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.

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INTRODUCTION

Disregarding the longstanding precedent of the Minnesota Supreme Court, Defendant-Respondent Secretary of State Steve Simon focuses his brief on minimizing the standard of constitutional review because he does not and cannot articulate any legitimate purpose served by disenfranchising the tens of thousands of Minnesotans who live, work, and participate in their communities. No parsing of his brief, the statutory scheme, or the history he reviews yields any basis for concluding that our government's interests are served by prohibiting Appellants from voting. Under any theory of constitutional review, it cannot be acceptable to deny Appellants the right to vote for no reason at all.

Respondent provides a thorough recitation of the legal history explaining the development of Minnesota's system of felony disenfranchisement and the statutory scheme that disenfranchises Appellants. Missing from that review is any justification for it. To the contrary, as Respondent acknowledges, the only legislative rationale for the disenfranchisement scheme is the Legislature's recognition, when adopting Section 609.165, that disenfranchisement stigmatizes and undermines the rehabilitation of people living in the community. He fails to explain how that rationale can reasonably be used to defend the disenfranchisement of Appellants and 53,585 Minnesotans living in the community while enduring that stigma. And the sheer arbitrariness of the disenfranchisement scheme is fully exposed by Respondent resorting to the suggestion that the current scheme should be accepted because previous iterations were worse.

Upon examination, Respondent's brief shows just how little is in dispute and the

absence of any factual support for the disenfranchisement scheme. Respondent does not dispute that community supervision did not exist at the Constitution's founding, that nothing in the framers' debates shows an intent to disenfranchise people living in the community, and that the State's constitutional history provides no justification for extending felony disenfranchisement to people on community supervision. Respondent does not dispute that disenfranchisement of Appellants is an exercise of legislative discretion, not a constitutional requirement. Respondent does not dispute that the Legislature has never articulated an interest in disenfranchising people living in the community, that doing so undermines its actual stated interest in rehabilitation, and that the disenfranchisement scheme is utterly divorced from any valid governmental purpose that has ever been articulated by the Legislature. Finally, Respondent does not dispute that the ultimate result of the disenfranchisement scheme is the disproportionate exclusion of people of color from the most basic right of citizenship, with disturbing rates of disenfranchisement undermining the political standing of communities of color.

This record leaves the disenfranchisement scheme with no viable constitutional defense. Systematic deprivation of the right to vote cannot be upheld because the practice is just the way it has always been, because the current statutory scheme is not as irrational as previous versions, or because the courts must yield to a naked exercise of legislative discretion no matter how arbitrary.

Because restoration of their right to vote serves the only legislative purpose underlying the current disenfranchisement scheme, Appellants respectfully request that the Court grant that relief.

ARGUMENT

I. RESPONDENT'S CRITICISMS OF THE FACTUAL RECORD FAIL TO ESTABLISH ANY GOVERNMENTAL PURPOSE SERVED BY THE DISENFRANCHISEMENT SCHEME

Respondent has never submitted any evidence or disputed any facts regarding the scope and impacts of the felony-disenfranchisement system. Instead, at the end of his brief, Respondent attempts to brush aside the factual record, but this effort only highlights the indefensibility of the disenfranchisement scheme. (*See* Resp. Brief 28–30.) Every version of constitutional review entails assessing whether the challenged government action furthers a valid legislative purpose. The facts matter, and, at bare minimum, a constitutional defense must start with some concrete, legitimate, rational reason for a deprivation of constitutional rights. Respondent offers nothing.

Respondent's concessions are dispositive. First, he admits that "strong policy reasons" exist that would justify changing the law. (Resp. Brief 28.) While quibbling with the extent to which studies statistically prove the link between disenfranchisement and recidivism, he does not deny the point, present any contrary evidence, dispute that disenfranchisement stigmatizes people living in the community, or, most definitively, claim that the Legislature even so much as considered how disenfranchisement of people on community supervision serves its interest in rehabilitation. (Resp. Brief 28–30.)[1] To

[1] Respondent refers to Professor Uggen's review of the evidence on recidivism, and the research confirms the obvious reality that rehabilitation of persons living in the community is furthered by civic engagement and active participation in the political process. (*See, e.g.*, ADD-35 (explaining that "voting is significantly correlated with lower crime" and voters "are thus less likely to be arrested and incarcerated").) Respondent has

the contrary, Respondent *admits* that the Legislature's stated interest in enacting Section 609.165 included the recognition that restoration of the franchise promotes rehabilitation and eliminates the counterproductive stigma associated with disenfranchisement. (Brief 6–7.) Thus, the Legislature's judgment *accords* with the social-science research. Yet Respondent cannot explain why the Legislature then adopted a policy directly at odds with its stated purpose by disenfranchising members of the community. The record confirms a complete disconnect between the Legislature's stated purpose and the adopted statutory scheme, and such an arbitrary denial of constitutional rights cannot survive any variant of judicial scrutiny.

