No. A20-1264

State of Minnesota In Supreme Court

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-Appellee.

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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STATEMENT OF ISSUES

Plaintiffs-Appellants challenge the constitutionality of Minnesota's statutory scheme 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. That statutory scheme deprives Appellants of the right to vote even as they live in the community as exemplary, contributing citizens in every respect. Appellants maintain that the statutory scheme perpetuating 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. The undisputed record demonstrates that the legislative practice of denying voting rights to persons living in the community on probation, parole, or supervised release disproportionately disenfranchises persons of color, and the Legislature has never articulated any purpose for doing so. Can a statutory scheme survive heightened rational-basis review when, for no stated or substantiated reason, it establishes a classification that causes significant racial disparities with respect to the right to vote and directly converts disparities in the criminal justice system into racial political inequality? The Court of Appeals answered "yes," on the ground that the statutes at issue do not facially discriminate based on race.

   Apposite Authority

   - *State v. Russell*, 477 N.W.2d 886 (Minn. 1991).
   - *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020).

2. Should a legislative scheme that denies voting rights to persons living in the community be subject to strict scrutiny under Article I of the Minnesota Constitution because voting is a fundamental right and Minnesota courts have a constitutional role to ensure that the political branches do not deny Minnesotans the right to vote for no sound reason? While acknowledging that no court has previously addressed the meaning of the Article VII felony disenfranchisement clause or its application to persons who have been restored to the right to live in the community, the Court of Appeals answered "no," because it ruled that Appellants do not have a right to vote.

   Apposite Authority

   - *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003).
   - *Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978).

3. The legislative history of the challenged statutory scheme lacks any rationale for disenfranchising members of the community; the Legislature instead expressed an interest in restoring voting rights to facilitate rehabilitation and a return to political participation. The disenfranchisement of persons living in the community undermines that purpose. Can a statutory scheme that disenfranchises Appellants in contradiction to the only articulated interest for the scheme survive any form of constitutional review, whether rational-basis review or the balancing test that Minnesota courts apply to electoral regulations burdening the right to vote? The Court of Appeals answered "yes," because it ruled that Appellants do not have a right to vote.

   Apposite Authority

   - *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005).

STATEMENT OF THE CASE

Like tens of thousands of other people on community supervision, Appellants actively contribute to their communities through their work, families, payment of taxes, and civic participation, but they are denied the right to vote by the statutory scheme they challenge. Specifically, Minnesota Statute Section 201.145 excludes Appellants from the statewide voter registration system until their "civil rights have been restored." In turn, Section 609.165 denies restoration of voting rights until sentences are fully discharged, which extends disenfranchisement throughout any period of probation, parole, or supervised release. That legislative scheme effects sweeping, expansive deprivations of the voting rights of persons living in the community far beyond anything required or intended by the limited felony disenfranchisement provision contained in Article VII of the Minnesota Constitution. The Legislature's denial of voting rights to Appellants and all persons restored to the right to live in the community violates the Article I guarantee of equal protection, the Article I protection of substantive due process, and Article VII protections of the fundamental right to vote.

Following fact and expert discovery, Appellants and Appellee Steve Simon, the Minnesota Secretary of State sued in his official capacity, agreed that there is no genuine dispute as to any material fact regarding Appellants' constitutional claims, and the parties filed cross motions for summary judgment. Ramsey County District Judge Laura Nelson granted Appellee's motion for summary judgment, denied Appellants' motion, and entered judgment for Appellee. The Court of Appeals affirmed the district court's judgment, and the Court granted review on August 10, 2021.

STATEMENT OF FACTS

There is no dispute regarding the factual record. As detailed below, the record includes extensive 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-42 to ADD-67; 2/25/20 Affidavit of Tom Pryor ("Pryor Aff.") #60, Ex. 1.) The record further includes 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 document the deeply personal impact of being prohibited from voting while living in the community. Nothing in this robust record was disputed by Appellee or questioned by the lower courts, 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 Appellee submitted the available materials regarding Minnesota's constitutional convention during which Article VII was drafted, the historical record regarding the 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 Appellee has ever articulated, much less substantiated, a reason why Appellants' disenfranchisement serves any purpose at all.

A. The Impact of Disenfranchisement on Appellants

Appellants seek relief from Minnesota's courts to remedy the deep harm caused by their exclusion from the political process and the Legislature's ongoing deprivation of their voting rights. 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.)

Since his release from prison in 2016, Plaintiff-Appellant Elizer Eugene Darris has consistently worked in community organizations, 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 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." *Id.* On October 29, 2020, following a *sua sponte* recommendation by the Director of Anoka County Community Corrections Department, the Anoka County District Court issued an order discharging Mr. Jecevicus-Varner from probation and thereby restoring his civil rights. While his right to vote has been restored, the profound intergenerational harm inflicted by the current disenfranchisement scheme remains. (*Id.* ¶ 8.)[1]

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.)

