No. A20-1264

State of Minnesota
In Court of Appeals

JENNIFER SCHROEDER, ELIZER EUGENE DARRIS, CHRISTOPHER JAMES JECEVICUS-VARNER, AND TIERRE DAVON CALDWELL,

Plaintiffs-Appellants,

v.

MINNESOTA SECRETARY OF STATE STEVE SIMON, IN HIS OFFICIAL CAPACITY,

Defendant-Respondent.

OPENING BRIEF AND ADDENDUM OF PLAINTIFFS-APPELLANTS

Craig S. Coleman (#0325491)
Michael M. Sawers (#0392437)
Thomas K. Pryor (#0395209)
Kirsten L. Elfstrand (#0401213)
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Phone: (612) 766-7000

Theresa J. Lee (NY #5022769) (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500

Attorneys for Plaintiffs-Appellants

Teresa J. Nelson (#0269736)
David P. McKinney (#0392361)
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
2828 University Avenue Southeast, Suite 160
Minneapolis, MN 55414
Phone: (651) 645-4097

Angela Behrens (#0351076)
Jason Marisam (#0398187)
Office of the Attorney General
445 Minnesota Street, Suite 1100
St. Paul, MN 55101
Phone: (651) 757.1275

Attorneys for Defendant-Respondent

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STATEMENT OF THE LEGAL ISSUES

Plaintiffs-Appellants challenge the constitutionality of Minnesota's system of felony disenfranchisement that denies the right to vote to more than 53,000 Minnesotans living in the community on probation, parole, or supervised release following felony convictions. Appellants maintain that their disenfranchisement violates the guarantee of equal protection and the due process clause contained in Article I and the fundamental right to vote protected by Article VII of the Minnesota Constitution. This appeal raises the following issues:

1. Should the Court strictly scrutinize Minnesota's practice of denying Appellants the right vote while they live in the community and restore their voting rights because the State's disenfranchisement scheme is not narrowly tailored to achieve any interest, much less a compelling one?
2. If, in the alternative, the Court applies rational-basis review to Minnesota's disenfranchisement of Appellants, does the Legislature's failure to articulate any reason or rationale for their disenfranchisement, coupled with Defendant-Respondent's failure to establish any legitimate purpose served by denying otherwise eligible voters the right to vote while they live in the community, necessitate restoration of Appellants' right to vote?
3. Does the statutory scheme that disenfranchises Appellants violate Article VII because their disenfranchisement effects a burden on their right to vote that is not outweighed by any government interest?

These issues were presented to the district court by the parties' cross motions for summary judgment. The district court granted Respondent's motion for summary judgment, denied Appellants' motion for summary judgment, and entered judgment in favor of Respondent on August 19, 2020. Appellants timely appealed that final order on September 30, 2020. (9/30/20 Notice of Appeal #84.)

Apposite constitutional provisions, statutes, and cases include:

- Minn. Const. art. I
- Minn. Const. art. VII, § 1
- Minn. Stat. § 609.165, subd. 1
- Minn. Stat. § 201.145, subd. 3
- *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005)
- *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003)
- *State v. Russell*, 477 N.W.2d 886 (Minn. 1991)
- *Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978)

STATEMENT OF THE CASE

Appellants filed this action in Ramsey County District Court claiming that their ongoing disenfranchisement as they live in the community on probation and/or supervised release violates the Minnesota Constitution. Specifically, Appellants' three-count Complaint alleged that Minnesota's disenfranchisement scheme violates the equal protection guarantee, the due process clause, and Article VII of the Minnesota Constitution. Appellants seek declaratory and injunctive relief declaring the disenfranchisement of persons living in the community to be unconstitutional and restoring their fundamental right to vote.

Following discovery, the parties agreed that no genuine dispute as to any material fact remained, and they filed cross motions for summary judgment. In an order issued on August 11, 2020 followed by entry of judgment on August 19, 2020, Judge Laura Nelson granted Respondent's motion for summary judgment and denied Appellants' motion. Appellants appeal that order.

STATEMENT OF FACTS

There is no dispute regarding the factual record. In support of their summary judgment motion, Appellants submitted expert reports from Professor Christopher Uggen and Professor Barbara Carson detailing the scope and impact of felony disenfranchisement in Minnesota, the historical development of Minnesota's criminal justice system and its current disenfranchisement scheme, the disproportionate impact of felony disenfranchisement on communities of color, and the negative impacts of disenfranchisement on rehabilitation and recidivism. (*See* ADD-15 to ADD-40; 2/25/20

Affidavit of Tom Pryor ("Pryor Aff.") #60, Ex. 1.) Appellants further submitted extensive data from the Department of Corrections, social science research, and the Minnesota Sentencing Guidelines Commission, among other sources. (Pryor Aff. #60, Exs. 3–32.) Appellants' personal declarations documented the deeply personal impact of being prohibited from voting while living in the community. Nothing in this robust record was disputed by Respondent or questioned by the district court, giving this Court a clear, uncontroverted factual record documenting the development of the disenfranchisement scheme and the sweeping scale of its current adverse and unjustified impacts.

Both Appellants and Respondent submitted the available materials regarding Minnesota's constitutional convention during which Article VII was drafted, the historical record regarding development of felony disenfranchisement in Minnesota, and the legislative history of relevant statutes. (*See* 2/25/20 Affidavit of Angela Behrens ("Behrens Aff.") #53, Exs. 1–12; Pryor Aff. #60, Exs. 8–9.) The record therefore contains the full available legislative history regarding the disenfranchisement scheme that Appellants challenge.

The facts giving rise to Appellants' constitutional challenge are uncontroverted. Most notably, review of the factual and legal record demonstrates the complete absence of any justification for disenfranchising persons living in the community on probation, parole, or supervised release following felony convictions. Neither the framers, the Legislature, nor Respondent has ever articulated, much less substantiated, a reason why Appellants' disenfranchisement serves any purpose at all.

A. The History of Article VII

Article VII was drafted and approved by Minnesotans with the State's first Constitution in 1857 to enshrine protection of voting rights in the Constitution. With amendments over time to expand the franchise, Article VII broadly protects the right to vote: "Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct." Minn. Const. art. VII, § 1.

Article VII's broad guarantee of the fundamental right to vote is subject to specific, limited exceptions. Other than those persons not meeting the thresholds for age, duration of residency, or citizenship, the only persons not entitled to vote are: "a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent." Minn. Const. art. VII, § 1. That language has been unaltered since ratification of the Constitution, and there is no record that it was considered, justified, or debated during the 1974 process to modernize the Constitution's language or during any of the Article VII amendments.[1]

The framers provided no rationale or justification for felony disenfranchisement when drafting, debating, and passing Article VII. (ADD-45 to ADD-50.) Transcription of the framers' deliberations in 1857 shows that the provision was given minimal consideration. Without any debate, the framers rejected a motion to strike the provision

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[1] *See, e.g.*, https://www.sos.state.mn.us/about-minnesota/minnesota-government/minnesota-constitution-1858/ (last visited Nov. 16, 2020) (noting that the modernization process "did not alter the meaning of the constitution" and that "[i]n cases of constitutional law, the original document remains the final authority.")

altogether. (ADD-46.) Following that decision, limited deliberations over the precise language stated an intention to ensure "the power of the Legislature to restore civil rights to any person." (*Id.*) The framers' entire discussion of the provision was conducted in less than a dozen sentences, none of which offered any further explanation for its adoption, the meaning of its terms, intentions about its scope, or a reason for felony disenfranchisement. (ADD-46 to ADD-47.) Importantly, the framers also provided no further guidance regarding the meaning of the term "restored to civil rights" or the process for restoring voting rights.

All that can be gleaned from the history of Article VII is that felony disenfranchisement was uncritically accepted and adopted by the framers as a given, just another prevailing 19th-century practice like white-male suffrage. (*See, e.g.*, ADD-49.) Beyond that, only two things can be known about the framers' intentions. First, they deliberately rejected permanent felony disenfranchisement and instead intentionally ensured that disenfranchisement must end when persons convicted of a felony have been "restored to civil rights." (ADD-46.) Thus, the framers purposefully limited the scope and duration of disenfranchisement.

Second, because community supervision did not exist until many decades after ratification, the original meaning of Article VII cannot have included felony disenfranchisement of persons living in the community on probation, parole, or supervised release. (*See* ADD-30; Pryor Aff. #60, Ex. 1 at 1-10; *see also id.* Ex. 5 at 5-03 to 5-04.) Moreover, in 1863, for example, all crimes fell into one of two categories: public offenses that were punishable by death or imprisonment in a state prison, and

everything else. Minn. Stat. ch. 91 § 2 (1863). Disenfranchisement applied only to persons subject to incarceration, and nothing in the history of Article VII or the historical context surrounding its adoption indicates an intention to disenfranchise persons following incarceration. Indeed, given the absence of any criminal justice system supervising persons living in the community, the phrase "restored to civil rights" should be understood to refer to freedom from incarceration. (Pryor Aff. #60, Ex.1 at 1-07.)

To the extent that any further light can be shed on the framers' intentions regarding felony disenfranchisement, it is noteworthy that the State has exploded the number and types of misconduct classified as felonies over time. At ratification, there were only about "seventy-five felony level crimes in Minnesota. Today there are over 375." (*See* ADD-30; Pryor Aff. #60, Ex. 5 at 5-03 to 5-04.) Felonies were defined by being punishable by "imprisonment in the state prison" (or death), while all other criminal infractions were categorized as misdemeanors that would not entail disenfranchisement. Minn. Stat. ch. 91 § 2 (1863). Felonies included treason, *id.* ch. 93 § 1, and serious violent crimes such as murder, *id.* ch. 94 § 2, and arson, *id.* ch. 95 § 1. Misdemeanors included morality crimes such as "commit[ting] fornication" outside of marriage, *id.* ch. 100 § 5, acts of animal cruelty, *id.* ch. 100 § 18, or breach of the peace, *id.* ch. 100 § 24. Minnesota's current penal code now includes a wide-ranging classification of crimes, ranging from petty misdemeanors to felonies, and it defines felonies as any crime "for which a sentence of imprisonment for more than one year may be imposed." *Id.* § 609.02, subd. 2. The litany of crimes now classified as felonies includes, for example, state lottery fraud, *id.* § 609.651, selling illegal cable-

communications equipment, *id.* § 609.80, subd. 2, and engaging in certain computer access crimes, *id.* § 609.891, subd. 2. Importantly, although many drugs such as morphine, marijuana, and even cocaine were used for medicinal or recreational purposes in the 19th century, possessing or selling those same substances are now among the most prosecuted felonies. (*See* Pryor Aff. #60, Ex. 1 at 1-10.) Nothing in the historical record supports a rationale, justification, or intention to disenfranchise persons convicted of the litany of conduct now classified as felonies, particularly once they are restored to the right to live in the community.