Second, Respondent acknowledges that "nothing would prevent the legislature" from restoring voting rights to people living in the community on probation, parole, or supervised release. (Resp. Brief 28.) Respondent therefore concedes that the current disenfranchisement scheme is an exercise of legislative discretion. Because Appellants' disenfranchisement is not required by Article VII, the statutory scheme is the cause of their disenfranchisement. The "narrow legal question" before the Court (*see* Resp.

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presented no evidence on this issue and has never contested the conclusion that the link between voting and reduced criminal conduct is "statistically significant." *Id.* Multiple amicus briefs provide compelling additional support on this point. (*See, e.g.*, D.C., *et al.* Amicus Brief 8–13; All Square, *et al.* Amicus Brief 24–25; City of Saint Paul and City of Minneapolis Amicus Brief 14–15.) And multiple amici emphatically show that disenfranchisement schemes *do* <u>*not*</u> promote rehabilitation and serve <u>*no*</u> legitimate state interest, including amici responsible for administering criminal justice systems. (*See, e.g.*, D.C., *et al.* Amicus Brief 13–15; Ramsey County Attorney's Office Amicus Brief 12; City of Saint Paul and City of Minneapolis Amicus Brief 15; Minnesota Association of Black Lawyers Amicus Brief 19–20; *see also generally* Volunteers of America Amicus Brief.).

Brief 30) is the constitutionality of the Legislature's decision to deprive people living in the community on probation, parole, or supervised release of the right to vote. Answering that question must start with a legislative justification for that decision, and Respondent's brief confirms that none exists.

Third, Respondent is forced to admit that "troubling data" justify "closer scrutiny of racial disparities in the criminal justice system." (Resp. Brief 28–29.) That concession occurs after Respondent makes the shocking and baseless assertion that the disenfranchisement scheme "does not cause racial disparities" (Resp. Brief 20), even as he never disputes the profoundly inequitable exclusion of people of color from the political process caused by the legislative scheme. The undisputed facts that Respondent asks the Court to ignore strike at the core of our constitutional fabric: the statutory scheme Appellants challenge disenfranchises 8% of otherwise eligible American Indian and 4.5% of Black Minnesotans living in the community (App. Brief 17); disenfranchises 10% of Black and American Indian voters in some Minnesota counties (ADD-27 to 28); and converts racial disparities throughout the criminal justice system into structural racial political inequality (*see, e.g.*, Volunteers of America Amicus Brief 13–14; Red Lake Band Amicus Brief 5–8; City of Saint Paul and City of Minneapolis Amicus Brief 10–12.). Rather than disputing these facts and the profound implications they have for our democratic system, Respondent asks the Court to ignore them and defer the issue to the Legislature. That position is directly contrary to the role the Supreme Court has established for Minnesota courts in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991). Moreover, Respondent takes that position while failing to point to any evidence showing

that the unequal exclusion of people of color from the political process has not animated the Legislature's ongoing refusal to reform the scheme. As more fully set forth below, "closer scrutiny" of statutory classifications that perpetuate racial inequalities is the duty of the courts, and here that requires the State to offer a reason for disproportionately disenfranchising people of color living in our communities. Particularly given the Respondent's recognition of the discriminatory history of felony disenfranchisement (Resp. Brief 30), his inability to offer one is alarming and necessitates relief.

Finally, Respondent appears to have the misimpression that Appellants built the factual record to convince the courts of the "popularity" of their position. (*See* Resp. Brief 29.) Appellants instead ask the courts to follow the law by scrutinizing whether, at a minimum, some legitimate reason justifies their continued disenfranchisement. The undisputed record demonstrates that the State has no legitimate interest in the statutory scheme, and that is a legal problem regardless of politics or public opinion. Lacking any articulated purpose furthered by Appellants' disenfranchisement, Respondent's defense reduces to a pronouncement that the Legislature has disenfranchised Appellants simply because it can and that the courts should look the other way. Appellants respectfully request that the Court reject such an arbitrary denial of the right to vote and grant their requested relief.

II. STRICT SCRUTINY SHOULD APPLY TO A STATUTORY SCHEME THAT DISENFRANCHISES CITIZENS

Respondent's efforts to avoid strict scrutiny lack merit and demonstrate the need to apply it.

