APPELLEE
BRUCE RAUNER, GOVERNOR OF ILLINOIS

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POINTS AND AUTHORITIES

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NATURE OF THE CASE

Plaintiff-Appellant Eric Gregg filed this action against Defendant-Appellee Bruce Rauner, Governor of Illinois, and Defendant Craig Findley, Chairman of the Illinois Prisoner Review Board. Gregg alleged that the Governor lacked sufficient grounds to remove him from the Prisoner Review Board. Defendants argued that the Governor's decision to remove Gregg from the Board was within his discretion and was not subject to judicial review. After the circuit court denied defendants' motion to dismiss on that basis, it held a bench trial and determined that the Governor lacked sufficient cause to remove Gregg from the Board. The court declared that Gregg was wrongfully terminated and enjoined the Governor from interfering with Gregg's exercise of his duties as a member of the Prisoner Review Board.

The appellate court reversed in a 2-1 decision, holding that this exercise of the Governor's removal authority was not judicially reviewable. This Court granted leave to appeal. Some of the issues raised are on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the Governor's decision to remove Gregg from the Prisoner Review Board for incompetence, neglect of duty, or malfeasance is not subject to judicial review because the Prisoner Review Board is an agency within the executive branch whose functions do not require political independence.

2. If the Governor's removal decision is reviewable, whether the

Governor did not act arbitrarily or unreasonably in removing Gregg from the Prisoner Review Board because Gregg never submitted a statement required by law disclosing a gift he received and signed a federal bankruptcy court filing incorrectly verifying that filing's accuracy.

STATEMENT OF FACTS

Factual background

Gregg's Statement of Economic Interests

In May 2012, Governor Quinn nominated Gregg to be a member of the Prisoner Review Board. C. 297. At that time, the governor's office provided Gregg with a Statement of Economic Interests form to complete. *Id*. On May 20, 2012, Gregg returned a completed form, which related to his income and gifts for 2011. C. 297-98, 308-09. In the space provided on the form to list the name of any entity from which a gift valued in excess of $500 was received during the preceding calendar year, Gregg wrote "None." C. 309.

Gregg was not appointed to the Prisoner Review Board in 2012 because he was recovering from an illness. T. 40. Instead, Governor Quinn appointed him to the Board on April 26, 2013. C. 297, T. 41. Upon his appointment, Gregg did not complete a new Statement of Economic Interests form. *Id*. Instead, the Governor's office filed with the Secretary of State's office the Statement of Economic Interests that Gregg completed for the 2011 calendar year. C. 297-98, 308-09. Gregg never filed a Statement of Economic Interests that applied to calendar year 2012. C. 298. In 2012, Gregg received a lift chair as a gift, and he did not report that gift on any Statement of Economic

Interests. *Id*., T. 61, 63-64. On November 7, 2013, the Illinois Senate approved Gregg's appointment to the Prisoner Review Board for a six-year term, ending January 21, 2019. C. 298, T. 41.

Gregg's bankruptcy filing

On December 8, 2014, Gregg filed a Chapter 13 bankruptcy petition. C. 299, 314-50. On December 22, 2014, Gregg's bankruptcy attorney electronically filed a form (Form 22c) entitled "Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period." C. 299, 352-62. That document stated that Gregg received net monthly income of $4,027 from operating a business. C. 352. Gregg signed the document under penalty of perjury declaring that the information on the form was true and correct. C. 354. Gregg did not receive the business income; rather, his wife did. C. 300, 377-79. On August 21, 2015, after an investigation by the Governor's office into Gregg's bankruptcy filing, his attorney submitted an amended Form 22c attributing the monthly business income to Gregg's wife. C. 300, 368-69, 373-75.

The Governor's removal of Gregg from the Prisoner Review Board

On September 16, 2015, the Governor's general counsel wrote to Gregg, informing him that the office had received allegations that Gregg had violated the terms of his appointment to the Prisoner Review Board. C. 381-82. The letter noted that Gregg's bankruptcy filing of December 22, 2014 stated that his monthly income was $11,184, but his average monthly salary from the

State at that time was $7,157. C. 381. The letter also stated that the Governor's office had received allegations that the Statement of Economic Interests Gregg filed in 2013 did not disclose any gifts, but the press had reported that he had received at least two gifts that were subject to the reporting requirements. *Id*.

A few days later, Gregg responded to the Governor's office that his bankruptcy attorney had inadvertently placed proceeds from a company that he formed called Southern Illinois Energy Group in his income column instead of the income column for his wife, as she was the owner of the company. C. 384. Gregg also noted that he stopped working for that company when he was appointed to the Prisoner Review Board in April 2013. C. 385. Addressing the Statement of Economic Interests, Gregg stated that he completed the form in May 2012, before he received the gift of the lift chair. *Id*. Additionally, many people contributed donations for the chair, so Gregg was uncertain whether it had to be reported. *Id*. Gregg's bankruptcy attorney also wrote to the Governor's office, stating that he correctly reported the Southern Illinois Energy Group income as income of Gregg's wife on Schedule I of the bankruptcy filing and that he filed an amended Form 22c to correct the misstatement on that document. C. 301, 388.

On October 2, 2015, the Governor's office sent Gregg a letter terminating his appointment to the Prisoner Review Board, effective immediately. C. 297, 301, 305-06. In that letter, the Governor's counsel

explained that Gregg's response to the office's September 16 letter acknowledged and constituted an admission that the Form 22c that he filed in the bankruptcy court and the Statement of Economic Interests were both false. C. 305. The Form 22c was signed by Gregg under penalty of perjury and the Statement of Economic Interests included a verification that the information it contained was true, correct, and complete. *Id*. But neither document was true, correct, and complete. *Id*. The Governor's letter continued that it was no defense that the Statement of Economic Interests may have been true when signed because it was not true 11 months later when it was formally filed with the Secretary of State. C. 306. These actions, the letter concluded, constituted a sufficient basis to remove Gregg from the Board. *Id*.