Respondent admits that Article VII does not require disenfranchisement of Appellants. He expressly concedes that the Legislature has discretion to restore voting rights to persons living in the community on probation, parole, or supervised release. (Pryor Aff. #60, Ex. 12 at 12-02 to 12-03.) Thus, it is undisputed that neither the text nor the history of Article VII mandates or justifies Appellants' ongoing disenfranchisement, and their disenfranchisement is the result of the prevailing legislative scheme.

B. Minnesota's Disenfranchisement Scheme

The statutory scheme that disenfranchises Appellants provides no rationale—or even a clear intention—for denying voting rights to persons living in the community. Adopted in 1962, Minnesota Statute § 609.165, subd. 1 clarifies that voting rights are restored once a criminal sentence has been discharged:

> When a person has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.

Id. Discharge does not occur absent an order of a court or expiration of a sentence. Minn. Stat. § 609.165, subd. 2. Thus, by its text, Section 609.165 ensures that voting rights are restored at discharge, but it does not preclude restoration of voting rights prior to discharge, state a legislative interest in disenfranchisement during probation or supervised release, or establish any reason or basis to deny voting rights to persons living in the community.

Nor does the legislative history of Section 609.165 indicate any government interest in disenfranchising persons on probation, parole, or supervised release. The Advisory Committee on Revision of the Criminal Law published comments on the 1962 revisions to the criminal code. (*See* ADD-41 to ADD-44.) The entirety of the committee's comments on the restoration provisions are as follows:

> The recommended sections also revise the rather extensive present provisions relating to the restoration of civil rights. This may be discretionary with the Governor, but in practice it appears that the restoration of civil rights has been granted almost as a matter of course. Under recommended provisions, these rights will be automatically restored when the defendant is discharged following satisfactory service of sentence, probation or parole. This is deemed desirable to promote the rehabilitation of the defendant and his return to this community as an effective participating citizen.

(ADD-42.) No legislative history, including the Advisory Committee comments, discusses a basis or reason for denying voting rights to those living in the community. To the contrary, the history of Section 609.165 shows only that the Legislature has an interest in restoring civil rights, facilitating the rehabilitation of those convicted of felonies, and promoting civic participation.

The Secretary of State "has never issued a decision, order, or guidance document interpreting section 609.165." (Pryor Aff. #60, Ex. 4 at 4-06.) Thus, nothing in the text, history, or implementation of Section 609.165 provides a rationale for Appellants' disenfranchisement.

Ultimately, Appellants' disenfranchisement is effectuated by Minnesota statutes controlling the statewide voter registration system. Minnesota Statute § 201.145, subd. 3 requires the Commissioner of Corrections to issue monthly reports to the Secretary of State identifying all "individuals 17 years of age or older who have been convicted of a felony." Section 201.145 further requires the Secretary of State to determine whether individuals identified in that report are registered to vote and to provide a list of those persons to county auditors. In turn, county auditors "must challenge the status on the record in the statewide voter registration system of each individual named in the list." *Id.* The statute goes further by mandating that county auditors report to county attorneys any individuals "who registered to vote or voted while serving a felony sentence." *Id.* Thus, the statute not only adopts a system to ensure disenfranchisement of those individuals living in the community on probation, parole, or community supervision, it also ensures that they are subject to mandatory reporting and criminal prosecution for voting. Section 201.145, subd. 4 uses similar procedures to restore voting rights after discharge of a sentence. Once again, no legislative history related to Section 201.145 establishes an interest served by refusing to restore voting rights until discharge of sentences.

In sum, Section 609.165 defers restoration of voting rights until discharge of sentence without explanation, and Section 201.145 precludes voting until discharge again

without explanation. Together, this statutory scheme results in the disenfranchisement of all persons living in the community following felony convictions until discharge of their sentences. This system of disenfranchisement is referred to herein as the "current disenfranchisement scheme."

C. The History and Scope of Minnesota's Felony Disenfranchisement

Whether measured by the number of persons or the percentage of the population impacted, the scope of Minnesota's system of felony disenfranchisement has grown dramatically over time. More than 53,000 otherwise eligible voters currently living in the community are now denied the right to vote.

At ratification, there were exceedingly few individuals convicted of felonies, and, because all of them would have served the entirety of their sentences in prison, no person would have been disenfranchised while living in the community. Census data from 1850 shows that just two of the 6,077 people living in Minnesota had been convicted of felonies, only one of whom remained incarcerated. (*See* ADD-29.) Thus, less than 0.1% of the population in 1850 was subject to felony disenfranchisement.[2] (*See id.*). By 1860, Minnesota's population had grown to 172,023 people, only 32 of whom were incarcerated. (*See id.*). Hence, the percentage of Minnesotans subject to felony disenfranchisement in 1860 was still less than 0.1%. Similarly, only 129 of 439,706 Minnesotans in 1870 was incarcerated, so the rate of disenfranchisement still did not

[2] Persons under 21, women, African Americans, and American Indians were ineligible to vote in this time period. (*See* ADD-29.) To calculate the percentage of otherwise eligible voters disenfranchised by felony convictions, these calculations conservatively assume that just a fourth of Minnesota residents were eligible to vote.

exceed 0.1%. (*See id.*) Even if every incarcerated prisoner could otherwise have voted, the disenfranchisement rate would still have been about 0.1%. And because anyone convicted of a felony would have served the entirety of their sentence in prison and no system of community supervision existed, no one living in the community would have been subject to felony disenfranchisement.

Minnesota's rates of incarceration and probation have exploded over the last fifty years, resulting in an expanding number of persons subject to felony disenfranchisement, including a disproportionate number of people of color. (*See* ADD-32 to ADD-33.) In 1974, for example, there were 2,546,000 voting-age adults in Minnesota and a total of **7,515** persons convicted of felonies in prison, on parole, or on probation. (*See id*.) By 2018, there were 4,307,433 voting-age adults and **61,727** persons convicted of felonies in prison, on parole, or on probation. (*See id*.) Thus, during that time period, the number of people who were disenfranchised because they were serving a felony sentence—whether in prison or within the community—rose from 0.3% of the state's voting-age population in 1974 to almost 1.5% in 2018. (*See id.*) The stark figures are summarized in the following table:

Total and Black Disenfranchised Populations in Minnesota, 1974-2018 (excluding jail)

Category	1974	1980	1990	2000	2010	2018
Voting-Age Population (VAP)	2,546,000	2,933,000	3,222,000	3,632,585	4,019,862	4,307,433
Total Disenfranchised	**7,515**	**11,494**	**21,068**	**46,052**	**57,897**	**61,727**
As % of Voting Age Population	0.30%	0.39%	0.65%	1.27%	1.44%	1.43%
Disenfranchised Group						
Prison	1,372	2,001	3,178	6,276	9,429	9,178
Parole/Supervised Release	1,539	1,534	1,873	3,072	5,807	6,779
Felony Probation	4,604	7,959	16,017	36,704	42,661	45,770
Black Voting Age Population	22,415	32,263	41,886	118,522	199,513	241,253
Black Disenfranchised	**773**	**1,028**	**2,990**	**11,792**	**14,096**	**14,184**
As % of Black VAP	3.45%	3.19%	7.14%	9.95%	7.07%	5.88%
Disenfranchised Group						
Black Prison	218	298	886	2,264	3,353	3,367
Black Parole/Supervised Release	245	228	522	1,108	1,504	1,548
Black Felony Probation	310	502	1,582	8,420	9,239	9,269

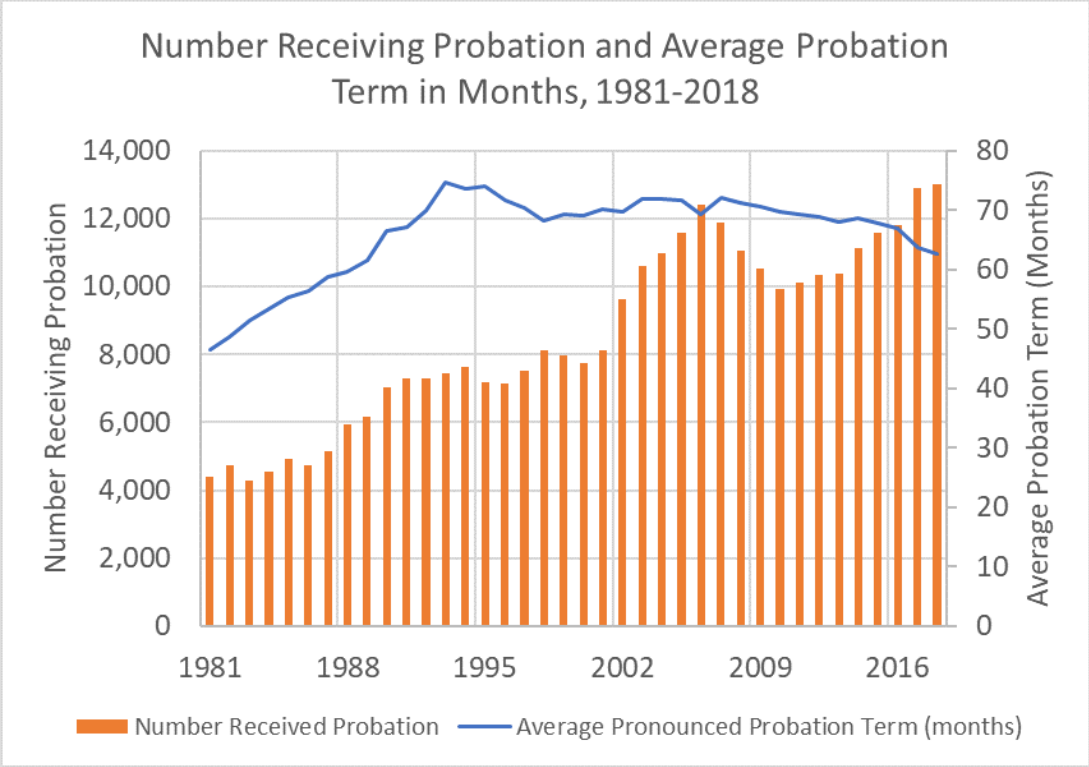
(ADD-33.)

