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**State of Minnesota
In Supreme Court**

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

Plaintiffs-Appellants,

vs.

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

Defendant-Appellee.

**BRIEF OF AMICI CURIAE CITY OF SAINT PAUL
AND CITY OF MINNEAPOLIS**

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amici are the City of Saint Paul and the City of Minneapolis (jointly, “the Cities”), the two largest cities in the State of Minnesota.¹ Saint Paul and Minneapolis, like all cities in Minnesota, want all of their residents to engage in civic life and their communities. In large part, this civic engagement is most important at the local level, where so many significant decisions related to daily life are decided via voting in elections on candidates, as well as ballot initiatives and referendums.

The cities of Saint Paul and Minneapolis have a disproportionately large number of individuals on probation or other supervised release (collectively, “probationers”) relative to the rest of the state. Accordingly, the unfair and unconstitutional limitations on voter participation which flow from the challenged legislation have a particularly pronounced effect on the cities of Saint Paul and Minneapolis and their residents. The result is an unwarranted watering-down of the Cities’ influence on statewide elections and restricted involvement in local elections and community.

In addition, the restrictions which Appellants seek to challenge excessively limit the rights of people of color, particularly African-Americans, to participate in the voting process, since residents of color are statistically more likely to be on probation than white residents. This disproportionality is especially pernicious in Saint Paul and Minneapolis,

¹Pursuant to Minn. R. Civ. P. 129.03, the Cities certify that this brief was not authored, in whole or in part, by counsel for either party to this appeal, and that no other person or entity, besides the Cities, have made a monetary contribution to its preparation or submission.

which are more racially diverse than either Hennepin or Ramsey Counties, or the State of Minnesota as a whole. In addition, because research indicates that active civic engagement, including voting, reduces the likelihood of recidivism, large cities—like Saint Paul and Minneapolis—with relatively large populations of persons under probation and supervised release, suffer particularly harshly by the application of Minnesota Statute section 609.165, as it increases the recidivism of the relatively high number of probationers in the Cities’ populations. Thus, the Cities support Appellants’ action to restore the right to vote to all persons when they are actively living in their local communities again, regardless of their probation status.

STATEMENT OF CASE AND FACTS

The Cities adopt Appellants’ Statement of the Case and Facts. In addition, the Cities provide the following information pertinent to their cities:

I. Demographics of the Cities.

Based on population, Minneapolis is the largest city in Minnesota and Saint Paul is the second largest.² Although smaller than Minneapolis by approximately 25%, Saint Paul has nearly three times the population of the third-largest city in the state, Rochester. *See* footnote 2.

²*See* information promulgated by the Minnesota Department of Administration – State Demographic Center at <https://mn.gov/admin/demography/data-by-topic/population-data/our-estimates/>.

Minneapolis and Saint Paul are considerably more racially diverse than the state as a whole. White people represent 63.8% of Minneapolis's population³ and 56.7% of Saint Paul's population,⁴ whereas the same group represents 84.1% of the state's population. Minneapolis has an African American population of 19.4%, and 16.0% of Saint Paul's population is African American, as compared to 6.8% of the state's population. *See* footnotes 3 and 4.

According to the most recent Census Bureau Data, Saint Paul's population as of July 2019 (the most recent date such data is available), is 308,096. *See* footnote 4. The population of Ramsey County is 550,321. *Id.* The population of the State as a whole is 5,639,632. *Id.* Accordingly, Saint Paul contains 55.9% of the population of Ramsey County. Ramsey County contains 9.8% of the state's population. *Id.*

Minneapolis' population as of July 2019 is 429,606. *See* footnote 3. The population of Hennepin County is 1,265,843. *Id.* Accordingly, Minneapolis contains 33.9% of the population of Hennepin County, and Hennepin County contains 22.4% of the state's population. *Id.*

³*See* <https://www.census.gov/quickfacts/fact/table/minneapoliscityminnesota,hennepincountyminnesota,MN/PST045219>.