Circuit court proceedings

Gregg brought this lawsuit to challenge his removal from the Prisoner Review Board. C. 12-52. In his amended complaint, Gregg sought a declaration that his removal was not for cause as required by the Illinois Constitution and Illinois statutes and he requested an injunction restoring him to his position on the Prisoner Review Board. C. 171-244.

Defendants moved to dismiss the complaint, arguing, among other things, that the Governor's decision to remove Gregg from the Prisoner Review Board was not judicially reviewable. C. 249-65. The circuit court denied that motion in part. C. 4-5. The court dismissed defendant Findley (C.

5), but found that the Governor's decision to remove Gregg was reviewable under the Illinois Supreme Court's decision in *Lunding v. Walker*, 65 Ill. 2d 516 (1977), because the Prisoner Review Board is a "quasi-judicial board which is independent of the executive branch" (C. 4-5).

The circuit court then held a trial on Gregg's complaint, and concluded that the Governor's determination that Gregg's bankruptcy filing and Statement of Economic Interests constituted malfeasance, neglect of duty, or incompetence was incorrect. C. 416. The court declared that Gregg was wrongfully terminated. C. 416-17. The court also enjoined the Governor from "interfering with or preventing" Gregg from "exercising his appointed duties" with the Board and from appointing a replacement for Gregg. C. 410.

Appellate court proceedings

The appellate court reversed. *Gregg v. Rauner*, 2017 IL App (5th) 160474. It began its analysis with the "general rule that once the Governor has determined that he has a basis to remove someone for incompetence, neglect of duty, or malfeasance, separation of powers prohibits the courts from questioning the Governor's determination of cause." *Id*. at ¶ 14. The court recognized that *Lunding* carved out an exception to this general rule for "a member of a board that required complete independence from executive control to perform his quasi-judicial obligations." *Id*. at ¶ 15. It concluded, however, that the Prisoner Review Board is not such a body, because "there is no indication that the legislature intended the [Prisoner Review Board] to be a

neutral, bipartisan board whose duties require absolute freedom from the executive branch." *Id*. at ¶ 22. Although the court acknowledged that the Prisoner Review Board performs some quasi-judicial functions, it reasoned that if that were enough to bring an agency within the *Lunding* exception, then the exception would swallow the *Wilcox* rule. *Id*. at ¶ 25. Overall, the court held, the Prisoner Review Board "acts as an agent of the executive branch by performing executive functions and aids in the exercise of traditional executive power." *Id*. at ¶ 28. The Governor's removal of a member of the Prisoner Review Board is thus not subject to judicial review. *Id*.

Justice Overstreet dissented, concluding that the Prisoner Review Board's role with respect to parole matters was quasi-judicial in nature, and that the legislature intended it to be neutral, bipartisan, and independent in performing that role. *Id*. at ¶¶ 33-34. This Court granted leave to appeal.

ARGUMENT

I. The Governor's decision to remove a member of the Prisoner Review Board is not judicially reviewable.

The drafters of the 1970 Constitution reaffirmed the rule established by this Court in *Wilcox v. People ex rel. Lipe*, 90 Ill. 186 (1878), that the Governor's exercise of his constitutional authority to remove an appointed official from office for incompetence, neglect of duty, or malfeasance in office, *see* Ill. Const. art. V, § 10, is not subject to judicial review. This Court later carved out a narrow exception to that rule in *Lunding v. Walker*, 65 Ill. 2d 516 (1976), holding that courts may review a gubernatorial decision to remove a member of the State Board of Elections because that agency requires an extraordinary degree of independence from political control. But the Prisoner Review Board does not share the distinctive features of the State Board of Elections that prompted this Court to recognize an exception to the *Wilcox* rule; like most agencies of the Illinois government, its role is to assist the Governor in exercising the executive power. For that reason, the Governor may remove a member of the Prisoner Review Board if he makes a finding of incompetence, neglect of duty, or malfeasance in office, and that finding is not subject to judicial review.

A. The standard of review is *de novo*.

The question of whether the Governor's decision to remove Gregg from the Prisoner Review Board is judicially reviewable, which was raised initially by defendants in a § 2-615 motion to dismiss, presents a legal question to be

reviewed *de novo*. *See Buecker v. Madison Cty.*, 2016 IL 120024, ¶ 7 ("Our review of an order granting or denying a section 2-615 motion to dismiss is *de novo*."); *Warren Cty. Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 47 (pure legal question reviewed *de novo*); *People v. Sutherland*, 223 Ill. 2d 187, 197 (2006) (same).

B. The long-established rule in Illinois is that the Governor's exercise of his constitutional removal authority is not subject to judicial review.

The Illinois Constitution provides that "[t]he Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws." Ill. Const. art. V, § 8. To assist him in carrying out his executive responsibilities, the Constitution vests him with the authority to nominate and, with the advice and consent of the Senate, to appoint "all officers whose election or appointment is not otherwise provided for." Ill. Const. art. V, § 9. As this Court has long recognized, however, the appointment power by itself cannot guarantee the Governor's ability to faithfully execute the laws unless he also has the authority to remove those whom he appoints. *See Wilcox*, 90 Ill. at 198 ("[T]he power of removal from office by the Governor [is] co-extensive with his power of appointment."); *Lunding*, 65 Ill. 2d at 521 ("Thus the true holding of *Wilcox* was not that the Governor's removal power was unlimited and unbridled, but that it was 'incident to and coextensive with his power of appointment.'"). Accordingly, the Constitution further provides that "[t]he Governor may remove for incompetence, neglect of duty, or malfeasance

in office any officer who may be appointed by the Governor." Ill. Const. art. V, § 10.