Incarceration increased dramatically during this period, with the State's prison population growing from 1,372 persons in 1974 to 9,178 persons in 2018. (*See id.*) This significant increase in incarceration caused similar increases in the number of persons living in the community on parole or supervised release following incarceration. And the number of persons serving probationary sentences after a felony conviction increased at an even higher rate, from 4,604 in 1974 to 45,770 in 2018. (*See id.*)

Minnesota's reliance on probation and community supervision has resulted in massive increases in disenfranchisement of persons living in the community. In 2016, Minnesota had the "fourth highest rate of community supervision among the 48 states for which year-end 2016 data were available." (*See* ADD-19.) At year-end 2016, the overall "adult probation supervision rate was approximately 2,280 per 100,000 in Minnesota, relative to 1,466 per 100,000 for the U.S. as a whole." (ADD-17.)

These stark numbers are driven by Minnesota's extensive use of probation and long probationary sentences. (*See* ADD-15 to ADD-17.) Compared to other states, for example, Minnesota's crime rate ranks 30th, but its probation rate ranks 5th. (Pryor Aff. #60, Ex. 16 at 16-08.) By year-end 2018, 100,188 adult Minnesotans were on probation. (*See* ADD-17.) Of these, 46,176 were on probation for felony-level offenses, meaning that 1,072 of every 100,000 eligible voters in Minnesota is disenfranchised while living in the community on probation. (*See id.*) Put another way, fully 1% of voting-age adults in Minnesota living in the community are currently disenfranchised while serving probation. The percentage of disenfranchised voters on probation varies greatly across Minnesota: for example, fully 5% of otherwise eligible voters in Mahnomen County (*i.e.*, the White Earth Indian Reservation) are disenfranchised while living in the community on probation. (*See* ADD-18.)

The fact that Minnesota disenfranchises a material percentage of persons living in the community may be explained, in part, by the length of probationary sentences in the state. (*See* ADD-19.) "For the past three decades, the average length of probation has exceeded 5 years in Minnesota, which is greater than the maximum (non-life) term that may be imposed in several states." (*Id.*) The following chart shows both the explosive growth in probationary sentences and the consistently long duration of those sentences:



(*See* ADD-20; *see generally* Pryor Aff. #60, Ex.13.) In some Minnesota counties, probationary sentences **average** more than **eight** years. (*See* ADD-20 to ADD-21.)

Moreover, increases in drug convictions have caused much of the increase in the number of Minnesotans serving probationary sentences. According to the Minnesota Sentencing Guidelines Commission:

> In 2016, 4,246 offenders received probation sentences for drug offenses, a 187 percent increase over the number receiving probation sentences in 1991 (Table 3). In comparison, the number of non-drug offenders serving probation sentences increased by about 42 percent during this same time period.

(*See* Pryor Aff. #60, Ex. 10 at 10-17.) Thus, Minnesota is disenfranchising thousands of its residents for committing drug crimes that did not even exist when Article VII was framed and adopted.

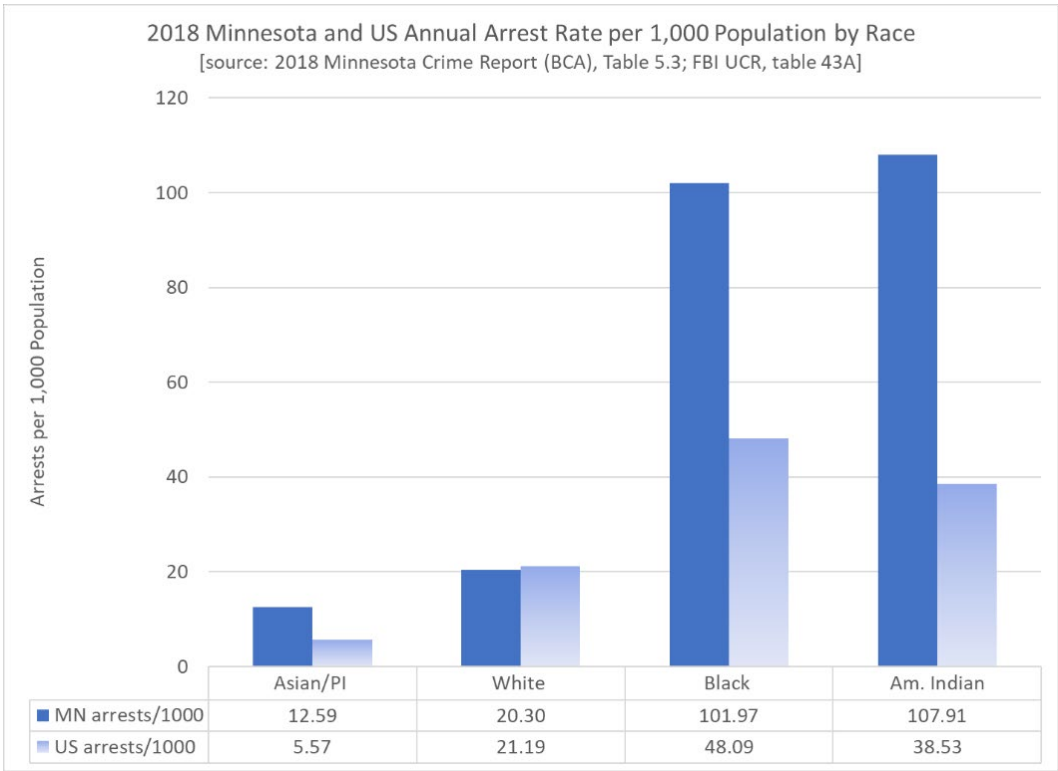
In addition to those on probation, an additional 8,234 adults live in the community

on parole or supervised release following incarceration for felony convictions. (*See* ADD-18 to ADD-19.) After eliminating any possible double counting, the total numbers of Minnesotans disenfranchised while living in the community include: 45,855 on probation, 7,697 on supervised release, and 28 on parole for a total of **53,585**. (*See* ADD-21.) That translates to a rate of 1,244 per 100,000 voting-age adults. (*See id*.) Thus, fully **1.2%** of voting-age adults in Minnesota are disenfranchised while subject to some form of community supervision for a felony-level offense. (*See* ADD-21 to ADD-22; Pryor Aff. #60, Ex. 14 at 14-3.)

D. The Inequitable Racial Impacts of the Disenfranchisement Scheme

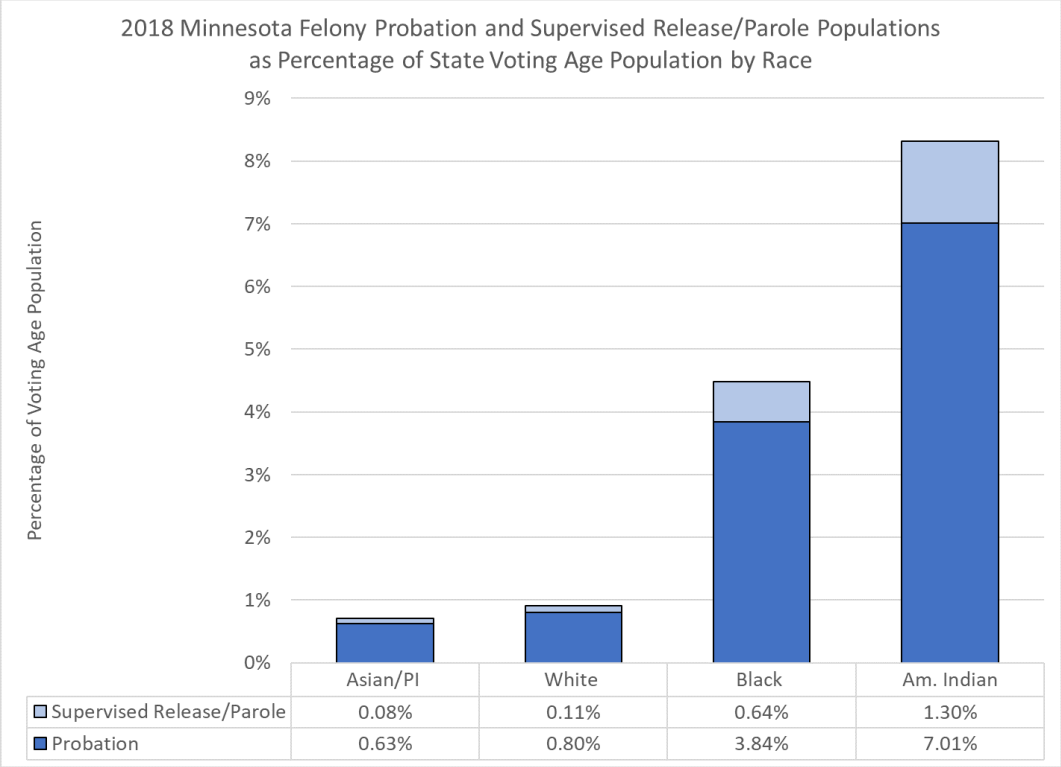
The disproportionate rates at which persons of color are arrested, convicted, and incarcerated culminate in racially inequitable rates of disenfranchisement. (*See* ADD-22 to ADD-28.) Focusing just on entry into the criminal justice system, in 2018 there were 102 arrests per 1,000 Black Minnesotans and 108 arrests per 1,000 American Indian Minnesotans. (*See* ADD-23.) Whites, in contrast, experienced approximately 20 arrests per 1,000 residents. (*See id*.) Black and American Indian Minnesotans are thus arrested at a rate **five times higher** than white Minnesotans.[3] (*See id*.) "Relative to other states and the nation as a whole, racial disparities in criminal justice are particularly high in Minnesota," as the below graph demonstrates:

[3] The denominator used to calculate these rates is total population rather than voting-age population, so arrest rates would likely be higher if excluding young minors. (*See* ADD-23.)