A. The Court Should Strictly Scrutinize the Legislature's Denial of Appellants' Right to Vote

Article VII establishes a broad grant of the franchise that Minnesota courts have long understood constitutes a fundamental right due to the significance of voting rights to the design of our constitutional system and democratic governance. *See Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978); *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003); *Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005). Appellants are denied the right to vote by a statutory scheme—including both Section 609.165 and Section 201.145—and Minnesota courts strictly scrutinize legislative deprivation of voting rights. Respondent's efforts to avoid strict scrutiny should be rejected.[2]

As a threshold matter, Respondent does not refute the premise established in *Ulland*, *Erlandson*, and *Kahn* that it is critically important for courts to review the denial of the right to vote. (*See* App. Brief 25–27.) In *Erlandson*, for instance, the Supreme Court recognized that all other rights follow from the right to vote and are "illusory" without it. 659 N.W.2d at 729. Judicial review is the only recourse of the disenfranchised, so it is essential that courts vigorously examine a statutory scheme that deprives citizens of the right to vote. It is therefore deeply troubling for the State to deny tens of thousands of otherwise eligible Minnesotans the right to vote and then attempt to minimize judicial

[2] Significantly, Respondent does not attempt to argue that the disenfranchisement scheme can survive strict scrutiny. Strict scrutiny ensures that any denial of the right to vote is deliberate, well-considered, and narrowly tailored to achieving a compelling purpose. (*See* App. Brief 30–31.) Because the courts should harbor serious concerns about any statutory scheme that denies voting rights without good reason, the inability of the disenfranchisement scheme to withstand such review underscores the need to apply it in the first instance.

review of, and the need to explain the rationale for, that practice. Respondent's position cannot be squared with the Supreme Court's recognition of the "paramount importance of the right to vote" and its role as the foundation of democratic governance. *Id.* at 730.

Much of Respondent's argument hinges on the misdirection that Section 609.165 is a restoration statute that does not expressly bar people living in the community from voting. (*See, e.g.*, Resp. Brief 9, 15.) That position cannot be squared with Respondent's recognition that the statutory scheme is an exercise of legislative discretion that prohibits Appellants from voting. (*See* Brief 28.) The current disenfranchisement scheme—including both Section 609.165 and Section 201.145—denies the restoration of voting rights to individuals living in the community who can and should be eligible to vote. Section 609.165 restores voting rights at discharge of sentence, but it also has the necessary effect of *denying* restoration to people on community supervision prior to that point. In any case, Section 201.145 affirmatively ensures that they are blocked from registering to vote. There is no distinction between disenfranchising an eligible voter and refusing to restore a voter to eligibility—either way, the voter is excluded from the political process by an act of legislative discretion. Because Appellants' disenfranchisement is rooted in the statutory scheme, courts should strictly scrutinize it to ensure that the statutory scheme perpetuating a deprivation of the right to vote is narrowly tailored to accomplishing a defined and compelling government interest. *See Ulland*, 262 N.W.2d at 415 (requiring strict scrutiny of legislative schemes that infringe the right to vote).

B. The 14th Amendment Is Not Relevant to Appellants' Claims Under the Minnesota Constitution

All of Appellants' claims are brought under the Minnesota Constitution. Respondent's recourse to *Richardson v. Ramirez*, 418 U.S. 24 (1974), and federal case law interpreting the federal 14th Amendment is misplaced. (*See* Resp. Brief 11.) *Richardson* specifically relies upon the text of the 14th Amendment to the U.S. Constitution, and it therefore does not constrain the rights of Minnesotans protected by our own Constitution. Furthermore, *Richardson* certainly did not hold that the right to vote is anything other than fundamental, and the federal cases expounding on the essential, fundamental nature of the right to vote are legion. *See, e.g.*, *Kahn*, 701 N.W.2d at 830–31 (reviewing federal-court recognition of the right to vote as fundamental). *Richardson* instead issued the narrow holding that the text of the 14th Amendment forecloses *federal* constitutional challenges to felony disenfranchisement. *Richardson*, 418 U.S. at 54 (holding that Section 2 of the 14th Amendment amounts to an "affirmative sanction" of state felony disenfranchisement); *see also* U.S. Const. Am. 14, § 2 (penalizing states for denying the right to vote of any person "except for participation in rebellion, or other crime").

Because *Richardson* turned on specific language in the 14th Amendment, it simply does not apply to Appellants' claims under the Minnesota Constitution. Minnesota courts must look to the text of the Minnesota Constitution, Minnesota's statutory scheme, and Minnesota's history of being "independently responsible for safeguarding the rights of [our] citizens." *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985).

The Minnesota Constitution departs from the federal Constitution in important respects. The equal protection guarantee in Minnesota's Article I does not contain any exception equivalent to Section 2 of the 14th Amendment. And unlike the text of the 14th Amendment, it directly and broadly guarantees the franchise. Additionally, Article VII broadly affirms the right to vote and ensures a path to restoration of voting rights following felony disenfranchisement. It is that process for restoration that Appellants ask the Court to review for adherence to Article I and Article VII. The federal Constitution provides no basis for Minnesota courts to refuse to apply careful scrutiny of the Legislature's refusal to restore voting rights.