In *Wilcox*, this Court set forth the general rule in Illinois regarding the removal power, declaring that the Governor "is to act in the matter, to determine, himself, whether the cause of removal exists, from the best lights he can get." 90 Ill. at 205. Because the Constitution does not prescribe "the mode of inquiry" for the Governor to determine whether cause for removal exists, "it rests with him to adopt that method of inquiry and ascertainment as to the charge involved which his judgment may suggest." *Id*. Once the Governor determines that cause for removal exists, "it is not for the courts to dictate to him in what manner he shall proceed in the performance of his duty, his action not being subject to their revision." *Id*. Thus, when the Governor exercises his removal power, "the manner of his exercise of the power can not be questioned by the courts, and must be held valid." *Id*. at 207.

The *Wilcox* rule of nonreviewability is grounded in the principle of separation of powers. As this Court explained, the Illinois Constitution "not only declares that the powers of the government of the State shall be divided into three distinct departments, but has expressly prohibited the exercise of any powers properly belonging to one by either of the others." *Id*. at 205. Thus, "'to institute the inquiry as to the correctness of the cause for which the Governor removed the defendant, would be a direct attack upon the independence of the executive, and a usurpation of power subversive to the

constitution.'" *Id*. at 207 (quoting *State v. Doherty*, 25 La. Ann. 119, 120 (La. 1873)).

The framers of the 1970 Constitution deliberately drafted a removal clause, Ill. Const. art. V, § 10, that is substantially identical to the clause of the 1870 Constitution construed in *Wilcox*. *See* 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1324 (Del. Young) (explaining that "all we have done, insofar as that section is concerned, is to clean up the language and make it just a little shorter."). The delegates understood the breadth of the *Wilcox* rule and chose to adhere to that rule in the 1970 Constitution. Gregg's statement that "*Wilcox* does not apply to the 1970 Illinois Constitution," AT Br. 16, is thus incorrect. As Delegate Young explained, "the courts have construed this section and authorized the governor to remove a man as long as he states in his letter, or whatever you may want to call it, that he is removing him for one of these reasons." 3 Record at 1324. He continued: "There is no appeal or no inquiry into whether the charge is valid or not." *Id*. at 1324-25.

That the Governor's removal authority is nonreviewable does not mean that it is standardless. As this Court has noted, the Constitution does not leave removal to "the arbitrary and unfettered whim of the Governor." *Lunding*, 65 Ill. 2d at 526. Rather, before he removes a gubernatorially appointed officer, the Governor must make a finding of incompetence, neglect of duty, or malfeasance in office, "from the best lights he can get." *Wilcox*, 90 Ill. at 205. To preserve this requirement of a threshold finding of

removability, the framers of the 1970 Constitution rejected a proposal by Delegate Netsch that would have revised the removal provision to read simply, "The governor may remove any officer whom he appoints." *See* 3 Record at 1325-27. In arguing against the Netsch amendment, delegates expressed concern, particularly with respect to quasi-judicial agencies, about "the governor just arbitrarily reaching in there and dismissing them and creating some kind of a political connotation. He would have to justify the removal of such type of individual under this provision, and this is one of the reasons why it was left in this fashion, rather than as has been suggested by Delegate Netsch." *Id*. at 1326 (Del. Orlando); *see also id*. at 1326-27 ("the language which is in here … does give the governor the leeway to discharge a person if he wants to bear the onus of stating that they have misbehaved in office …") (Del. Davis); *id*. at 1326 (existing removal provision "at least puts some responsibility on the governor for having a reasonable reason for doing it") (Del. Friedrich). Importantly, none of the delegates on either side of the debate over the Netsch proposal contemplated that there would be *judicial review* of the Governor's finding of removability; instead, the delegates took the *Wilcox* rule as a given, and the debate concerned solely whether the Governor needed to articulate such a finding as a prerequisite to removal.

Thus, the general rule in Illinois for 140 years has been that a court cannot review the Governor's exercise of his removal power. As explained below, this Court has carved out a narrow exception to that rule for members

of agencies whose distinctive functions require complete independence from gubernatorial influence.

C. The Governor's unreviewable removal authority is subject to a narrow exception for members of agencies that require complete political independence.

This Court has carved out a narrow exception to the *Wilcox* rule of nonreviewability for agencies that require an exceptional degree of political independence. In *Lunding*, the Governor sought to remove a member of the State Board of Elections on grounds of neglect of duty for failure to file a required financial disclosure statement. 65 Ill. 2d at 518. Given "the unique character of the office held by plaintiff," *id*., the Court held that the Governor's determination of removability was judicially reviewable.

In concluding that the functions of the State Board of Elections required independence from the Governor, *Lunding* focused on the "particular factual setting" in which that Board carries out its duties. *Id*. Three features of the Board of Elections were especially relevant: its origin, its structure, and its functions. *First*, the Board of Elections, "unlike most other State agencies, boards, and commissions, is constitutionally mandated." *Id*. at 526; *see* Ill. Const. art. III, § 5. In other words, the convention delegates made a deliberate choice to place this constitutionally mandated agency outside of the Governor's unreviewable constitutional removal authority. *Id*.

Second, the delegates structured the Board of Elections to be "a highly independent board," *id*. at 526-27, by specifying that "'[n]o political party shall

have a majority of members of the Board,'" *id.* at 526 (quoting Ill. Const. art. III, § 5). Accordingly, the Board of Elections, unlike virtually all other multimember agencies in the State, has an even number of members. *See* 10 ILCS 5/1A-2 (2016) (providing that the Board consists of eight members, four from Cook County and four from outside of Cook County, and that each group of four members must include two from the Governor's political party and two from the party whose nominee received the second most votes in the last gubernatorial election).