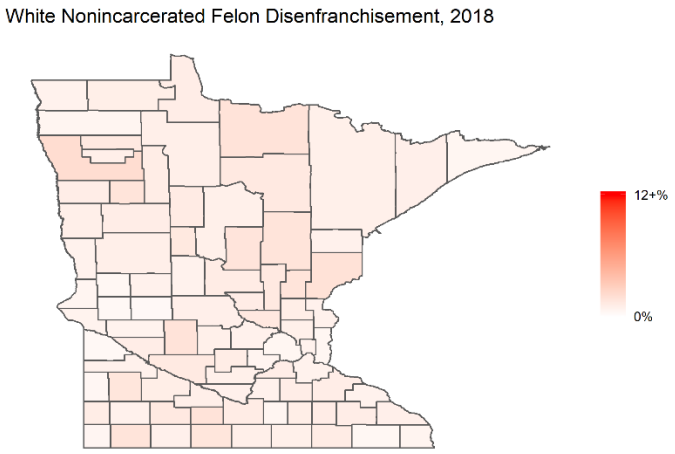
(*See* ADD-23 to ADD-24.)

Disproportionate disenfranchisement of racial minorities is the inevitable result of the disparate impacts that pervade the State's criminal justice system. (*See* ADD-24.) While 1.2% of all otherwise eligible Minnesotans living in the community were subject to felony disenfranchisement, the racial disparities are stark: 0.92% of white, 4.48% of Black, and 8.31% of American Indian Minnesotans. (*See id*.) Put another way, "[a]bout 4.5% of voting-age Black Minnesotans and 8.3% of American Indian Minnesotans are disenfranchised due to voting restrictions for persons on community supervision, relative to less than 1% of . . . White Minnesotans." (*Id.*) The below graph demonstrates those discrepancies:

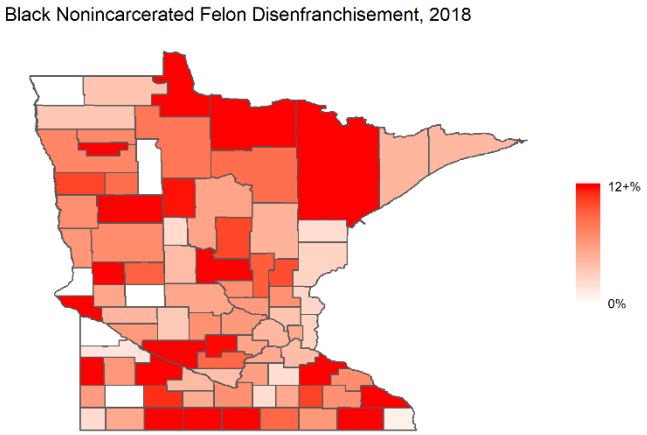


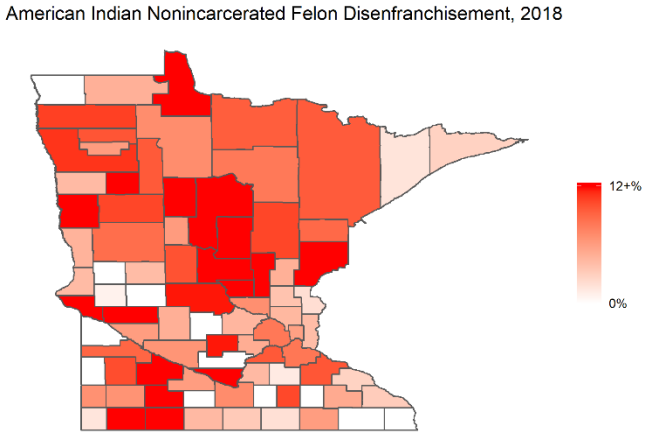
(*See* ADD-25.) Among other effects, disproportionate disenfranchisement of communities of color systematically dilutes their political influence and subordinates their standing in the political process. (ADD-36.)

The geographic variation in community-supervision rates by race compounds the disparities in some Minnesota counties. (*See* ADD-25 to ADD-28.) There is a relatively uniform, and uniformly low, rate for whites:



(*See* ADD-26.) However, in addition to disenfranchisement rates that are almost always uniformly higher, there is much more variation in the supervision rates for Black and American Indian Minnesotans across the state, with some counties disenfranchising as many as **12%** of otherwise eligible voters in these racial groups:





(*See* ADD-27 to ADD-28.)

E. The Absence of Any Government Interest in Disenfranchisement

While neither the Legislature nor Respondent has ever claimed that disenfranchisement of persons living in the community furthers some government

purpose, the undisputed factual record demonstrates that disenfranchisement undermines the aims of the criminal justice system. Indeed, the restoration of voting rights following a felony conviction is associated with decreases in crime and recidivism. (*See* ADD-35 to ADD-36; Pryor Aff. #60, Ex. 5 at 5-06; *see generally id.*, Ex. 11.) Voting aligns with the government's interest in encouraging civic and community engagement which, in turn, furthers rehabilitation and reduces recidivism. (*See* ADD-35 to ADD-36; *see generally* Pryor Aff. #60, Ex. 11.) Disenfranchisement of persons living in the community is particularly perverse because it stigmatizes and alienates persons from civic life, even as the criminal justice system purportedly seeks to integrate them into the community. (*See* ADD-35 to ADD-36; Pryor Aff. #60, Ex. 11 at 11-20 to 11-21.)

Nor does disenfranchising those living in the community serve a deterrent effect. No research has established that the collateral consequence of disenfranchisement has an additional and distinct deterrent effect above and beyond the risk of incarceration or a criminal sentence. (*See* Pryor Aff. #60, Ex. 5 at 5-05, Ex. 6 at 6-34 to 6-35.) For a punishment to deter crime, for example, people must *know* what the punishment is, but few offenders know that disenfranchisement is a consequence of a felony conviction. (*See id.*) No evidence suggests that would-be perpetrators account for the risk of disenfranchisement when considering whether to offend. (*See id.*)

In sum, the record shows that the State's felony disenfranchisement scheme subverts the State's interests, while failing to further any valid countervailing purpose.

F. The Impact of Disenfranchisement on Appellants

In 2013, Plaintiff-Appellant Jennifer Schroeder was sentenced to one year in jail and *40 years* of probation for drug possession. (2/25/20 Affidavit of Jennifer Schroeder ("Schroeder Aff.") #57, at ¶ 5.) While she has since graduated from college and now works as an addiction counselor, she will not be eligible to vote until 2053, at which point she will be 70 years old. (*Id.* ¶¶ 5–6, 10.)

Plaintiff-Appellant Christopher James Jecevicus-Varner was sentenced to 20 years of probation after pleading guilty to drug possession in 2014 following a battle with addiction. (2/25/20 Affidavit of Christopher Jecevicus-Varner ("Jecevicus-Varner Aff.") #59, at ¶ 3.) Mr. Jecevicus-Varner has successfully completed drug treatment, works as an electrician, and helps to care for his granddaughters. (*Id.* ¶¶ 5–7.) He "want[s] to set an example for [his] kids and grandkids by showing them the importance of voting," but he will not be eligible to do so until 2034, highlighting the profound intergenerational harm inflicted by the current disenfranchisement scheme. *(Id.* ¶ 8.)

Since his release from prison in 2016, Plaintiff-Appellant Elizer Eugene Darris has consistently held jobs, volunteered as a mentor and re-entry coach, worked on political campaigns, and been active in civic groups. (2/25/20 Affidavit of Elizer Eugene Darris ("Darris Aff.") #58, at ¶¶ 4–6.) Absent relief, he will remain disenfranchised until 2025 while on supervised release. (*Id.*)

Plaintiff-Appellant Tierre Davon Caldwell was released from prison on supervised release in 2016, and was disenfranchised until discharge of his sentence in December 2019. (2/26/20 Affidavit of Tierre Caldwell ("Caldwell Aff.") #62, at ¶ 5.) Since his

release, Mr. Caldwell "dedicated [his] life to mentoring at risk youth" and works in construction, raises children, and remains active in the community. (*Id.* ¶¶ 2, 7–8.)

SUMMARY OF ARGUMENT

Minnesota's system of felony disenfranchisement is constitutionally intolerable. The franchise is our Constitution's fundamental expression of the dignity and humanity of its citizens, and the right to vote is the essential guarantor that political power remains accountable to those subject to its exercise. The disenfranchisement of Appellants dehumanizes them, alienates them from the community, and excludes them from the political process even as they remain subject to the full weight of the state's power while living and working in the community. Outright denial of their right to vote therefore demands the searching scrutiny that courts apply to transgressions of fundamental constitutional rights, especially when it has such a stark disparate impact on persons and communities of color. Appellants respectfully seek this Court's careful judicial scrutiny of the systematic disenfranchisement of 53,585 Minnesotans living in our communities.

Minnesota's disenfranchisement scheme cannot survive *any* version of constitutional scrutiny. It should be shocking to the Court that the State has never offered the slightest rationale for disenfranchising members of the community on probation, parole, or supervised release, even as felony disenfranchisement has ever expanded in scope and racial disparities. All forms of constitutional review involve ascertaining a legislative interest served by the government action at issue, assessing the validity and magnitude of that interest, and evaluating whether a practice that burdens constitutional rights has at least some connection to that interest. The disenfranchisement scheme flunks

every articulation of this analysis because neither the Legislature nor Respondent has ever explained any purpose served by denying voting rights to persons living in the community on probation, parole, or supervised release. Worse, the current disenfranchisement scheme undermines the purposes of the criminal justice system by alienating individuals from the communities in which they live, codifies racial disparities in the criminal justice into structural political inequalities, and corrodes democracy by marginalizing a political underclass living in our communities. The record contains no factual support demonstrating any justification for the existence of the disenfranchisement scheme. The courts should not accept a statutory scheme that denies Appellants the right to vote for no reason at all.

STANDARD OF REVIEW

The district court's decision on cross motions for summary judgment is reviewed de novo. *See, e.g.*, *Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 821–22 (Minn. 2016). De novo review also applies to a district court's statutory interpretation, *State v. Minn. School of Business, Inc.*, 899 N.W.2d 467, 471 (Minn. 2017), and constitutional issues that have been decided as a matter of law, *Melendez v. O'Connor*, 654 N.W.2d 114, 117–18 (Minn. 2002).