⁴*See* <https://www.census.gov/quickfacts/fact/table/stpaulcityminnesota,ramseycountyminnesota,MN/PST045219>.

II. Enrollment in Probation by Saint Paul and Minneapolis Residents.

The Minnesota Sentencing Guidelines Commission maintains data on persons on probation. Amici’s Addendum (“Am. Add.”) 001-50⁵. The Guidelines Commission’s data reflects the following information regarding persons on probation between 1981 and 2018 (the data does not include information specific to cities, including Saint Paul or Minneapolis, as that information is not maintained by the Guidelines Commission or the Department of Corrections):

Year Range Sentenced	Number Who Received Probation – Statewide	Number Who Received Probation – Ramsey County	Number Who Received Probation – Hennepin County
1981 – 1990	51,924	8,001	11,834
1991 – 2000	75,377	12,456	17,076
2001 – 2018	197,920	23,981	37,913
TOTAL	325,221	44,438	66,823

Am. Add. 020-21, 031-32, and 049-50.

Between 1981 and 2018, then, 13.7% of all persons who received probation in the State of Minnesota (44,438 out of 325,221) resided in Ramsey County, which contains only 9.8% of the state’s population; 20.5% of all persons who received probation resided in Hennepin County, which contains 22.4% of the state’s population. *Id.*

⁵The Cities’ Addendum (referenced herein as “Amici’s Addendum”) is in the appellate record, as it was filed in conjunction with the Cities’ amicus brief before the Minnesota Court of Appeals. The same documentation was filed with the District Court in connection with Saint Paul’s amicus brief before that court.

III. Enrollment in Probation by Persons of Color.

Data assembled by the Minnesota Sentencing Guidelines Commission also reflects the racial makeup of persons on probation. *Id.* That data reflects the following information:

Year Range Sentenced	Race	Number Received Probation
1981 – 1990	White	40,739
	Black	7,184
	Am. Indian	2,433
	Hispanic	1,202
	Asian	223
	Other	143
	TOTAL	51,294
1991 – 2000	White	48,773
	Black	17,774
	Am. Indian	3,793
	Hispanic	3,554
	Asian	1,147
	Other	336
	TOTAL	75,377
2001 – 2018	White	122,393
	Black	46,667
	Am. Indian	13,705
	Hispanic	10,260
	Asian	4,732
	Other	163
	TOTAL	197,920
TOTAL	White	211,905
	Black	71,625
	Am. Indian	19,931
	Hispanic	15,016
	Asian	6,102
	Other	642
	TOTAL	325,221

Am. Add. 006-8.

Between 1981 and 2018, then, 22% of all probationers were African American, despite the fact that African Americans represent only 6.8% of the state's population, 19.4% of the population of Minneapolis and 16% of the population of Saint Paul. *Id.*; *see* footnote 2, *supra* at 2. White people, who represent 84.1% of the state's population, made up only 65.2% of probationers during the same timeframe. *Id.*

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Minnesota Statute section 609.165 as implemented, represents an unfair and unconstitutional obstacle to persons on probation, denying them the basic and essential right to vote. Because this case involves the unwarranted interference with the fundamental right to vote of persons under supervised release, this Court should issue an Order which clarifies the law in this critically important area.

The impact caused by Minnesota Statute section 609.165 is particularly severe and pernicious as to the Cities' residents. The populations of Saint Paul and Minneapolis include a disproportionately large number of persons on probation and supervised release. In addition, the Cities' populations are more racially diverse than that of the state as a whole, and persons of color are far likelier than white persons to be subjected to probation and supervised release. The result is that, as a whole, residents of Saint Paul and Minneapolis are under-represented at the polls, reducing the Cities' weight in voting in statewide elections and negatively impacting resident input in city matters at the local level. These impacts are disproportionately carried by African American and indigenous people. In addition, the application of Minnesota Statute section 609.165 adversely affects the

Cities by increasing the recidivism of Saint Paul and Minneapolis' residents subject to probation and supervised release.