Third, and most fundamental, the functions of the State Board of Elections necessitate absolute political independence. The delegates to the 1970 drafting convention made clear that the Board of Elections needed to be completely independent and nonpartisan because the integrity of the electoral process requires neutrality in administration. *Lunding*, 65 Ill. 2d at 526-27. As one convention delegate put it, "neutrality in the administration of elections is particularly important. The integrity of no process is more fundamental to the proper functioning of the political system under which we live." 2 Record 1057 (Del. Cicero). The General Assembly, in carrying out this constitutional mandate, "obviously sought to negate partisanship as much as possible and to guarantee the Board's political independence." *Lunding*, 65 Ill. 2d at 527. As this Court recognized, "the legislators intended, and the public interest demands, that Board members not be amenable to political influence or discipline in the discharge of their official duties." *Id.* Because the Board of

Elections was created to be "neutral, bipartisan, and independent," the Governor's decision to remove a Board member may be reviewed by the courts. *Id*.; *see id*. at 528 ("We hold that because of the independent nature of the Board the question of whether this is sufficient 'neglect of duty' to justify the Governor's exercise of his removal power is a question which is properly reviewable by the courts.").

To bolster its analysis, the *Lunding* Court relied on a trilogy of federal cases that examined the President's power to remove appointees. 65 Ill. 2d at 521-25 (discussing *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); and *Wiener v. United States*, 357 U.S. 349 (1958)). The Court found instructive the federal distinction between the President's "complete removal power" for "[a]ll officers in the ordinary departments" and his more circumscribed authority to remove "those who are members of a body to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Lunding*, 65 Ill. 2d at 523-24 (internal quotation marks omitted). According to the Court, this "sharp differentiation derives from the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference." *Wiener*, 357 U.S. at 353.

Although the *Lunding* Court found the federal precedents illuminating, it also noted that this Court is not "inexorably bound by Federal decisions in

this matter." 65 Ill. 2d at 524. In fact, importing the federal law of removal wholesale into Illinois would be impractical, owing to the many differences between the two regimes. For example, the federal Constitution makes no reference to the mode of, or grounds for, removal of officers, except by impeachment. U.S. Const., art. II, § 4. By contrast, of course, the Illinois Constitution expressly prescribes the grounds for the removal of gubernatorial appointees. Ill. Const. art. V, § 10. Under the federal trilogy, the President must be able to remove at will an officer of "the Executive establishment," *Wiener*, 357 U.S. at 353, while Congress has the power to require good cause for the removal of members of agencies that "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Executor*, 295 U.S. at 628. In Illinois, the determination of cause to remove members of executive agencies is committed to the Governor's discretion, while the courts may review the Governor's decision to remove members of agencies whose functions require political independence. *Lunding*, 65 Ill. 2d at 529. And the federal cases were decided against the backdrop of the independent regulatory agencies, such as the Federal Trade Commission at issue in *Humphrey's Executor*—bodies that have no close counterpart in Illinois law.

For these reasons, this Court's analysis should not be guided by post-*Lunding* developments in the federal law of removal. Nonetheless, it should be pointed out that Gregg mischaracterizes those developments in two important ways. *First*, Gregg goes astray when he describes the Supreme

Court in recent years as embracing the notion that "quasi-judicial" agencies inherently require political independence—perhaps because he repeatedly quotes the *dissenting opinion* from the Supreme Court's latest case on the subject, while failing to note that the quotes come from a dissent. *See* Gregg Br. 16 (quoting *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 561 U.S. 477, 533 (2010) (Breyer, J., dissenting)); Gregg Br. 16-17 (quoting *Free Enterprise Fund*, 561 U.S. at 530 (Breyer, J., dissenting). The opinion for the Court in *Free Enterprise Fund* tells a very different story: it pointedly declines to reach the constitutionality of independent agencies under the federal Constitution because the parties did not raise the issue, 561 U.S. at 483, and goes on to emphasize that at-will removal authority is a crucial component of the executive power, *id*. at 513-14. Federal law, in short, has moved away from unquestioning solicitude for the independence of "quasi-judicial" agencies in the four decades since *Lunding*.

Second, at page 30 of his brief, Gregg mistakenly cites page 486 of the majority opinion in *Free Enterprise Fund* for the proposition that the federal jurisprudence of removal focuses on whether Congress has "aggrandiz[ed] its power" by "draw[ing] to itself" the power to remove. Those concepts do not appear at page 486 or anywhere else in the majority opinion; once again, they come from Justice Breyer's dissent (the proper citation is to page 535). In fact, the prohibition on Congress participating directly in removal (except by impeachment) is only one prong of the Supreme Court's modern test for the

constitutionality of removal restrictions. *See Morrison v. Olson*, 487 U.S. 654, 686 (1988). The other prong insists that Congress not interfere with the President's ability to execute the laws. *See id*. at 689-90. Although this Court should not treat federal law as controlling for the reasons given above, judicial review of the Governor's removal of a member of the Prisoner Review Board would clearly fall on the impermissible side of the *Morrison* test were this Court to adopt it, because such review would interfere with the Governor's exclusive responsibility "for the faithful execution of the laws," Ill. Const. art. V, § 8. See *infra* I.D.

Developments in federal law aside, it is clear that this Court intended *Lunding* to be a narrow exception to the general rule of Illinois law that courts may not review exercises of the removal power. The Court explained that the framers of the 1970 Constitution were aware of *Wilcox* yet left the removal provision essentially unchanged from the 1870 Constitution. *Id*. at 519 (explaining that the removal provision "first appeared, in essentially its present form, as section 12 of article V of the 1870 Illinois Constitution"); *id*. at 525-26 (discussing convention debates referencing *Wilcox* rule). The Court extensively canvassed the distinctive features of the State Board of Elections, *id*. at 526-27, and took pains to limit its holding to "this particular factual setting," *id*. at 529, concluding that "in this particular instance, because of the unique character of the office held by plaintiff," the Governor's decision was judicially reviewable, *id*. at 518-19. Accordingly, where the appointee does not

occupy an office of similarly "unique character," *Lunding*'s exception does not apply.

D. The Prisoner Review Board does not share the features that led this Court to conclude that the State Board of Elections requires complete political independence.