Moreover, the Minnesota Supreme Court has made it clear that it will depart from federal constitutional case law when necessary to protect fundamental rights and specifically the right to vote. In *Kahn*, for example, the Supreme Court held that "for right-to-vote cases in Minnesota, we employ the same strict scrutiny standard of review for our state constitution as is required under the U.S. Constitution," 701 N.W.2d at 831, and *Kahn* emphasized that Minnesota courts will ensure "greater protection for right to vote [] under the Minnesota Constitution" if following federal precedent fails to adequately protect that right, *id.* at 833–34.

Respondent's invocation of federal case law also ignores the Minnesota Supreme Court's longstanding commitment to expanding protection of fundamental rights common to both constitutions where necessary to secure rights in accordance with the "state's own concepts of justice." *Women of the State of Minn. by Jane Doe v. Gomez*, 542 N.Wd.2d 17, 31 (Minn. 1995) (hereinafter *Gomez*). "We also will apply the state

constitution if we determine that the Supreme Court has retrenched on Bill of Rights issues, or if we determine that federal precedent does not adequately protect our citizens' basic rights and liberties." *Kahn*, 701 N.W.2d at 815, 828 (collecting cases so holding); *see also Gomez*, 542 N.W.2d at 30 (holding that the Minnesota Supreme Court has "interpreted the Minnesota Constitution to provide more protection than that accorded under the federal constitution or have applied a more stringent constitutional standard of review"). As *Kahn* recognized, Minnesota courts will extend constitutional protections beyond federal constitutional rights when necessary: "[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Kahn*, 701 N.W.2d at 824 (quoting Justice Brennan). Here, the federal courts have declined to apply any searching federal review of state felony-disenfranchisement schemes under the federal Constitution, so it is necessary for Minnesota courts to fulfill that role. (*See* Resp. Brief 14–15.)

Finally, Minnesota courts are especially vigilant when plaintiffs lack political standing and are therefore most in need of recourse to the courts:

> Minnesota possesses a long tradition of affording people on the periphery of society a greater measure of government protection and support than may be available elsewhere. This tradition is evident in legislative actions on behalf of the poor, the ill, the developmentally disabled and other people largely without influence in society.

Gomez, 542 N.W.2d at 30. Relegated "to the periphery of society" and barred from the political process, Appellants are exactly the type of litigants most in need of judicial

protection and stringent constitutional review of the very laws depriving them of fundamental rights and denying them political standing.

Here, Appellants rely on Minnesota's express constitutional grants of the right to vote and our courts' longstanding vigilant protection of voting rights as justification to accord careful judicial scrutiny to a legislative scheme that effects broad disenfranchisement. Under our Constitution, Minnesota courts must assume an active role in reviewing any expansive approach to Article VII exceptions. Minnesota's Constitution and constitutional jurisprudence provide no support for Respondent's suggestion that this Court should follow *Richardson* by failing to carefully scrutinize the disenfranchisement scheme.

C. The Court Should Reject Respondent's Attempt to Manufacture Unreviewable Legislative Discretion to Disenfranchise Appellants

While accusing Appellants of lacking historical or legal support for their reading of Article VII (Resp. Brief 12), Respondent manufactures a grant of legislative discretion that does not appear anywhere in Article VII and engages in evidence-free pronouncements about the original operation of the felony-disenfranchisement provision. None of Respondent's arguments justify the Court granting the Legislature unfettered discretion to define the scope of felony disenfranchisement without meaningful judicial review.

Respondent's version of Article VII suffers from two serious defects. First, he acknowledges that the framers rejected permanent disenfranchisement and sought to protect the ability of the Legislature to restore civil rights. (Resp. Brief 13.) That history

only highlights that the framers could have, but did not, write legislative discretion into the text of Article VII. Namely, they could have made an express delegation to the legislature by, for example, authorizing disenfranchisement "unless restored to civil rights *by the legislature*" or otherwise expressly making restoration a discretionary act of the Legislature or Governor. Instead, the framers adopted the passive voice that is, at minimum, consistent with restoration occurring upon release from confinement. (*See* App. Brief 6–7.) The framers certainly provided no text suggesting that restoration is an entirely discretionary act that allows the Legislature to act with no effective judicial review. Respondent invents the principle that Article VII contains no limit on the Legislature's authority to decide when, how, or whether to restore voting rights, an interpretation that wishes language into existence that cannot be found in the text. Action by the Legislature to define the scope of Article VII exceptions, or to determine the process for restoring the franchise, is not unconstrained by the other protections of the Minnesota Constitution including the protection of the fundamental right to vote.

Second, citing nothing, Respondent asserts that, at the time of founding, disenfranchisement was permanent absent a pardon. (Resp. Brief 12.) No facts in the record support this groundless assertion. It is not justified given the absence of any system of community supervision at founding, meaning that penal consequences, supervision of people convicted of felonies, and the ability to control voting rights ended with release from incarceration. (*See* App. Brief 6–7.) If anything, Respondent's acknowledgement that the first restoration statute ten years after ratification tied restoration to the end of incarceration further supports that fact. (*See* Resp. Brief 13.)