ARGUMENT

Review of Appellants' constitutional claims brought under the equal protection guarantee, the due process clause, and Article VII of the Minnesota Constitution must start by determining the appropriate standard of constitutional review. First, Appellants maintain that strict scrutiny should be applied because the State's disenfranchisement

scheme infringes the fundamental right to vote. Second, even if strict scrutiny did not apply, Minnesota's heightened rational-basis review would be required due to the profound disparate impacts of the disenfranchisement scheme on persons of color. Third, even if Appellants' Article VII claim is reviewed by applying the balancing test used to evaluate some burdens on voting rights, the Court must weigh the government's interest in the disenfranchisement scheme against its infringement of the right to vote.

While it is vital to properly scrutinize a statutory scheme that disenfranchises Appellants, Minnesota's disenfranchisement scheme must ultimately be invalidated under *any* standard of constitutional review. The disenfranchisement scheme cannot survive even the least restrictive version of rational-basis review because neither the State nor Respondent has ever proffered, much less substantiated, a legitimate purpose served by it.

I. THE STATE'S DISENFRANCHISEMENT SCHEME CANNOT SURVIVE STRICT SCRUTINY WHICH MUST BE APPLIED TO THE DENIAL OF THE FUNDAMENTAL RIGHT TO VOTE

Strict scrutiny applies because Appellants have been denied the fundamental right to vote. Application of strict scrutiny unquestionably dooms the disenfranchisement scheme because it is not narrowly tailored to fulfill any government interest, much less a compelling one.

A. The Disenfranchisement Scheme Is Subject To Strict Scrutiny

Appellants bring two claims requiring strict scrutiny. Minnesota's guarantee of equal protection requires the courts to strictly scrutinize infringement of fundamental rights, including the right to vote. *See Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978). And Minnesota's constitutional protection of substantive due process also requires

strict scrutiny of a statutory scheme that burdens fundamental rights. *State v. Holloway*, 916 N.W.2d 338, 344 (Minn. 2018) (holding that substantive due process requires application of strict scrutiny when a "fundamental right is implicated" by a statutory scheme). Both claims lead to the same conclusion: because Appellants have been denied the right to vote, strict scrutiny must be applied.

1. The disenfranchisement scheme must be subject to strict scrutiny because it directly infringes on the fundamental right to vote

Minnesota strictly scrutinizes statutory schemes that directly burden the right to vote:

> The critical threshold inquiry in [Plaintiff's] equal protection challenge concerns the level of scrutiny to which [the statute] must be subjected by this court. The basic principles in this area are familiar. It is well established that the exercise of the political franchise is a "fundamental right." Legislative enactments which directly infringe such rights are subject to "strict scrutiny" review.

Ulland, 262 N.W.2d at 415 (footnotes omitted). Thus, when courts are confronted with a statutory scheme that "constitutes a sufficiently direct infringement on fundamental franchise rights, the 'strict scrutiny' test must be employed." *Id.* Minnesota courts are particularly vigilant regarding burdens imposed on the right to vote: "It is undisputed that the right to vote is a fundamental right under both the federal and state constitutions, and under both constitutions *any potential infringement* is examined under a strict scrutiny

standard of review." *Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005) (emphasis added) (footnote omitted).[4]

The Minnesota Supreme Court has been consistent and unequivocal in demanding strict scrutiny whenever citizens face disenfranchisement. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003) (holding that adherence to a statute that "denies the franchise" must be subject to heightened scrutiny and that strict scrutiny must be applied if the statutory scheme denies "some residents the right to vote"). Minnesota's longstanding practice of safeguarding the right to vote through exacting judicial scrutiny is grounded in the State's recognition that the franchise is the most fundamental of rights:

> Our review must be informed by the recognition that no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Erlandson, 659 N.W.2d at 729 (cleaned up). The commitment of Minnesota's courts to judicial protection of voting rights is longstanding:

> The right to vote . . . is a fundamental and personal right essential to the preservation of self-government. . . . To whatever extent a citizen is disinfranchised [sic] by denying him reasonable equality of representation, to that extent he endures taxation without representation and the democratic process itself fails to register the full weight of his judgment as a citizen. The importance of the franchise right is recognized by the Bill of Rights in Minn. Const. art. 1, s 2, M.S.A., and the principle of equality of representation has been preserved with respect to the legislature, art. 4, s 2.

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[4] *Kahn v. Griffin* evaluated a challenge to the timing of a municipal election under federal constitutional principles applicable to electoral regulations enacted to "maintain fair, honest, and orderly elections." 701 N.W.2d 815, 832–33 (Minn. 2005). Prior to doing so, *Kahn* reaffirmed Minnesota's commitment to rigorously scrutinizing any infringement of the fundamental right to vote. *Id.* at 831–32.

State ex rel. South St. Paul v. Hetherington, 61 N.W.2d 737, 741 (1953).

Here, Appellants challenge a statutory scheme that outright denies them the right to vote and excludes them entirely from the electoral process. Any statute that disenfranchises voters must be subject to strict scrutiny.

2. Article VII provides no basis to avoid strict scrutiny

The Court should reject any suggestion that strict scrutiny does not apply because Article VII deprives Appellants of their right to vote rather than the Legislature's statutory scheme. Any such argument cannot be squared with Respondent's acknowledgement that Article VII does not require or mandate Appellants' disenfranchisement as they live in the community on probation, parole, or supervised release. (Pryor Aff. #60, Ex. 12 at 12-02 to 12-03.) It is therefore undisputed that the Legislature has chosen to adopt a statutory scheme that denies Appellants the right to vote, an exercise of legislative discretion that Minnesota courts have always held necessitates strict scrutiny.

The text, history, and historical context of Article VII confirm that it does not *require* Appellants' disenfranchisement for at least three additional reasons. First, a plain reading of Article VII indicates that Appellants can and should have their right to vote restored upon their return to the community. Upon release from incarceration, Appellants regain the fundamental rights essential to citizenship, including the freedom to move in the community, associate, speak freely, obtain news, and attend the polls. Thus,

Appellants have been "restored to civil rights" because they have "restored to civil life in the community."[5]

Second, that plain reading of Article VII is consistent with the framers' intent. The framers expressly and deliberately rejected permanent disenfranchisement. (*Supra* at 5–6.) At ratification, the criminal justice system's control over offenders necessarily ended with release from incarceration. (*Supra* at 6–7.) Nothing in the ratification debates suggests that the framers intended to separate restoration of the right to vote from all other rights, including the freedom to move in the community, that are restored upon release from incarceration.[6] And the framers did not express any intent or interest in disenfranchising persons living in the community following incarceration. Given the

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[5] The text at the Republican Constitutional Convention supports Appellants' interpretation of Article VII. (*See* 2/25/20 Defendant's Memorandum Supporting Summary Judgment #52, at 3–4.) The original amendment read:

> No person shall be qualified to vote at any election who shall be convicted of treason—or any felony—or of voting, or attempting to vote, more than once at any election—or of procuring or inducing any person to vote illegally at any election; *Provided*, That the Governor or the Legislature may restore any such person to civil rights.

(ADD-46.) A representative moved to strike out everything after the word "felony," but that proposal was rejected because it would have permanently disenfranchised persons convicted of felonies. (*Id.*) The ratified version instead omitted the phrase, "*the Governor or the Legislature may* restore such person to civil rights," in favor of the passive phrase, "unless restored to civil rights." If the framers intended the restoration clause to mean that persons convicted of felonies are disenfranchised unless and until the Legislature decides in its discretion to re-enfranchise them, they could easily have done so with the original language or something like it. They adopted the current text instead.

[6] Since probation, parole, and community supervision did not exist at the founding, those freed from incarceration were not subject to any restrictions on civil liberties.

framers' desire to expand the franchise and the prevailing criminal justice system at ratification, the best reading of Article VII is that Appellants' right to vote are restored when they return to the community. At bare minimum, the framers intended that voting rights are subject to restoration upon release from incarceration.

That reading is also consistent with the overall structure of Minnesota's Constitution. The Constitution's broad commitment to the right to vote confirms that any expansion of the felony-disenfranchisement provision must be subject to exacting judicial review. Article VII includes a broad grant of the franchise followed by specific, enumerated exceptions. To adhere to Minnesota's longstanding principle that any burden on the right to vote must be strictly scrutinized, any expansion of the tightly circumscribed exceptions to universal franchise must be stringently reviewed. Given the primacy of Article VII's guarantee of the right to vote and the presumption against infringements of it, the Court should adopt the narrowest reading of the felony-disenfranchisement provision. *See Erlandson*, 659 N.W.2d at 733 (holding that "the general presumption of constitutionality afforded state statutes" does not apply to laws that infringe the right to vote (citation omitted)). Thus, the Constitution's protection of the fundamental right to vote requires courts to apply strict scrutiny to any discretionary legislative expansion of the enumerated exceptions.

The necessity of strictly scrutinizing expansion of Article VII exceptions beyond their narrowest terms is illustrated by the exceptions related to sanity and mental competence. Courts would not hesitate to apply strict scrutiny to a statutory scheme that expanded those exceptions beyond their narrowest possible reading. Indeed, it would be

constitutionally dangerous to claim that the Legislature somehow possesses wide discretion in defining those exceptions. So too, here.

Third, evaluating the constitutionality of Minnesota's system of felony disenfranchisement requires applying the terms of Article VII's disenfranchisement provision to the system of community supervision that the Legislature adopted and expanded since ratification. The scope and impact of felony disenfranchisement has wildly expanded since ratification and bears no relationship to anything the founders intended. (*Supra* at 7–8, 11–16.) That is true in terms of the raw numbers of individuals impacted, ever-lengthening terms of community supervision, and the extraordinary expansion of crimes now categorized as felonies. (*Supra* 7–8, 11–16.) The record contains no basis to conclude that the dramatic expansion of felony disenfranchisement is consistent with the purpose, meaning, text, or intent of Article VII.

In sum, it is the statutory scheme that prohibits Appellants from voting, and this Court should apply strict scrutiny to that legislative choice to disfranchise Appellants. The practice of disenfranchising Appellants and tens of thousands of persons living in the community vastly exceeds the original, intended, and plain scope of Article VII, and the courts should strictly scrutinize any scheme that expands disenfranchisement beyond the narrowest possible application of the Article VII exceptions.