The Prisoner Review Board shares none of the features of the State Board of Elections that led this Court in *Lunding* to carve out a narrow exception to the general rule of nonreviewability to accommodate agencies that require an exceptional degree of political independence. *First*, the Illinois Constitution neither creates nor mandates the establishment of a Prisoner Review Board. Instead, that agency was established by the General Assembly in the Article 3 of the Code of Corrections. 730 ILCS 5/3-3-1 (2016). Therefore, the *Lunding* Court's apparent conclusion that the framers of the Illinois Constitution intended to supersede the ordinary functioning of the constitutional removal power and alter the structure of the executive branch by creating an independent body within that branch has no application here.

Second, unlike the eight-member State Board of Elections with its constitutional and statutory nonpartisanship requirements, Ill. Const. art. III, § 5; 10 ILCS 5/1A-2 (2016), there is no requirement of strict party balance on the Prisoner Review Board. Rather, like most agencies in Illinois, the Prisoner Review Board has an odd number of members. The Board as a whole, then, is not required to be nonpartisan—and indeed, the General Assembly contemplated that it could feature a working partisan majority. *See* 730 ILCS

5/3-3-1(b) (2016) (providing that no more than 8 of the 15 members of the Prisoner Review Board may be from the same party).

Third, the Prisoner Review Board is not one of the rare agencies whose functions require complete insulation from gubernatorial influence. The Board is denominated "independent of the Department of Corrections" and consists of 15 persons appointed by the Governor with the advice and consent of the Senate. 730 ILCS 5/3-3-1(a), (b) (2016). The members of the Board must have "5 years of actual experience" in one or a combination of the enumerated fields, which include penology, corrections work, law, law enforcement, sociology, medicine, psychology, education, or other behavioral sciences. 730 ILCS 5/3-3-1(b) (2016). At least six of the 15 members must have at least three years of experience in the field of "juvenile matters." *Id*. And as mentioned, no more than eight of the 15 Board members may be from one political party. *Id*.

The Code of Corrections enumerates the six main functions of the Prisoner Review Board. It serves as (1) the paroling authority for persons sentenced under law prior to 1977; (2) the board of review for cases involving revocation of sentence credits or a suspension or reduction in the rate of accumulation of credits; (3) the board of review and recommendation for the Governor's exercise of executive clemency; (4) the authority for establishing release dates for certain prisoners; (5) the authority for setting conditions for parole and mandatory supervised release; and (6) the authority for

determining whether violation of aftercare release conditions by minors adjudicated delinquent warrants revocation of aftercare release. 730 ILCS 5/3-3-1(a) (2016); P.A. 99-628, § 30 (eff. Jan. 1, 2017).

The Prisoner Review Board's relationship to the Governor in the executive clemency process establishes that it is not an independent agency but rather a traditional part of the executive branch. Under the Illinois Constitution, the Governor "may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law." Ill. Const. art. V, § 12. The Illinois Supreme Court has explained that this constitutional provision "does not in any way restrict the Governor's power to act." *People ex rel. Madigan v. Snyder*, 208 Ill. 2d 457, 467 (2004); *see Mack v. State*, 37 Ill. Ct. Cl. 1, 19 (1984) ("Pursuant to article V, section 12, of the Illinois Constitution of 1970, whether or not a prisoner receives the pardon lies purely in the realm of gubernatorial discretion and such discretion is unfettered by legal technicalities and evidentiary problems."). The Governor's constitutional clemency power is "extremely broad" and his exercise of that power "'cannot be controlled by either the courts or the legislature. His acts in the exercise of the power can be controlled only by his conscience and his sense of public duty.'" *Snyder*, 208 Ill. 2d at 473 (quoting *People ex rel. Smith v. Jenkins*, 325 Ill. 372, 374 (1927)). Clemency, then, is a matter left to the Governor's

discretion and, as the clemency power's enumeration in Article V of the Constitution suggests, it is an important executive function.

As mentioned, the Prisoner Review Board serves as the "board of review and recommendation for the exercise of executive clemency by the Governor." 730 ILCS 5/3-3-1(a)(3) (2016). Petitions seeking clemency are addressed to the Governor and filed with the Prisoner Review Board. 730 ILCS 5/3-3-13(a) (2016). The Board "shall, if requested and upon due notice, give a hearing to each application . . . after which it shall confidentially advise the Governor by a written report of its recommendations which shall be determined by majority vote." 730 ILCS 5/3-3-13(c) (2016); *see* 730 ILCS 5/3-3-2(a)(6) (2016) (Board shall "hear by at least one member and through a panel of at least 3 members decide, all requests for pardon, reprieve or commutation, and make confidential recommendations to the Governor"). Once the Governor makes a decision on the clemency application, he must communicate that decision to the Board and notify the petitioner of the decision. 730 ILCS 5/3-3-13(d) (2016).

Thus, the Prisoner Review Board works closely with the Governor and provides advice to him in his exercise of the broad, discretionary executive power of clemency. By giving the Prisoner Review Board this role in the clemency process, the General Assembly established that the Board—far from being a body that must act with complete political independence—is an agency of the executive branch that aids in the exercise of a constitutionally

enumerated executive power. As *Wilcox* reasoned, if the Governor is to rely on his executive agencies to help him carry out the laws, he must have the discretion to remove their members, without that discretion "being controlled in its exercise by any other branch of the government." 90 Ill. at 207 (quoting *Doherty*, 25 La. Ann. at 120).

Gregg argues that the clemency power is held by the Governor, not the Prisoner Review Board. Gregg Br. 24. That is true but irrelevant. Just as the Governor must have an unreviewable power of removal over his confidential advisors in the Office of the Governor—even though it is he, and not they, who makes the final executive decisions—so too must he have that authority with respect to the members of the Prisoner Review Board, who make recommendations to him concerning clemency decisions that are ultimately "controlled only by his conscience and his sense of public duty." *Snyder*, 208 Ill. 2d at 473. And the fact that the Prisoner Review Board is denominated independent *of the Department of Corrections*, *see* Gregg Br. 27 (citing 730 ILCS 5/3-3-1(a)), does not establish that it must function independently *of the Governor*. To the contrary, as explained, it works closely with the Governor in the exercise of a constitutionally vested core executive power.