Ultimately, the issue is whether Article VII forecloses a meaningful role for the courts in reviewing a statutory scheme that determines the scope of felony disenfranchisement. It is obvious that neither the plain text nor the history of the Article VII justifies that approach. Instead, the Constitution's broad protection of voting rights, the framers' debates, and the long history of Minnesota courts aggressively protecting the right to vote all support one of two options: a) a narrow reading of the text of Article VII's exception to universal franchise that restores the right to vote when individuals are restored to the right to live in the community; or b) strictly scrutinizing any statutory scheme that involves a discretionary expansion of felony disenfranchisement beyond the minimum possible term. At minimum, the Court should apply strict scrutiny here.

III. THE DISENFRANCHISEMENT SCHEME CANNOT SURVIVE ANY VERSION OF RATIONAL-BASIS REVIEW

Even if the Court declines to apply strict scrutiny, rational-basis review requires invalidation of the disenfranchisement scheme. The scheme wrongly classifies Appellants as ineligible to vote for no sound reason. Heightened rational-basis review, a standard at the very heart of Minnesota's unique constitutional scheme, makes the arbitrariness of the statutory scheme obvious, but it cannot survive even regular rational-basis review.

A. Appellants Are Similarly Situated in All Relevant Respects to People Possessing the Right to Vote

In arguing that Appellants are not similarly situated to people who have completed felony sentences, Respondent misses the point in at least two respects.

First, he concedes that the question is whether a plaintiff is "situated in all *relevant* respects to those to whom the plaintiff is comparing him- or herself." (Resp. Brief 18 (emphasis added) (citing *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018).) Here, Appellants challenge a statute that classifies them as ineligible to vote, so the issue is whether they are similarly situated to others with respect to exercising that right. In their opening brief, Appellants explained why they are similarly situated to all other people living in the community (including people on community supervision for misdemeanors, people who have completed sentences, and all other eligible voters) with respect to all of the rights, freedoms, and responsibilities relevant to voting. (App. Brief 44–46.) Respondent never contests that point. He instead points to the bare fact that Appellants' sentences have not been completed (Brief 19), but he never explains why that fact provides any *relevant* justification for denying them the right to vote even as they bear the burdens of citizenship and life in the community. Specifically missing from Respondent's brief is any explanation as to why the restrictions entailed in community supervision are relevant to eligibility to vote.[3] On this point, Respondent's brief continues

[3] Respondent cites *State v. Frazier*, 649 N.W.2d 828 (Minn. 2002), but that decision confirms the gap in Respondent's argument. *Frazier* evaluated an equal protection claim challenging unequal sentences for criminal conduct that the appellant claimed was similar. Thus, the question was whether the conduct addressed by two different criminal statutes was "the same or essentially similar," and the relevant criteria was the underlying nature of the crimes. *Id.* at 837–38. The court denied the claim because the appellant was differently situated with respect to the relevant conduct. Here, Appellants claim to be similarly situated to those possessing the right to vote, so the relevant criteria are the rights, responsibilities, and capacities for voting. With respect to every right relevant to the act of voting, Appellants are indistinguishable from every other member of the community.

the fundamental failure of the disenfranchisement scheme to establish any relevant, valid reason for classifying people living in the community on probation, parole, or supervised release as ineligible to vote.

Second, Respondent presents this issue as a "threshold" requirement for Appellants' equal protection claim (Resp. Brief 18), but his argument assumes away constitutional review. Appellants freely acknowledge that their sentences have not been discharged, a fact that distinguishes them from other citizens living in the community who are eligible to vote. The question presented by Appellants' equal protection claim is whether that distinguishing fact establishes a valid reason to classify them as ineligible to vote, and rational-basis or heightened rational-basis review provides the method to answering that question if strict scrutiny does not. Respondent begs the question by pointing to their ongoing sentences as reason enough to deny their equal protection claim with no further judicial scrutiny. If this were so, the government would never even have to demonstrate that its restriction of rights is *rational*, thus preserving entirely irrational classifications without judicial review. Because Appellants challenge a statutory classification as a violation of their right to equal protection, Respondent cannot avoid constitutional review of the statutory scheme.

B. Respondent Provides No Basis to Avoid Application of Heightened Rational-Basis Review

Respondent's attempt to avoid application of *Russell* and heightened rational-basis review directly contradicts the law and the facts.