B. The Disenfranchisement Scheme Cannot Survive Strict Scrutiny

Because strict scrutiny must be applied to disenfranchisement of persons living in the community on probation, parole, or supervised release, Respondent must demonstrate that the current disenfranchisement scheme is "narrowly tailored and reasonably

necessary to further a compelling governmental interest." *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 725 (Minn. 2008) (citation omitted); *see also In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn. 2014) ("Once a statute is subject to strict scrutiny, it is not entitled to the usual presumption of validity. Rather, the County must carry a heavy burden of justification, to show that the classification is narrowly tailored to serve a compelling government interest." (internal quotations marks and citations omitted)). The government's burden is "almost always insurmountable, and a statute will rarely survive the strict scrutiny test." *Mitchell v. Steffen*, 487 N.W.2d 896, 903 (Minn. Ct. App. 1992) (internal quotation marks and citation omitted), *aff'd* 504 N.W.2d 198 (Minn. 1993).

The current disenfranchisement does not fulfill any governmental purpose. The starting place for examining the government's interest must be the legislative record, and the basic premise of strict scrutiny is that the government must substantiate some justification for infringing constitutional rights. *See, e.g.*, *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (holding that Minnesota courts will not hypothesize an unstated government interest even when applying rational-basis review and instead require an "actual, and not just the theoretical" connection to a stated statutory goal); *In re Welfare of Child of R.D.L.*, 853 N.W.2d at 134–35 (applying strict scrutiny of statute at issue by carefully reviewing the legislative record, weighing the substantiated legislative interest in protecting children, and evaluating the detailed statutory scheme that protected the implicated fundamental rights); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17, 21–24, 31 (Minn. 1995) (providing detailed review of legislative history, record, and

stated statutory purpose when finding that statutory limits on the use of state funds for abortion services could not survive strict scrutiny). Here, the Legislature has never provided even a cursory or token rationale for disenfranchising persons living in the community, so the statutory scheme cannot survive.

Section 609.165 ties restoration of voting rights to discharge of sentence, rather than restoration of life in the community. Neither the text of the statute nor its legislative history provides any reason for adopting that scheme. Indeed, it is remarkable that the history of Section 609.165 not only fails to contain any reason to disenfranchise persons on probation, parole, or supervised release, but instead undercuts any possible legislative purpose served by disenfranchising those living in the community. Explaining the need for automatic discharge of sentences, the 1962 Advisory Committee comments state that it is "desirable to promote the rehabilitation of the defendant and his return to this community as an effective participating citizen." (ADD-42.) That is the full legislative explanation for a scheme that refuses to restore voting rights until the discharge of sentence. Missing from the legislative record is any explanation why persons convicted of a felony should not be restored to effective participating citizens when they return to the community on probation, parole, or supervised release.

In fact, the undisputed factual record demonstrates that the Legislature's interest in rehabilitation is *undermined* by denying voting rights to probationers and parolees who live in the community. Indeed, the record here confirms the obvious point that voting is an act of civic engagement that connects persons to the community, that voting is rehabilitative, and that voting reduces recidivism. (ADD-35 to ADD-36.) Not only are

voters less likely to recidivate than non-voters, they are "more likely to successfully complete probation and parole supervision," as demonstrated by data from those states where probationers and parolees are allowed to vote. (*Id*.) In contrast to the significant evidence demonstrating that voters are less likely to reoffend and more likely to successfully complete terms of probation or parole, no research or evidence suggests that denying the right to vote furthers any government interest in rehabilitation, reducing recidivism, or establishing community connections. (ADD-36 to ADD-37.) Thus, continued exclusion of Appellants from the political process is directly contrary to the Legislature's stated interest in promoting their involvement in the community as effective participating citizens.

Moreover, neither the legislative record nor the record in this litigation includes any indication that disenfranchisement serves some unstated criminal justice purpose or any government interest at all. Disenfranchisement does not function as meaningful deterrence or effective punishment. (*Supra* at 19–20.) In fact, the undisputed record demonstrates that many probationers do not even know that they are barred from voting, meaning that felony disenfranchisement cannot have created any deterrent effect and instead perversely subjects them to additional criminal jeopardy merely for the act of voting while on probation. (*See id.*) The record contains no evidence that the Legislature when adopting sentencing provisions in the criminal code or judges when issuing sentences specifically intend disenfranchisement as a punishment. When persons are returned to life in the community on probation or supervised release, disenfranchisement

erects barriers to civic participation and alienates probationers and parolees from their communities without any evidence of a countervailing purpose.

To the extent that the disenfranchisement scheme is defended as an exercise of legislative discretion, naked discretion that serves no purpose cannot constitute a compelling government interest. The very point of judicial review is to ensure that legislative discretion used to burden the exercise of constitutional rights is justified by a compelling governmental interest. *See Skeen v. State*, 505 N.W.2d 299, 312 (1993) (holding that the State must "prove that the statute is necessary to a compelling government interest"). It is not constitutionally acceptable for the Legislature to disenfranchise Appellants simply because it can.

Finally, even if Appellants' disenfranchisement served some unstated and unsubstantiated government interest, the current disenfranchisement scheme is not narrowly tailored to achieving it. Strict scrutiny requires that the compelling government interest be achieved through "the least restrictive means available." *Kahn*, 701 N.W.2d at 831 (quoting *Bernal v. Fainter*, 467 U.S. 216, 219 (1984)). If the State has "other viable options" or "available alternatives" to address its compelling government interest, then unnecessary infringement of fundamental rights is unconstitutional. *State v. Trahan*, 870 N.W.2d 396, 404 (Minn. Ct. App. 2015). Minnesota's system of felony disenfranchisement has expanded to deny the right to vote to 53,585 Minnesotans, including 45,855 probationers, living in the community prior to discharge of their sentences, making it impossible for the Respondent to show narrow tailoring of the current scheme. That is particularly true because the concept of probation and numerous

felonies did not even exist when Article VII was ratified, and neither the Legislature nor Respondent has ever claimed that explosive growth of felony disenfranchisement fulfills Article VII's intent or any other purpose. Indeed, the lack of any effort by the Legislature to consider or tailor the scope of disenfranchisement should be fatal to the current scheme.

Appellants perfectly illustrate the vast overreach of Minnesota's system of felony disenfranchisement. All live and work as exemplary, contributing members of the community. Whatever possible interest might be conjured as a reason to disenfranchise persons living in the community, it would be preposterous to claim that the State has some valid reason to disenfranchise Ms. Schroeder for 40 years because she was convicted of drug possession while fighting addiction. (Schroeder Aff. #57, at ¶¶ 4–5.) No one has made such an argument in this litigation.

In sum, the current disenfranchisement scheme has no relationship to a valid governmental interest, and it should be declared unconstitutional.

II. THE STATE'S DISENFRANCHISEMENT SCHEME CANNOT SURVIVE RATIONAL-BASIS REVIEW

Constitutional review of Appellants' disenfranchisement fares no better under rational-basis review. Particularly because heightened rational-basis review must be applied given the profound disproportionate impacts of the disenfranchisement scheme on persons of color, the lack of any state interest in denying the right to vote to persons living in the community renders the scheme indefensible. Even more, the defectiveness of the disenfranchisement scheme cannot survive normal rational-basis review.

A. Heightened Rational-Basis Scrutiny Must Be Applied If Strict Scrutiny Is Not

Even if strict scrutiny did not apply, the current disenfranchisement scheme cannot survive Minnesota's heightened rational-basis review. In *Russell*, 477 N.W.2d at 889, the Minnesota Supreme Court made clear that the Minnesota Constitution applies "an independent Minnesota constitutional standard of rational basis review" to strengthen Minnesota's guarantee of equal protection and ensure its independence from federal law. The *Russell* court expressly sought to affirm that "a more stringent standard of review as a matter of state law" must be applied to legislative classifications giving rise to equal protection concerns that do not trigger strict scrutiny. *Id.* While Minnesota's heightened rational-basis scrutiny has applied to equal protection claims "since the early eighties," *id.* at 888, it is especially necessary when legislative classifications disproportionately burden protected classes:

> It is particularly appropriate that we apply our stricter standard of rational basis review in a case such as this where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection.

Id. at 889.[7]

[7] A finding of disproportionate impact further supports application of heightened rational-basis review but is not required, because "this stricter standard applies when analyzing *any* case under the equal protection clause of the Minnesota Constitution." *Mitchell v. Steffen*, 487 N.W.2d 896, 904 n.2 (Minn. Ct. App. 1992) (emphasis in original), *aff'd*, 504 N.W.2d 198 (Minn. 1993).

Importantly, the Supreme Court recently reaffirmed *Russell* and the importance of strengthening rational-basis review when a statutory scheme disproportionately burdens racial minorities.

> [U]nder the equal protection guarantee of the Minnesota Constitution, we hold lawmakers to a higher standard of evidence when a statutory classification demonstrably and adversely affects one race differently than other races, even if the lawmakers' purpose in enacting the law was not to affect any race differently. *See State v. Russell*, 477 N.W.2d 886, 890 (Minn. 1991). In those circumstances, we require actual (and not just conceivable or theoretical) proof that a statutory classification serves the legislative purpose.

Fletcher Properties, Inc. v. City of Minneapolis, 947 N.W.2d 1, 19 (Minn. 2020). *Fletcher* further underscored that heightened rational-basis review demands "a tighter fit between the government interest and the means employed to achieve it in the form of actual evidence (as opposed to hypothetical or conceivable proof) that the challenged classification will accomplish the government interest." *Id.* at 27 n.12. *Fletcher* therefore confirms the fundamental importance of heightened rational-basis review to Minnesota's distinct guarantee of equal protection where the record demonstrates that a statutory scheme leads to inequitable racial impacts.

Here, the current disenfranchisement scheme leads to starkly disproportionate impacts on persons of color. At least as concerning as the enhanced criminal penalties for crack cocaine that the Supreme Court reviewed in *Russell*, the current disenfranchisement scheme criminalizes voting for 53,585 Minnesotans who are no longer incarcerated and have been misclassified as ineligible to vote. *See* Minn. Stat. §§ 201.145 (mandatory

reporting to prosecutors for registering to vote), and 201.014 (declaring voting while ineligible to be a felony).[8] All of the following facts are undisputed:

- White Minnesotans are subject to about 20 arrests per 1000 persons, comparable to the national figure of 21 arrests per 1000.
- Minnesota's arrest rates of Black and American Indian Minnesotans, however, are more than five times higher, with 102 and 108 arrests, respectively, per 1000 persons.
- In no Minnesota county is more than 2.2% of the white population disenfranchised by the disenfranchisement scheme, and, statewide, 0.9% of white adults are so disenfranchised.
- Statewide about 4.5% of the Black and nearly 9% of the American Indian voting-age populations are disenfranchised due to felony-level community supervision.
- While Black Minnesotans comprise about 4% of Minnesota's voting-age population, they account for more than 20% of disenfranchised voters.
- American Indian Minnesotans comprise less than 1% of Minnesota's voting age population but comprise 7% of those disenfranchised.