The other duties assigned to the Prisoner Review Board are of no more help to Gregg's argument that it is an independent body. Among those duties, it makes parole decisions for eligible prisoners sentenced under the law before the 1977 amendments to the criminal code. 730 ILCS 5/3-3-2(a)(1), (2) (2016).

Parole determinations are not quasi-judicial determinations that could be said to require absolute independence and neutrality. On the contrary, the Board's administrative decisions provide that the "Board grants parole as an exercise of *grace and executive discretion* as limited or defined by the Illinois General Assembly in duly adopted legislation." 20 Ill. Admin. Code § 1610.50(a) (emphasis added). Indeed, that is why this Court held two decades ago that there is no meaningful standard that would permit judicial review of the Prisoner Review Board's decisions to deny parole. *See Hanrahan v. Williams*, 174 Ill. 2d 268, 276 (1996) (General Assembly "intended the Board to have complete discretion in determining whether to grant parole when the denial of parole is not mandated by statute.") Similarly, the "Prisoner Review Board has wide discretion in setting the conditions of [mandatory supervised release]." *Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶ 21.

Thus, when the Prisoner Review Board makes decisions about parole and mandatory supervised release, it does not act like a court that determines retrospective questions of fact and renders judicially reviewable final decisions. Instead, the Board brings to bear "grace and executive discretion," 20 Ill. Admin. Code § 1610.50(a), and makes a prospective policy judgment about what will best serve the interests of the inmate and the community. As the Supreme Court has observed, the parole decision "differs from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the

decisionmaker and leading to a predictive judgment as to what is best for both the individual inmate and for the community." *Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7-8 (1979). Parole is thus "'a matter of clemency and grace'" that "'relates to prison government and discipline.'" *People ex rel. Kubala v. Kinney*, 25 Ill. 2d 491, 493-94 (1962). It stands to reason that the chief executive's traditional (and unreviewable) removal power should extend to an agency exercising these executive functions. Indeed, political independence would hinder, not facilitate, its work in this regard.

Gregg argues that the statute creating the Prisoner Review Board supports his argument that courts may review the Governor's decision to remove a member of the Board, Gregg Br. 31-32, but the argument is unpersuasive. Enacted in 1988, the relevant provision largely parrots the language of the Constitution's removal clause, providing that "[a]ny member may be removed by the Governor for incompetence, neglect of duty, malfeasance or inability to serve." 730 ILCS 5/3-3-1(c) (2016); 1988 Ill. Legis. Serv. P.A. 85-1433 (West 2018). By incorporating the substantive constitutional test for removal (while adding "inability to serve"), the legislature did nothing to resolve the question of whether judicial review of the Governor's removal decision is appropriate, which is a question of constitutional dimension. And while Gregg is correct that the General Assembly in 1988 must be presumed to have been aware of controlling rules of

constitutional law, the more logical conclusion is that it expected this executive agency to be covered by the general *Wilcox* rule rather than the narrow *Lunding* exception.

E. The Prisoner Review Board is not a "quasi-judicial" agency, and performing some "quasi-judicial" functions does not bring an agency within the *Lunding* exception.

Gregg repeatedly characterizes the Prisoner Review Board as a "quasi-judicial" entity. But that is not how this Court has described the Board. For instance, although Gregg relies upon *People ex rel. Abner v. Kinney*, 30 Ill. 2d 201 (1964), for the proposition that the Prisoner Review Board functions as an "independent quasi-judicial tribunal," Gregg Br. 18, that case says nothing of the kind. Indeed, it does not mention the words "independent" or "quasi-judicial" at all, and on the page cited by Gregg it describes the Parole and Pardon Board (the Prisoner Review Board's predecessor) simply as "the Governor's agent in hearing applications for executive clemency" and "an administrative body with the power to make final decisions in parole matters." 30 Ill. 2d at 205. Nor can an agency insulate itself from executive control by the labels it uses to describe itself on a web page. *See* Gregg Br. 17 (quoting www.illinois.gov/prb); *but see* www2.illinois.gov/agencies/PRB (last visited April 30, 2018) ("The Illinois Prisoner Review Board handles all traditional parole release decisions, adjudication of adult and youth release revocation hearings, victim notification regarding inmate releases, and requests for executive clemency on behalf of the Governor.").

It is true that the Prisoner Review Board's functions include deciding certain matters that involve disputed facts. For instance, the Board "decides cases brought by the Department of Corrections against a prisoner in the custody of the Department for alleged violation of Department rules" if the Department seeks to revoke a certain amount of sentence credit from the prisoner. 730 ILCS 5/3-3-2(a)(4), (8) (2016). Additionally, the Board may determine whether conditions of parole or mandatory supervised release have been violated. 730 ILCS 5/3-3-1(a)(5) (2017). But those duties do not make the Board the kind of "quasi-judicial" agency for which political independence is essential to ensure the integrity of its processes. Rather, they show only that the Board makes administrative determinations that sometimes turn on disputed facts, like most other executive agencies.

Similarly, the fact that the Prisoner Review Board entered into a settlement agreement, approved by the Attorney General, concerning due process protections in parole revocation proceedings, *see* Gregg Br. 22-23, says nothing at all about whether the Board should be treated as an independent agency within the *Lunding* exception. Of course, all government decision-makers—including traditional executive agencies such as departments of corrections—are bound by the procedural requirements of the Due Process Clause when they resolve disputed facts in a way that deprives any person of a liberty or property interest. *See*, *e.g.*, *Wolff v. McDonnell*, 418 U.S. 539 (1974). The Prisoner Review Board's effort to ensure compliance with generally

applicable federal procedural standards has no bearing on how the Board is properly categorized as a matter of Illinois separation-of-powers law.