Given the racial disparities, it is of utmost import that courts apply the proper standard when considering Appellants' equal protection claim under the Minnesota Constitution. In this case, the lower courts concluded that because Article VII of the Minnesota Constitution restricts the voting rights of convicted felons, voting is not a fundamental right for probationers, and accordingly declined to apply strict scrutiny.⁶ The lower courts further held that the heightened rational basis scrutiny delineated in *State v. Russell*, 477 N.W.2d 886 (Minn. 1991), did not apply despite its clear application to a case such as this, where "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." 477 N.W.2d at 890. This Court should, at a minimum, apply the heightened rational basis scrutiny delineated in *Russell* on the basis of the racially-disparate impact of the State's restrictions on the voting rights of probationers.

ARGUMENT

I. This Court Should Review Minnesota's Felony Disenfranchisement Laws Under Strict Scrutiny, Or, At A Minimum, Under The Heightened Rational Basis Scrutiny Standard Promulgated In *State v. Russell*.

Minnesota Statute section 609.165, as applied, represents an unconstitutional infringement on the fundamental right to vote. "The political franchise of voting . . . is

⁶The Cities respectfully disagree with the lower courts' determination, based on federal case law, that the voting rights of felons at issue in this case are not "fundamental rights" under the Minnesota Constitution.

regarded as a fundamental right, because [it is] preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also McLain v. Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980) (citing *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)) (“‘voting is of the most fundamental significance under our constitutional structure’ and requires jealous protection”).

Even if this Court were to agree with the lower courts that the rights at issue in this case do not involve a “fundamental right” subject to strict scrutiny, this Court’s analysis requires a higher level of scrutiny than traditional rational basis review. Given the disparate racial impact involved, there must be a more searching consideration of whether the Legislature has “proved a sufficiently strong connection between the purpose of the law ... and the means chosen by the Legislature.” *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 24 (Minn. 2020).

The Cities respectfully believe the lower courts erred in applying the traditional rational basis scrutiny rather than the appropriate strict scrutiny or, at a minimum, the heightened rational basis scrutiny standard promulgated in *Russell*, 477 N.W.2d at 890.

This Court recently clarified the standards to be applied by courts when considering a claim brought under the Minnesota Constitution’s equal protection clause. *Fletcher Properties, Inc.*, 947 N.W.2d at 22–23. Importantly, this Court reiterated that in certain cases, courts should “apply a more searching level of scrutiny and less deference to legislative enactments challenged under the Minnesota Constitution’s Equal Protection Clause than would be applied under” the traditional rational basis test. *Id.* This Court specifically cited to the decision in *Russell*, and stated that lawmakers will be held to a

heightened standard of proof when a statutory classification adversely affects one race differently than other races. *Id.* at 23–24. Further, the Court explicitly stated that:

[p]recedent under the Minnesota Constitution requires more of lawmakers (actual as opposed to theoretical factual justification for a statutory classification)—and demands of this court more searching scrutiny—than does the [rational basis test under the] Fourteenth Amendment.

Fletcher Properties, Inc., 947 N.W.2d at 27.

The lower courts improperly considered the issue of disparate impact. The statutory scheme involved in this case disproportionately affects African Americans and indigenous people as compared to white people because African Americans and indigenous people have a higher incidence of being on probation. In Minnesota, it is clear that when a law has a disproportionate impact on a certain race, a “more searching scrutiny” is demanded of the courts. *Fletcher Properties, Inc.*, 947 N.W.2d at 27. However, the court of appeals merely considered whether § 609.15 was racially neutral on its face and concluded that “there is no evidence in this case that the statutes racially neutral criterion has been applied differently based on race.” (App. Add. 23). This analysis fails to recognize that the crack cocaine statute at issue in *State v. Russell* was racially neutral and was not applied differently based on race. Instead, the important issue to be considered is the impact on minority racial groups. Indeed, the disparate impact analysis as expressed in *State v. Russell* and *Fletcher Properties* specifically applies to statutes that are facially neutral and regardless of any legislative intent. *Id.* at 24-25.