Russell held that it is "particularly appropriate" to apply heightened rational-basis review "where the challenged classification appears to impose a substantially disproportionate burden on the very class of people whose history inspired the principles of equal protection." 477 N.W.2d at 889. Because Respondent does not dispute that the disenfranchisement scheme imposes a "substantially disproportionate burden" on the right of people of color to vote, his effort to avoid heightened rational-basis review directly contradicts the controlling Minnesota Supreme Court precedent in *Russell*. Given the undisputed evidence of the disproportionate burden imposed by the disenfranchisement scheme on the voting rights of racial minorities, *Russell* applies.[4] Additionally, contrary to Respondent's suggestion, *Fletcher Properties, Inc. v. City of Minneapolis*, 974 N.W.2d 1 (Minn. 2020), broadly reaffirmed *Russell*'s principle that heightened rational-basis review applies when a statute "adversely affects one race differently than other races, even if the lawmakers' purpose in enacting the law was not to affect any race differently." *Id.* at 27 Because Respondent does not and cannot deny that the disenfranchisement scheme adversely affects Black and American Indian

[4] Respondent attempts to avoid the plain language of *Russell* by trying to manufacture some limited application of its holding, and this effort leads him to assert that heightened rational-basis review only applies when a statute "directly cause[s] racial disparities in the criminal justice system." (Resp. Brief 21.) That is not what *Russell* said. Even if it was, Respondent whitewashes the fact that felony disenfranchisement is a collateral consequence of the criminal justice system that disproportionately burdens persons of color. Just as increasing penalties for crack cocaine disproportionately impacted persons of color, refusing to restore voting rights to persons living in the community causes a racial disparity in the criminal justice system by disproportionately disenfranchising persons of color.

Minnesotans more than white Minnesotans, *Fletcher* confirms that heightened rational-basis review must be applied.

Unable to escape the plain holdings of *Russell* and *Fletcher*, Respondent engages in contortions. Respondent's repeated assertion that the disenfranchisement scheme "does not cause racial disparities" is remarkable. (*See* Resp. Brief 20–21.) Appellants painstakingly established that the statutory scheme causes profound racial disparities with respect to the right to vote, these facts are undisputed, and Respondent never explains why racially unequal disenfranchisement could be construed as anything other than a "racial disparity." Appellants specifically challenge the practice of disenfranchising people living in the community prior to discharge of their sentences. Because that is exactly what Sections 609.165 and 201.145 effect and these statutes cause racial disparities regarding the right to vote, courts should ensure that a "genuine and substantial" justification for the disenfranchisement scheme exists. *Russell*, 477 N.W.2d at 888. That is what *Russell* requires, and nothing in the case law or Minnesota's constitutional jurisprudence makes an exception where the disparity involves the right to cast a ballot.

Respondent then attempts to deflect by noting that he is not responsible for the criminal justice system and that Appellants' "real challenge" is to the design of the criminal justice system. (Resp. Brief 22–23.) By operation of the statutory disenfranchisement scheme that Appellants challenge, the Secretary of State is directly responsible for prohibiting Appellants from voting while they live in the community, *see* Section 201.145, and he has therefore appropriately never argued that his office is not the

proper defendant for this action. And while Appellants agree that the record establishes many reasons for "important concerns" about the criminal justice system (Resp. Brief 23), this action challenges just one: prohibiting members of the community from voting until discharge of sentences. That particularly unjustified feature of the criminal justice system means, for example, that American Indian Minnesotans are **9 times** more likely to be disenfranchised than white Minnesotans. (ADD-24.) That the criminal justice system produces such stark racial inequality in voting rights provides a compelling reason to scrutinize the justification for the specific statutory scheme Appellants challenge. Respondent's suggestion that the courts turn a blind eye to the obvious adverse racial disparities effected by the disenfranchisement scheme because the criminal justice system may be riddled with racial injustice is an affront to the letter and meaning of *Russell*, and indeed to the Minnesota Constitution.

Finally, Respondent's protestations only magnify the imperative importance of heightened rational-basis review. The Court is faced with a statutory scheme that disproportionately disenfranchises people of color and, by extension from one generation to the next, communities of color. As *Russell* requires, courts must dispense with the presumption that a benign and legitimate rationale exists for statutes causing such an outcome. Courts must instead ensure that a statutory scheme that disproportionately denies political participation to racial minorities is justified by a stated, substantial, legitimate government purpose grounded in facts. *See Russell*, 477 N.W.2d at 890. In short, heightened rational-basis review provides the constitutional assurance that courts

will demand an explanation for structured racial political inequality. That guarantee of equal protection must be applied here.

C. The Disenfranchisement Scheme Cannot Survive Any Version of Rational-Basis Review

Respondent's efforts to skirt *Russell* can be explained by the fact that the disenfranchisement scheme cannot survive heightened rational-basis review.