Moreover, even if some of the Prisoner Review Board's activities could be described as quasi-judicial, that would not be enough to permit judicial review of the Governor's decision to remove one of its members. Indeed, if the duty to resolve disputed facts were sufficient to place an agency within the *Lunding* exception, the exception would quickly swallow the *Wilcox* rule. After all, many executive agencies perform quasi-judicial tasks at times, yet as the appellate court recognized, "'[a]n entity with quasi-judicial powers is not, as a matter of law, a quasi-judicial body at all times.'" *Gregg*, 2017 IL App (5th) 160474, ¶ 25 (quoting *Parillo, Weiss & Moss v. Cashion*, 181 Ill. App. 3d 920, 926 (1st Dist. 1989)). For instance, the Illinois Department of Corrections acts in a quasi-judicial manner when it resolves disciplinary charges against inmates, but it is also responsible for formulating and implementing the executive's correctional initiatives, and therefore is not properly characterized as a "quasi-judicial" agency. Other executive agencies, similarly, act in an adjudicatory capacity at times, but that does not deprive them of their character as executive agencies. *See Petrovic v. Dep't of Employment Sec.*, 2016 IL 118562, ¶ 19 (Department of Employment Security has adjudicatory duties but is also entrusted with executive tasks of administering the law, preserving the unemployment fund, and handling its assets)*; Sierra Club v. Illinois Pollution Control Bd.*, 2011 IL 110882, ¶ 13 (Pollution Control Board

performs both quasi-legislative and quasi-judicial functions); *Gadlin v. Auditor of Pub. Accounts*, 414 Ill. 89, 97 (1953) (licensing agency such as State Auditor of Public Accounts "necessarily exercises quasi-judicial powers, but such exercise is incidental to the duty of administering the law").

The principle that any agency that performs some quasi-judicial functions must be politically independent such that its members cannot be removed by the Governor without judicial review would work a drastic change not only in Illinois separation-of-powers jurisprudence but in the structure of state government. Had this Court intended to embrace such a far-reaching new rule in *Lunding*, one would expect it to have relied heavily on the fact that the State Board of Elections exercised some quasi-judicial powers. But it did not do so. Instead, it expounded at length on the "unique character" of the State Board of Elections, which necessitated an exceptional degree of political independence. *See* 65 Ill. 2d at 518.

For these reasons, the analogy to the necessary independence maintained by the judiciary, which guided the federal district court in *Ford v. Blagojevich*, 282 F. Supp. 2d 898, 905 (C.D. Ill. 2003), fails here. In *Ford*, the court held that members of the Industrial Commission could be removed only for judicially reviewable cause because the General Assembly intended the Commission to be "a neutral, bipartisan, and independent board" administering the Worker's Compensation Act. *Id*. at 904-05. The court's analysis, which was confined to a single paragraph, focused largely on the fact

that the Industrial Commission was tasked with reviewing arbitrators' decisions in worker's compensation cases, assessing the credibility of witnesses, weighing evidence, and determining questions of fact. *Id*. at 905. These quasi-judicial functions, together with the agency's balanced political membership, suggested to the court that the Commission needed political independence to carry out its duties. *Id*. Likewise, in *Kosoglad v. Porcelli*, 132 Ill. App. 1081 (1st Dist. 1985), the court concluded, also in a single paragraph, that a municipal Board of Fire and Police Commissioners, which was charged with conducting "fair and impartial" hearings on charges brought against safety officers by the municipality and maintaining a list of officers eligible for promotion, could not carry out those duties without independence from the municipal Board of Trustees, *id*. at 1088. As described above, the Prisoner Review Board is not a "quasi-judicial" agency that requires the same political independence.

In sum, the general rule in Illinois as expressed by *Wilcox* and adopted by the framers of the 1970 Constitution is that the Governor may remove an appointee for incompetence, neglect of duty, or malfeasance in office, and that his decision to remove such an appointee is not subject to judicial review. This general rule is subject to the narrow exception set forth in *Lunding* for instances where the framers or the General Assembly have made the judgment that political independence is essential to the agency's proper functioning, and thus the agency falls outside of the Governor's ordinary authority over

executive officers. The Prisoner Review Board is not an independent agency but rather is part of the "Executive establishment," *Wiener*, 295 U.S. at 625-26. Therefore, the Governor's decision to remove Gregg from the Prisoner Review Board is not subject to judicial review.

II. If the Court does review the decision to remove Gregg from office, it should uphold that decision because it was within the Governor's discretion.

If this Court reaches the question of whether the Governor's decision to remove Gregg from the Prisoner Review Board was valid, it should uphold that decision as a proper exercise of the Governor's broad discretion over whether and when to exercise his constitutional removal authority.

A. The Governor's decision is entitled to substantial deference.

When a decision to remove an appointee may be judicially reviewed because the agency at issue requires complete political independence, the removal decision "will not be reversed unless it is arbitrary, unreasonable, or unrelated to the requirements of service." *Kosoglad*, 132 Ill. App. 3d at 1089 (internal quotation marks omitted). Under this standard, the court must "pay great deference" to the determination that cause for removal exists. *Id*. at 1088; *see also Maddox v. Williamson Cty. Bd. of Comm'rs*, 131 Ill. App. 3d 816, 823 (5th Dist. 1985) (county board's decision to discharge supervisor of assessments under standard requiring "misfeasance, malfeasance, or nonfeasance" was entitled to "substantial deference" and could be overturned only "where found to be arbitrary and unreasonable").