Thus, the lower courts improperly refused to apply the more searching scrutiny to the issue of the disparate impact on other races by application of Minnesota Statute section 609.165.

II. The Discriminatory Impact Of Minn. Stat. § 609.165 Is More Severe At The Local Level Of Government, And Is Greater On Large Cities Like Saint Paul And Minneapolis.

Minnesota Statute section 609.165 works a severe harm to probationers' inability to vote at the local level. The vast majority of services and infrastructure impacting a person's daily life are decided and managed at the local level. Among many things, cities provide road maintenance, water and other utilities, organize police and fire services, manage certain licensing matters, and create and enforce housing and zoning regulations. Similarly, education of children and schooling issues are handled at the local level. Real change and impact is had at the local level, since an individual vote has greater weight when it is one vote among thousands rather than one vote among hundreds of thousands or millions.

Barring a particular group (here, persons on probation and supervised release) from the polls is especially harmful at the local level, because those persons that live in a city cannot be involved in the important civic process that determines policies and elects officials. Saint Paul and Minneapolis want to empower as many residents as possible to participate in city matters, because they believe this is the best path to creating engaged, healthy, safe and thriving communities.

Moreover, as discussed supra, residents of Saint Paul are more likely than residents of the State of Minnesota to be on probation and supervised release. In aggregate, residents

of Ramsey County are nearly 50% likelier than residents of the state as a whole to be on probation. Am. Add. 020-21, 031-32, and 049-50; *see also* the information promulgated by the Minnesota Department of Administration – State Demographic Center, at <https://mn.gov/admin/demography/data-by-topic/population-data/our-estimates/>. Minneapolis, as the State’s largest city, has a tremendous number of probationers as well.

Because residents of large cities like Saint Paul and Minneapolis are likelier to be on probation and supervised release than Minnesota residents as a whole, the Cities suffer particularly severely from the effects of Minnesota Statute section 609.165. In addition to local elections, the effect of disenfranchising persons on probation and supervised release from voting is that Saint Paul and Minneapolis as a whole are under-represented at the polls. This dilution of the Cities’ voting power means that Saint Paul and Minneapolis have less influence on selecting officers elected to statewide office at both the state and federal levels. Moreover, these officers have less incentive to act in a manner which protects and benefits the residents of the Cities. Effectively, large cities like Saint Paul and Minneapolis are harmed by the implementation of Minnesota Statute section 609.165 in a way that smaller municipalities and unincorporated areas are not.

Minnesota Statute section 609.165 has a disparate impact on persons of color, particularly African-Americans and indigenous people, because a disproportionately large percentage of these groups are on probation and supervised release. This fact aggravates the harmful impact of Minnesota Statute section 609.165 in areas that, like Saint Paul and Minneapolis, are more racially diverse than the state as a whole, because an outsized percentage of the Cities’ residents are unable to vote. Minneapolis and Saint Paul take

pride in their diversity and seek to protect the rights of all residents, regardless of their race, against unwarranted attack. Minnesota Statute section 609.165 represents just such an attack. The statute infringes on the essential right to vote, and particularly impairs voting participation in communities of color, without any reasonable justification.

In addition, the disenfranchisement of probationers has community-wide, generational effects that go far beyond the individual voters' ability to cast votes, particularly in communities of color. In these communities, where a relatively large percentage of residents are disenfranchised, even persons eligible to vote are less likely to do so. According to a 2009 study by Erin Kelley, "eligible and registered" African American voters were nearly 12 percent less likely to cast ballots if they lived in states with lifetime disenfranchisement policies, as compared with white voters, who were only 1 percent less likely to vote in such states. *See* Erin Kelley, Brennan Ctr. for Justice, *Racism & Felony Disenfranchisement: An Intertwined History* (May 2017), at https://www.brennancenter.org/sites/default/files/2019-08/Report_Disenfranchisement_History.pdf. A separate 2011 study, by Anthony Thompson, found that "the probability of voting declines for African-Americans, even if they do not possess a criminal record," in States that impose "restrictive criminal disenfranchisement laws." *See* Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 *How. L.J.* 587, 607 (2011). As a whole, Thompson concluded, barring "so many" returning citizens in minority communities from voting "makes exercising the franchise less a part of the fabric of the community, precipitating a negative ripple effect." *Id.*; *see also* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender*