The standard is not truly in dispute. Respondent quotes *Fletcher* for the proposition that heightened rational-basis review requires "actual (and just conceivable or theoretical) proof that a statutory classification serves the legislative purpose." (Resp. Brief 25 (quoting *Fletcher*, 974 N.W.2d at 19.); *see also Russell*, N.W.2d at 889–90 (requiring "factual support" for the classification and an "actual, and not just theoretical," connection between the legislative purpose and the classification).) And *Fletcher* further clarifies that heightened rational-basis review demands careful scrutiny to ensure the necessary "tighter fit between the government interest and the means employed to achieve it." *Fletcher*, 974 N.W.2d at 27 n.12.

Respondent's arguments expose just how badly the disenfranchisement scheme flunks this test. He fails to point to *any* legislative explanation for classifying people on community supervision as ineligible to vote. Instead, Respondent points to the Legislature's rationale for automatically restoring voting rights at discharge of sentence (Resp. Br. 26), but nothing anywhere in the record reflects a stated legislative rationale for disenfranchisng members of the community as they wait for that discharge. Simply put, the Legislature has never explained why restoration of voting rights should be

deferred until discharge of sentence, and, without explanation or consideration, it instead adopted a classification that disenfranchises tens of thousands of otherwise eligible voters living in the community. Under *Russell* and *Fletcher*, that legislative failure is dispositive and necessitates relief.

Respondent's defense of the statutory scheme gets worse from there, demonstrating not only that it cannot survive heightened rational-basis review, but that it cannot survive review of any kind. Lacking any actual legislative reason for disenfranchisng people on community supervision, Respondent invokes the Legislature's stated interests in automatic restoration of voting rights—namely, promoting rehabilitation, facilitating effective democratic participation, and eliminating the stigma associated with disenfranchisement. (Resp. Brief 26.) Yet Respondent fails to explain why the Legislaure undermined every one of those stated purposes by perpetuating the disenfranchisement of people living in the community on probation, parole, or supervised release. Not only does the legislative record lack any fact-based connection between the proffered legislative purpose and the challenged classification, it demonstrates that the statutory scheme is utterly capricious by adopting a scheme directly at odds with the governmental interest.[5] As such, the disenfrachisement scheme cannot survive even ordinary rational-basis review.

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[5] Respondent makes the startling assertion that Appellants do not dispute that Section 609.165 promotes rehabilitation. (Resp. Brief 26.) Appellants have disputed exactly that point since the filing of their complaint. Section 609.165 works in concert with Section 201.145 to disenfranchise Appellants and others living in community on

Respondent fails to acknowledge the reality that the arbitrariness of the disenfranchisement scheme is rooted in the Legislature's failure to deliberately consider whether and why people on community supervision should be disenfranchised. The record shows only that the Legislature decided to automatically restore voting rights at discharge, without ever contemplating the reason to continue disenfranchising people between incarceration and discharge or the meaning of the constitutional text. (*See* Resp. Brief 25–26.) Respondent's review of the historical devleopment of felony disenfranchisment may provide some context for explaining that legislative failure, but it is not a valid defense to argue that a statutory scheme must be constitutional simply because it represented "progress" at the time. While Respondent claims that the statute "expands" voting rights, it merely codified what was a prevailing practice. The record demonstrates that 53,585 Minnesotans are now disenfranchised because the Legislature adopted the statutory classification while abjectly failing to consider that disenfranchisement of people living in the community actively undermines the Legislature's stated interests. Because that error is not reasoned or rational, it should be

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probation, parole, or supervised release. (*See* App. Brief 8–9.) The statutory scheme that disenfranchises persons on community supervision undermines their rehabilitation, stigmatizes them, and denies their ability to participate as effective citizens. Appellants have been abundantly clear on this point throughout this litigation. Respondent seems to suggest that because an alternative statutory scheme could more broadly violate constitutional rights, Appellants should accept the current scheme and their disenfranchisement without meaningful recourse to the courts.

invalidated under any version of rational-basis review.[6] Without evidence in the legislative record showing a fit between the government's interest and the classification, it certainly cannot survive heightened rational-basis review.

Respondent fares no better in his efforts to manufacture a justification for the statutory classification that the Legislature never articulated. He alludes to discharge of sentence serving as an "objective and indisputable cut-off point" for restoration (Resp. Brief 22) and observes that automatic restoration is administratively more efficient than pardons or ad hoc applications for restoration (Resp. Brief 26). Heightened rational-basis review forecloses this defense because it entirely ignores the key requirement that the Legislature must *actually* articulate and support its interest in the statutory classification. *See Russell*, 477 N.W.2d at 889–90; *Fletcher*, 974 N.W.2d at 19. Had the Legislature really intended to design a statutory classification to achieve administrative efficiency, it no doubt would have restored voting rights at the end of incarceration and thereby