Gregg attempts to distinguish *Kosoglad* on the ground that the statute at issue in that case prohibited removal "except for cause," 132 Ill. App. 3d at 1085 (quoting Ill. Rev. Stat. 1983, ch. 24, par. 10–2.1–3), while the applicable standard here requires the Governor to make a finding of "incompetence, neglect of duty, or malfeasance in office." Gregg Br. 33-34. But Gregg never explains why this difference in the applicable *substantive standard* for a determination of removability should eliminate the *judicial deference* that is owed to that determination. To the extent Gregg suggests that the Governor's determination should be reviewed *de novo*, his suggestion ignores the underlying principle that the determination of whether an official may be removed rests first with the Governor. Ill. Const. art. V, § 10. The Illinois Constitution gives the Governor discretion to remove an official: "The Governor *may* remove for incompetence, neglect of duty, or malfeasance in office any officer who may be appointed by the Governor." *Id*. (emphasis added). A court reviewing an exercise of executive discretion does not undertake that review *de novo*, but inquires only into whether there has been an abuse of that discretion by an arbitrary and capricious act. *Bigelow Group, Inc. v. Rickert*, 377 Ill. App. 3d 165, 174-75 (2d Dist. 2007). According deference to the Governor's exercise of his discretion is also consistent with the long-established principle in Illinois that officials in whom the removal power is vested are presumed to exercise it in good faith and not "from mere caprice." *People ex rel. Stevenson v. Higgins*, 15 Ill. 110, 116 (1853).

B. The Governor's decision to remove Gregg was not arbitrary, unreasonable, or unrelated to the requirements of service.

The Governor was within his wide discretion in removing Gregg from the Prisoner Review Board. There is no dispute that Gregg signed the filing in the bankruptcy action that reported the income from Southern Illinois Energy Group as his own and that he never filed a Statement of Economic Interests that reflected the gift he received in 2012. C. 298-99. The circuit court discounted these actions, finding them insufficient to show incompetency, neglect of duty, or malfeasance. C. 413-16. But the court erred by reviewing the Governor's decision *de novo*, failing to give that decision the required "great deference."

With regard to the Statement of Economic Interests, the court found that when it was filed in 2013, it was "inaccurate and not true." C. 413. But the court discounted this because the Statement was for 2011, and Gregg received the gift in 2012. C. 413-14. Because Gregg simply never filed a Statement of Economic Interests for 2012, the court excused his failure to report the gift, even though the law required Gregg to report it.

The Illinois Governmental Ethics Act requires persons whose appointment to office is subject to confirmation by the Senate to file a verified written statement of economic interests. 5 ILCS 420/4A-101(d) (2016). The appointee shall file his statement at the time his name is submitted for confirmation, and a new statement shall be filed each year by May 1 for the

preceding calendar year. 5 ILCS 420/4A-105 (2016). Gregg was appointed to the Prisoner Review Board in April 2013 and confirmed by the Senate in November of that year. C. 297-98. Under the Ethics Act, he was required to submit a Statement of Economic Interests for the preceding calendar year, which was 2012. He never did so. C. 298. It was not arbitrary or unreasonable for the Governor to conclude that Gregg's failure to file the required statement provided cause for his removal.

To be sure, the Ethics Act provides for certain penalties, up to removal from office, for the failure to file a Statement of Economic Interests if certain notice requirements are satisfied. *See* 5 ILCS 420/4A-105, 4A-107 (2016). There is no dispute here that Gregg never received notice that he failed to file a Statement for 2012. C. 298. But the failure to receive that notice does not bar the Governor from exercising his discretion and determining that the failure to comply with the Ethics Act rendered Gregg unfit for the Board. Indeed, Gregg admitted that he had filed many Statements of Economic Interests in the past, so he was undoubtedly aware of the requirement. *See* Tr. 62. And the Governor should be able to consider the failure to comply with state ethics laws in deciding whether someone is fit to act as an advisor on important executive decisions. It was therefore not arbitrary for the Governor to conclude that the failure to file a Statement for 2012, in violation of the Ethics Act, demonstrated incompetence or a neglect of the duties that the law places on government appointees such as Gregg.

With regard to the bankruptcy matter, the circuit court found that the incorrect filing was the fault of Gregg's bankruptcy attorney, which "was a result of input error into an electronically filed document." C. 415. This, however, ignores the fact that Gregg's signature appeared on the form, verifying that the information he reported to the federal court was correct. C. 354. Again, whether or not the form was a mistake, Gregg's failure to observe that mistake and his decision to sign the document to verify its accuracy could be indicative of incompetency. The Governor was well within his discretion to so conclude.

As discussed, the Governor relies on the members of the Prisoner Review Board to provide advice on clemency petitions. Additionally, the Board's members make executive decisions regarding important matters such as who should be released from prison on parole or the conditions under which individuals are released from prison on mandatory supervised release. These duties carry great social significance, and it is not an abuse of discretion for the Governor to seek to ensure that the appointees carrying out those duties can be trusted to do so. On the facts of this case, the Governor did not act arbitrarily or unreasonably in concluding that Gregg's failure to follow the Ethics Act and verification of an incorrect bankruptcy court filing demonstrated incompetence or neglect of the duties of a state employee and showed that he was not fit to remain a member of the Prisoner Review Board. Therefore, the Governor's decision should be upheld.

* * *

The United States Supreme Court concluded its most recent discussion of the presidential removal power with observations that are equally applicable to the Illinois Governor:

> The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority "would greatly diminish the intended and necessary responsibility of the chief magistrate himself." *The Federalist* No. 70, at 478.

Free Enterprise Fund, 561 U.S. at 513-14. If this Court were to depart from the rule established 140 years ago in *Wilcox* and permit judicial review of the Governor's decision to remove a member of the Prisoner Review Board, the Governor's discretionary authority over such matters as clemency and parole would be diminished and the system of political accountability in Illinois would be undermined. "[T]he buck would stop somewhere else." *Id*. This Court should not take that step.

CONCLUSION

For these reasons, this Court should affirm the appellate court's judgment.

Respectfully submitted,

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Dated: May 3, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 37 pages.

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CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 3, 2018, the foregoing **Brief of Defendant-Appellee Bruce Rauner, Governor of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses of the persons named below:

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