Reentry, 45 B.C. L. Rev. 255, 282–83 (2004) (“The loss of voting power has ramifications not only for the individual ex-offender, but also for the communities to which ex-offenders return, which will then include growing numbers of residents without a recognized political voice.”).

The upshot is that disenfranchisement of probationers has the effect of reducing not only their individual voting power, but the voting power of their entire communities. This disenfranchisement just worsens the existing gap in political and economic power between predominantly White communities and communities of color to no legitimate end.

III. Saint Paul And Minneapolis Suffer From Increased Recidivism Resulting From The Disenfranchisement Of Persons On Probation And Supervised Release.

It is well established that persons on probation and supervised release who are permitted to vote are significantly less likely to re-offend. In one study, among individuals who had been arrested previously, 27% of non-voters were rearrested, compared with 12% of voters. Christopher Uggen, Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from A Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 215 (2004). This suggests that voting forms part of an overall pattern of civic involvement that, collectively, may help to prevent former felons from reoffending. While researchers Uggen and Manza acknowledge that “the single behavioral act of casting a ballot is unlikely to be the single factor that turns felons’ lives around,” they note that “it is likely the act of voting is tapping something real, such as a desire to participate as a law-abiding stakeholder in a larger society.” *Id.* at 213.

Because residents of Saint Paul and Minneapolis include a relatively high percentage of persons on probation and supervised release, data suggests that the Cities suffer more from recidivism tied to the inability to vote due to the application of Minnesota Statute section 609.165 than the state as a whole. This has the effect of exposing the Cities' residents to increased crime committed by recidivists.

The concept referenced by researchers Uggen and Manza – that increased civic engagement reduces the likelihood of recidivism – is an essential part of the Court's consideration. Persons on probation and supervised release are not exempted from paying taxes. They are required, as are all residents, to pay for local services such as road maintenance, water, police and fire services, and the administration of elections. It is only fair and just that they be permitted to participate in choosing the representatives who oversee these services, and to vote on ballot measures that affect their day-to-day lives. It is, moreover, likely that being allowed to do so – being treated as whole citizens – will reduce their likelihood of re-offending. Appellee has not identified any credible or rational way that restricting these residents' right to vote can be squared with the basic fairness and equity protections provided for in the Minnesota Constitution.

The Cities do not believe any legitimate purpose is served by disenfranchising probationers from full participation in the lives of their communities, including granting them the right to vote. Rather, it is the Cities' firm belief that their best interests, and the best interests of their residents, are best served by fully restoring the rights of persons with felony convictions at the conclusion of their custodial term, rather than after what may be decades of probation or other supervised release.

CONCLUSION

For the above-stated reasons, the Cities of Saint Paul and Minneapolis hereby respectfully request that this Court find that the statutory scheme at issue in this lawsuit disproportionately impacts minority racial groups and cannot survive any level of legal scrutiny. The right to vote should be restored to all persons when they are actively living in their communities again, regardless of their probation status.

Dated: September 16, 2021

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CERTIFICATION OF LENGTH OF DOCUMENT

This Brief of Amici Curiae City of Saint Paul and City of Minneapolis complies with the typeface requirements and word limitations set out in the Minnesota Rules of Civil Appellate Procedure. The document was produced using a proportional 13-point Times New Roman font in Microsoft Word for Office 365 and contains 3,342 words exclusive of the cover page, Table of Contents, Table of Authorities, signature block and this Certification of Length of Document.

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