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[6] Respondent cites *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010), and *Madison v. State*, 163 P.3d 757 (Wash. 2007), for the proposition that tethering restoration of voting rights to discharge of sentence is a rational decision that clears rational-basis review. Both cases examined the constitutionality of state disenfranchisement laws under the U.S. Constitution (*Madison* ultimately deferred to the federal constitutional analysis) and focused on the state interests of those states in the statutory schemes their legislatures designed. *See Hayden*, 594 F.3d at 171 (noting that the "legislature made the state interest clear"); *Madison*, 163 P.3d at 772 (examining the specific "asserted interests" in the scheme). Here, the Court is presented with Minnesota's legislative record demonstrating that the Minnesota Legislature has an interest in restoring voting rights to further rehabilitation, reduce stigma, and promote citizenship. On this record, the Legislature's decision to adopt a classification contrary to that interest is arbitrary and irrational. It is also important to note that neither court considered the specific rights protected by Minnesota's Constitution, nor applied Minnesota's heightened version of rational-basis review. That is required here.

avoided the need to educate people on community supervision regarding their ineligibility to vote, eliminated uncertainty about the voting rights of community members, streamlined administration of the statewide voter registration and electoral systems, and negated the prosecution of people on community supervision for the act of voting. Instead, when adopting Section 609.165, the Legislature claimed only that the purpose of the statute was to further rehabilitation and eliminate the stigma associated with disenfranchisement (Resp. Brief 26), while then arbitrarily undermining that purpose by failing to restore voting rights to people living in the community. The disenfranchisement scheme fails even rational-basis review, which requires that statutes must have "emerged from a reasoned, deliberative process." *Fletcher*, 947 N.W.2d at 10.

Moreover, resolution of Appellants' claims entails identifying the government's interest in refusing to restore their voting rights upon release from incarceration. The administration efficiency involved in automatic restoration at discharge is a *non sequitur* that provides no answer to that question. Respondent does not claim, much less prove, that administrative efficiency is served by denying voting rights to members of the community or that release from incarceration is anything other than an "objective and indisputable cut-off point" for restoration of voting rights. And it would be equally, if not more, efficient to automatically restore voting rights upon release from incarceration.

Because the State has never established an interest in disenfranchising Appellants, they and others in the community must be restored to the right to vote.

IV. THE DISENFRANCHISEMENT SCHEME BURDENS APPELLANTS' ARTICLE VII RIGHT TO VOTE WITHOUT JUSTIFICATION

Respondent fails to engage with Appellants' claim that any expansion of the Article VII exceptions to universal adult franchise must be reviewed as burdening the right to vote and therefore subject to close judicial scrutiny by balancing state interests against that burden. (App. Brief 48.)

Kahn is among the long line of Minnesota cases recognizing the critical significance of Article VII's broad protection of the right to vote to our constitutional order. (*Id.*) That principle establishes the need for courts to closely review any legislative expansion of the Article VII exceptions beyond their narrowest terms.[7] The absence of any constitutional history suggesting a reason or rationale for felony disenfranchisement further confirms that it is appropriate to narrowly construe the provision. Indeed, the overwhelming constitutional interest in voting rights necessitates the imposition of limits on the Legislature's authority regarding Article VII exceptions. The Court should reject Respondent's refusal to recognize any such limits.

Rather than addressing the scope of the burdens imposed by Minnesota's system of felony disenfranchisement and attempting to justify it, Respondent dodges the inquiry altogether. He first argues that Article VII "vests authority to restore that right [to vote] in

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[7] Respondent does not explain why felony disenfranchisement should be treated differently than the narrow exceptions in Article VII for guardianship, insanity, or mental competence. Indeed, it can only be as a result of the State's long, uncritical acceptance of the scope of felony disenfranchisement that Respondent dismisses the need for careful judicial review of a scheme that disenfranchises more than 1% of all otherwise eligible voters living in the community. (ADD-21.)

the legislature and governor" (Resp. Brief 17), but not only does the text of Article VII do no such thing,[8] Respondent also entirely ignores whether any limitations on that discretion exist. Respondent is silent on Appellants' point that limits must exist on any legislative discretion given the role and significance of the right to vote, and a statutory scheme having the effect of broadly disenfranchising otherwise eligible voters must be capable of surviving meaningful judicial review. The actions of the Legislature in this context remain constrained by other constitutional guarantees, including the fundamental nature of the right to vote.

Respondent then assumes away Appellants' requested relief and sweeps aside constitutional review of the disenfranchisement scheme by arguing that Appellants' right to vote would not be restored if Section 609.165 is invalidated. (Resp. Brief 17.) But that argument ignores Appellants' request that the Court direct Respondent to restore their eligibility to vote and that of all others living in the community subject to probation, parole, or supervised release: the relief justified by the Legislature's and Respondent's failure to explain why the Legislature's discretionary denial of their right to vote serves a government interest.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court issue an order restoring their right to vote.

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[8] Beyond judicial review of other government actions, as a constitutional branch of government itself, the courts have authority under Article VII to restore voting rights.

Date: January 22, 2021

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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.

Certification of Brief Length

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