(*See generally* ADD-22 to ADD-28; Pryor Aff. #60, Ex. 1 at 1-17.)[9] Thus, many times more Black Minnesotans and American Indian Minnesotans are subject to felony

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[8] It should be noted that, unlike Sections 609.165 and 201.145, Section 201.014 closely tracks Article VII's disenfranchisement language by stating that persons ineligible to vote include individuals "convicted of treason or any felony whose civil rights have not been restored." Thus, Section 201.014 does not provide any text, much less a rationale or explanation, as to why or how individuals living in the community on probation, parole, or supervised release should be denied the right to vote.

[9] Racial discrepancies occur throughout the criminal justice system, resulting in greater disenfranchisement of persons of color. For example, a national study of the criminal justice system found that "Blacks and Hispanics are sentenced to prison more often and serve longer terms than whites convicted of similar crimes" and that whites are "more successful than minorities at virtually every stage of pretrial negotiation." (Pryor Aff. #60, Ex. 22 at 22-05 (citations and internal quotation marks omitted).)

disenfranchisement while living in the community than white Minnesotans—the very definition of disparate impact.

Minnesota's disenfranchisement scheme is especially pernicious because it turns all of the racial imbalances in the criminal justice system into political marginalization and structured political inequality. A system that results in the disproportionate disenfranchisement of racial minorities—with many thousands of voters of color denied the right to vote—is an affront to most basic notion of a constitutional guarantee of equal protection. At the very least, Minnesota's heightened rational-basis review should be applied to assess whether any government interest justifies such a result.

The district court's analysis on this point badly misses the mark. (*See* ADD-10.) While felony disenfranchisement is grounded in the Constitution, the question before the Court is the constitutionality of a statutory scheme that precludes restoration of voting rights until the discharge of sentences. The district court did not deny the settled point that the Legislature could restore voting rights to all persons living in the community, but has failed to do so for no stated reason. Instead, the prevailing legislative classification disenfranchises 53,585 Minnesotans who can and should be eligible to vote, and, due to racial disparities throughout the criminal justice system, excludes about 4.5% of Black and nearly 9% of American Indian Minnesotans from the political process.[10] Stated

[10] While the district court suggested that "Minn. Stat. § 609.165 affects all persons convicted of felonies equally," (ADD-10) the same could have been said of all persons convicted of crack cocaine. *Russell* squarely rejected that logic. As in *Russell*, the Legislature has adopted a classification that disproportionately affects persons of color.

differently, heightened rational-basis review exists precisely to assess whether the Legislature had a sound basis to tether voting rights to discharge of sentences notwithstanding the extreme racial inequities caused by that legislative decision.

B. The Disenfranchisement Scheme Cannot Survive Rational-Basis Review

The current disenfranchisement scheme fails rational-basis review for two reasons. First, it is an arbitrary, ill-considered statutory scheme that undermines the Legislature's stated interest in returning persons convicted of felonies to effective citizenship. Second, no genuine and substantial justification exists for misclassifying Appellants as ineligible to vote.

1. No actual or stated legislative purpose justifies classifying Appellants as ineligible to vote

The current disenfranchisement scheme cannot survive Minnesota's rational-basis review because the Legislature has never articulated any purpose for denying voting rights to individuals who live in the community on probation, parole, or supervised release. A critical component of heightened rational-basis review is scrutiny of an actual, stated, substantiated, and valid government interest in the classification:

> What has been consistent, however, is that in the cases where we have applied what may be characterized as the Minnesota rational basis analysis, we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires. Instead, we have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.

Russell, 477 N.W.2d at 889. Emphasizing the point, the *Russell* court carefully examined the legislative rationale and record that purportedly justified greater criminal penalties for

crack than powder cocaine, and the court invalidated those heightened penalties given the infirmity of the record. *Id.* at 889–90. In particular, *Russell* held that "anecdotal testimony," lack of "factual support," and lack of a "sufficiently justified" rationale for the classification rendered it unconstitutional. *Id.*; *see also Fletcher Properties, Inc.*, 947 N.W.2d at 24–25 (rejecting hypothetical or conjectural justifications); *State v. Garcia*, 683 N.W.2d 294, 300 (Minn. 2004) (applying heightened rational-based review to invalidate statutory system for awarding jail credit based on review of actual legislative history, aims, and record); *Healthstar Home Health, Inc. v. Jesson*, 827 N.W.2d 444, 450–51 (Minn. Ct. App. 2012) (holding that "assumptions rather than facts" cannot serve as a sufficient government interest to survive the Minnesota rational-basis test); *Granville v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 668 N.W.2d 227, 235 (Minn. Ct. App. 2003) (denying government's motion to dismiss because the government must provide evidence showing the reasonableness of the challenged classification). And even under the least stringent version of rational-basis review, the courts must determine whether the statutory scheme "emerged from a reasoned, deliberative process, rather than as a result of legislative chance, whim, or impulse." *Fletcher Properties, Inc.*, 947 N.W.2d at 10.

At least the *Russell* court had a legislative record, a stated legislative purpose, and some legislative fact finding to review. Here, there is nothing at all. Absent pure conjecture or guesswork, the Court cannot find an explanation anywhere in the record for the Legislature's decision to disenfranchise persons living in the community until discharge of sentence. *Russell* makes clear that *post hoc* rationalizations will not suffice,

so the current disenfranchisement scheme necessarily fails Minnesota's rational-basis review.

Instead of any legislative explanation for denying the right to vote to Appellants and others living in the community prior to discharge of sentence, the legislative history confirms that the scheme is irrational, arbitrary, and no more than the sort of legislative whim disproportionately impacting a protected class that *Fletcher* proscribes. Again, the Legislature's only stated interest in disenfranchising individuals until the discharge of sentence under Section 609.165 is to return persons to "effective participating citizens" after felony convictions. (ADD-42.) That interest is utterly divorced from the statutory classification that denies Appellants the ability to participate as effective citizens. Moreover, disenfranchisement of persons on parole, probation, or supervised release serves no sound criminal-justice purpose since disenfranchisement alienates persons from the community, undermines reintegration, increases the likelihood of recidivism, does nothing to protect the community, and adds no effective deterrent or punishment beyond other criminal sanctions. (*Supra* at 19–20.)

The reality is that the Legislature failed to restore voting rights to persons restored to life in the community without any record that it made a deliberate decision to perpetuate their disenfranchisement. Thus, Appellants' disenfranchisement is borne of legislative inaction, inconsideration, and inertia, not any expressed legislative intent. The failure of the Legislature to undertake the work of articulating a legislative purpose and developing a factual record is the very reason that 53,585 Minnesotans are currently

disenfranchised. [11] Thus, the current disenfranchisement scheme stands as the poster child for the merits of *Russell*'s heightened rational-basis review, and it cannot withstand that scrutiny.

Moreover, *Russell* illustrates why heightened rational-basis review is so critical when a statutory scheme yields racially disparate impacts. For one thing, the process of stating and supporting a sufficient legislative purpose allows courts to smoke out improper motive, identify pretextual legislative rationales, and ensure that a sound reason exists for policies that disadvantage persons of color. *See, e.g.*, *Russell*, 477 N.W.2d at 892 (Yetka, J., concurring) (noting that legislative history provided "enough evidence from which to infer discriminatory purpose"). For another thing, a legislative record allows courts to evaluate the sufficiency of the fit between the purpose of a classification and its design. At bare minimum, fulfillment of equal protection requires a clearly stated and defined purpose underlying any classification that disproportionately burdens protected classes, particularly with respect to the right to vote. The Legislature's abject failure to provide any legislative purpose, backed by a record, for denying Appellants' right to vote implicates all of these principles. In particular, without a history of legislative consideration, the Court cannot foreclose racial discrimination as a motivation

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[11] The basic premise of Minnesota's rational-basis review is that the Legislature has the responsibility to undertake that factfinding, giving the Court a basis to follow its work. By never expressly considering why voting rights should be denied to those living in the community on probation, parole, or supervised release, it failed to do so. Left with a blank legislative record, a factual record supporting the classification cannot be assumed or manufactured for litigation. *Russell* instead requires the Court to strike down the unsupported classification.

for a system that disproportionately disenfranchises and disempowers communities of color.[12]

Simply put, equal protection under the Minnesota Constitution must at least mean that a legislative scheme cannot disproportionately disenfranchise persons of color without explanation and for no good reason. That is exactly the injustice before the Court here.

2. No genuine and substantial justification exists for misclassifying Appellants as similarly situated to those incarcerated for felony convictions and ineligible to vote

The Legislature had no genuine and substantial basis for classifying as ineligible to vote those persons living in the community on probation, parole, or supervised release. Minnesota's rational-basis review requires not only a "genuine and substantial . . . basis to justify" the legislative classification, but also a "genuine" connection between the classification and the legislative purpose. *Russell*, 477 N.W.2d at 888. That is, the classification must be tailored to the purpose of the law based on "the distinctive needs peculiar to the class[.]" *Id.* While acknowledging that the Court is disadvantaged by the lack of any stated legislative purpose supporting the current disenfranchisement scheme, disenfranchisement of the Appellants badly fails this test.

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[12] As Professor Uggen explained in his report describing the findings of his research, "the adoption and expansion [felony disenfranchisement] laws in the United States is closely tied to the divisive politics of race and the history of racial oppression." And there is no doubt that the corrosive politics of race tainted the framers' approach to Article VII given their deliberate rejection of universal suffrage. (ADD-29.)

Appellants function as participating members of their communities identical in all relevant respects to eligible voters: they work, volunteer, raise families, worship, pay taxes, hold and advocate political opinions, and participate in the private, civic, and public lives of their communities. (*See generally* Schroeder Aff. #57; Caldwell Aff. #62; Jecevicus-Varner Aff. #59; Darris Aff. #58.) In marked contrast to incarceration, they now have all of the rights, freedoms, and standing needed to participate in the State's elections. *See, e.g.*, *Garcia*, 683 N.W.2d at 299 (invalidating classification for failure to make "relevant comparison" between persons with respect to statutory purpose); *Mitchell*, 487 N.W.2d at 904–05 (rejecting classification based on criteria not "relevant to its asserted purpose").

The classification fares no better if the distinguishing principle is whether Appellants have been "restored to civil rights." For the purpose of voting, the current disenfranchisement scheme places Appellants in the same classification as incarcerated prisoners. Yet they have far more in common with any other eligible voter living in the community. The simple fact that Appellants have the freedom to attend their polling locations on Election Day demonstrates that they are similarly situated to eligible voters, not prisoners, in terms of civil rights. They have the rights to speak freely, walk around their communities, consume the news of their choice, work for or associate with campaigns, talk to candidates, and exercise all of the other civil rights relevant to voting. In terms of civil rights—and especially the civil rights relevant to voting—no genuine and substantial basis exists to define persons living in the community on probation or parole to be the same as incarcerated prisoners. The result of the Legislature's crude,

unconsidered classification scheme is that Appellants have been misclassified as similarly situated to incarcerated prisoners who lack all but the most basic civil rights. Their disenfranchisement has been the consequence, and it should be declared unconstitutional.

The arbitrariness of classifying Appellants as ineligible to vote is further exposed by the fact that there is no principled reason to deny voting rights to those subject to community supervision for felony convictions while no such sanction applies to those on community supervision for non-felony convictions. While terms of community supervision may vary widely and are subject to the discretion of the criminal justice system, there are no material differences between the restrictions that can be placed on those convicted of felonies rather than, for example, gross misdemeanors.[13] Outside of those restrictions, both groups share the same fundamental liberties and right to move around in their community, volunteer, and participate in civic and political life. But it is arbitrary to disenfranchise those living in the community on probation, parole, or supervised release for a felony, while no political rights are denied to those convicted of misdemeanors.[14] Without any explanation or distinctions, the Legislature disenfranchised

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[13] *See, e.g.*, Minn. Stat. § 609.135 subd. 1 (stating that offenders can be placed on probation "with or without supervision and on the terms the court prescribes"). Supervision by probation officers, rehabilitative requirements, and other limits associated with probation can be applied to either group.

[14] In terms of the criminal code and the practice of the criminal justice system, the distinctions between conduct that constitutes a felony and conduct that constitutes a misdemeanor are often blurry and arbitrary. For example, it is a gross misdemeanor for a first-time offender to possess less than .05 grams of heroin, even .0499 grams, but possessing .05 grams can be punished as a felony. Minn. Stat. § 152.025 subd. 4. A

tens of thousands of people based on the blunt reason that they have committed felonies, not misdemeanors. It is fatal to the statutory scheme that the Legislature failed to establish any genuine and substantial connection between eligibility to vote and completion of felony sentences while living in the community.

Because the State has no genuine and substantial basis to misclassify Appellants as ineligible to vote, its system of disenfranchisement should be ruled unconstitutional to the extent that it denies the right to vote to people living in the community on probation, parole, or supervised release.

III. THE STATE'S DISENFRANCHISEMENT SCHEME CANNOT SURVIVE THE BALANCING TEST APPLICABLE TO GOVERNMENT BURDENS ON THE RIGHT TO VOTE

Even when strict scrutiny does not apply to laws, rules, or election procedures that burden the right to vote, the Minnesota Constitution requires courts to ensure that such burdens are outweighed by the government's interest. In *Kahn*, 701 N.W.2d at 832, for example, the Minnesota Supreme Court reiterated Minnesota's typical reliance on the "analytical approach" used by the U.S. Supreme Court to review electoral procedures or

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person who has been twice convicted of possessing small amounts of heroin can be sentenced as a felon, essentially turning addiction into a felony. *Id.*, subd. 4(b). In contrast, intentionally accessing a computer without authorization and in a way "that creates a risk to public health and safety" is only punishable as a misdemeanor. *Id.* § 609.891 subd. 3. These distinctions are exacerbated by the discretion, resource constraints, and biases that may affect charging and pleading decisions. *Cf. State v. Herme*, 298 N.W.2d 454, 455 (Minn. 1980) (noting that, "as a general rule, the prosecutor's decision whom to prosecute and what charge to file is a discretionary matter"). The Respondent cannot show that the State has a rational, valid reason to decide which persons living in the community following a criminal conviction get to vote based on the distinctions between felonies and misdemeanors.

regulations that "in some measure burden the right to vote." In contrast to strict scrutiny that applies to "any potential infringement" of the right to vote, Minnesota follows federal courts by applying a more flexible approach to electoral regulations that do not directly infringe voting rights. *Id*. "We have indicated that we will weigh the character and magnitude of the burden imposed on voters' rights against the interests the state contends justify that burden, and we will consider the extent to which the state's concerns make the burden necessary." *Id.* at 833.

In *Minn. Voters Alliance v. Ritchie*, 890 F. Supp. 2d 1106, 1116 (D. Minn. 2012), the District of Minnesota confirmed that, at a minimum, any expansion of the franchise exceptions in Article VII must be reviewed under the analytical framework applied in *Kahn*. Applying that same sliding scale, the court held that exceptions to the right to vote enshrined in Article VII rights must be narrow and restricted, and it therefore rejected an attempt to interpret more broadly Article VII's guardianship exception to the right to vote. *See id.* (recognizing the tension between Article VII exceptions and the broad right to vote and holding that an expanded definition of guardianship that disenfranchised voters could not survive the "close constitutional scrutiny" that would apply). In fact, *Minnesota Voters Alliance* noted that the statutory scheme related to guardianship is much more protective of voting rights than the "state constitution's apparent categorical ban on the rights of persons 'under guardianship' to vote[.]" *Id.* at 1117. Thus, the Legislature has a constitutional obligation to carefully tailor voting restrictions, and ill-considered expansions of Article VII's disenfranchisement provisions must be invalidated. *See also Pavlak v. Growe*, 284 N.W.2d 174, 177–78 (Minn. 1979) (holding

that the Minnesota Secretary of State violated Article VII, § 6 by barring a candidate who had violated campaign laws from the ballot because doing so unnecessarily exceeded the state's interest in protecting electoral integrity).

Applying the balancing approach used in *Kahn* yields the same result as strict scrutiny or heightened rational-basis review, because no government purpose outweighs Appellants' disenfranchisement. The burden imposed by the disenfranchisement scheme on their voting rights is absolute. To balance the scales, the State's interest must be correspondingly weighty and accompanied by a scheme that is "necessary" to achieve it. *Kahn*, 701 N.W.2d at 833. Yet the current disenfranchisement scheme violates the constitutional guarantee of the right to vote by significantly extending the reach of felony disenfranchisement to include Appellants and others living in the community on parole, probation, or supervised release. Through the Legislature's historical failure to consider when to restore voting rights as a question separate from discharge of sentences and expansion of the criminal justice system, 53,585 Minnesotans living in the community are now denied the fundamental right of self-government. Thus, there is a terrible imbalance between the burden on Appellants' right to vote, the lack of any established government interest, and the vast scope of the disenfranchisement perpetuated by the current disenfranchisement scheme.

Finally, Appellants' challenge to Minnesota's system of felony disenfranchisement presents exactly the type of circumstances that, according to *Kahn*, warrant greater protection of the right to vote under the Minnesota Constitution than the federal Constitution. While rejecting a constitutional challenge to the timing of

Minneapolis's municipal elections based on federal cases reviewing election procedures, *Kahn* went out of its way to hold "that under other facts and circumstances, a successful argument may be made that greater protection for the right to vote exists under the Minnesota Constitution." *Kahn*, 701 N.W.2d at 834. *Kahn* reviewed a claim that Minneapolis should have held its election closer in time to the 2000 census results. Here, by contrast, Appellants challenge a vast system of disenfranchisement that denies the right to vote to tens of thousands of Minnesotans and disproportionately disenfranchises persons of color. To adhere to Article VII's broad protection of the right to vote, Minnesota has a constitutional interest in ensuring that any system of disenfranchisement is strictly scrutinized. *Id.* at 830–31. Minnesota courts should not follow any approach by federal courts that would relax that exacting scrutiny.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court issue an order restoring their right to vote and declaring the practice of disenfranchising persons living in the community on probation, parole, or supervised release to be unconstitutional.

Date: November 16, 2020

/s/ Craig S. Coleman

FAEGRE DRINKER BIDDLE & REATH LLP

Craig S. Coleman (#0325491)
Michael M. Sawers (#0392437)
Thomas K. Pryor (#0395209)
Kirsten L. Elfstrand (#0401213)
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Phone: (612) 766.7000

Teresa J. Nelson (#0269736)
David P. McKinney (#0392361)
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
2828 University Avenue Southeast,
Suite 160
Minneapolis, MN 55414
Phone: (651) 645.4097

Theresa J. Lee (NY #5022769) (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549.2500

Attorneys for Plaintiffs-Appellants Jennifer Schroeder, Elizer Eugene Darris, Christopher James Jecevicus-Varner, and Tierre Davon Caldwell

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STATE OF MINNESOTA
IN COURT OF APPEALS

Jennifer Schroeder, et al.,

Plaintiffs-Respondents,

v. **ORAL ARGUMENT REQUESTED**

Minnesota Secretary of State Steve Simon,
in his official capacity,

Defendant-Appellant.

Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, for a brief produced with a proportional font. The length of this brief is 12,190 words. This brief was prepared using Microsoft Word 2016 software.

Date: November 16, 2020

/s/ Craig S. Coleman

FAEGRE DRINKER BIDDLE & REATH LLP

Craig S. Coleman (#0325491)
Michael M. Sawers (#0392437)
Thomas K. Pryor (#0395209)
Kirsten L. Elfstrand (#0401213)
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Phone: (612) 766.7000

Teresa J. Nelson (#0269736)
David P. McKinney (#0392361)
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
2828 University Avenue Southeast,
Suite 160
Minneapolis, MN 55414
Phone: (651) 645.4097

Theresa J. Lee (NY #5022769) (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549.2500

Attorneys for Plaintiffs-Appellants Jennifer Schroeder, Elizer Eugene Darris, Christopher James Jecevicus-Varner, and Tierre Davon Caldwell