[1] The Court of Appeals held that restoration of Mr. Jecevicus-Varner's and Mr. Caldwell's civil rights during this litigation mooted their claims. Appellants do not appeal that ruling here, and it does not impact the Court's review of the issues before the Court. Injunctive relief remains essential to securing Ms. Schroeder's and Mr. Darris's right to vote. The damage done to Mr. Jecevicus-Varner and Mr. Caldwell by the disenfranchisement scheme remains in the record and in their lives and should inform the Court's review of the scheme.

B. Minnesota's Disenfranchisement Scheme

Minnesota's system for disenfranchising Appellants and others living in the community is effectuated by statute. But the relevant statutory scheme 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 automatically 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. The statute precludes discharge of a sentence absent a court order or the expiration of the sentence. Minn. Stat. § 609.165, subd. 2. Thus, by its text, Section 609.165 ensures that voting rights are restored when a sentence has fully expired, but it does not 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.

The legislative history of Section 609.165 does not offer any explanation, support, or justification for 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-68 to ADD-71.) 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-69 (emphasis added).) Thus, 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 states or substantiates a legislative interest in disenfranchising Minnesotans who have served their time and live in the community on probation, parole, or supervised release.

Statutes regulating the statewide voter registration system mandate the disenfranchisement of Appellants and the tens of thousands of Minnesotans who live on community supervision. 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. No legislative history related to Section 201.145 establishes an interest served by refusing to restore voting rights until discharge of sentences.

Finally, Section 201.014 declares that individuals are not eligible to vote if convicted of a felony until their civil rights have been restored and makes it a felony to vote while ineligible. Minn. Stat. § 201.014, subd. 2–3.

In sum, Section 609.165 deprives voting rights to members of the community until full completion of their sentences without explanation, Section 201.145 precludes voting until discharge again without explanation, and Section 201.014 criminalizes voting for Appellants. Combined, 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 "disenfranchisement scheme."

C. Article VII Protections of the Right to Vote

Article VII of the Minnesota Constitution was drafted and approved by Minnesotans with the State's first Constitution in 1857. Its express purpose was to enshrine protection of voting rights in the Constitution. Following amendments over time to expand the franchise to achieve universal suffrage, 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 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, explained, or debated during the 1974 process to modernize the Constitution's language or during any of the Article VII amendments.

Appellee 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 supports Appellants' ongoing disenfranchisement, and their disenfranchisement is instead the result of the prevailing legislative scheme.

The text and history of the Article VII disenfranchisement provision confirms that it provides no support or justification for disenfranchising persons living in the community. Transcription of the framers' deliberations in 1857 shows that the provision was given almost no consideration. (ADD-72 to ADD-77.) Without any debate, the framers rejected a motion to strike the provision altogether. (ADD-73.) 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-73 to ADD-74.) Importantly, the framers provided no further guidance regarding the meaning of the term "restored to civil rights" or the process for restoring voting rights. Nothing in the history of Article VII suggests any constitutional reason or purpose for disenfranchising persons living in the community. And it is undisputed that the framers intended that both the scope of the Article VII exceptions to voting rights and the process for restoring civil rights comport with all other constitutional protections.

All that can be gleaned from the history of Article VII is that felony disenfranchisement was uncritically accepted by the framers as a given, just another prevailing 19th-century practice like white-male suffrage. (*See, e.g.*, ADD-76.) Beyond that, only two things are known about the framers' intentions. First, they deliberately rejected permanent felony disenfranchisement and instead intentionally ensured that disenfranchisement ends when persons convicted of a felony are "restored to civil rights." (ADD-73.) Thus, the framers 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 disenfranchisement of persons living in the community on probation, parole, or supervised release. (*See* ADD-57; Pryor Aff. #60, Ex. 1 at 1-10; *see also id.* Ex. 5 at 5-03 to 5-04.) Moreover, in

1863, all crimes fell into one of two categories: public offenses that were felonies punishable by death or imprisonment in a state prison, and everything else. Minn. Stat. ch. 91 § 2 (1863). Thus, at the time, only persons subject to incarceration were disenfranchised, and nothing in the history of Article VII or the historical context surrounding its adoption indicates an intention to disenfranchise non-incarcerated persons. Indeed, given the absence of any criminal justice system supervising persons living in the community, the phrase "restored to civil rights" is best understood as freedom from incarceration. (Pryor Aff. #60, Ex. 1 at 1-07.)

Since ratification, 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-57; 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 limit a person's ability to vote. 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.

Changes to Minnesota's penal code have been dramatic. 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 (and therefore did not trigger disenfranchisement), 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.

D. 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 the State's founding, there were exceedingly few individuals convicted of felonies. 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-56.) 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 were incarcerated, so the rate of disenfranchisement still did not 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 dramatically expanding numbers of persons subject to felony disenfranchisement, including a disproportionate number of people of color. (*See* ADD-59 to ADD-60.) 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

[2] Persons under 21, women, African Americans, and American Indians were ineligible to vote in this time period. (*See* ADD-56.) 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.

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-60.) In addition to showing the dramatic recent expansion of the State's system of felony disenfranchisement, the numbers demonstrate the disturbing practice of increasingly disenfranchising Black voters as the number of otherwise Black voters increased.

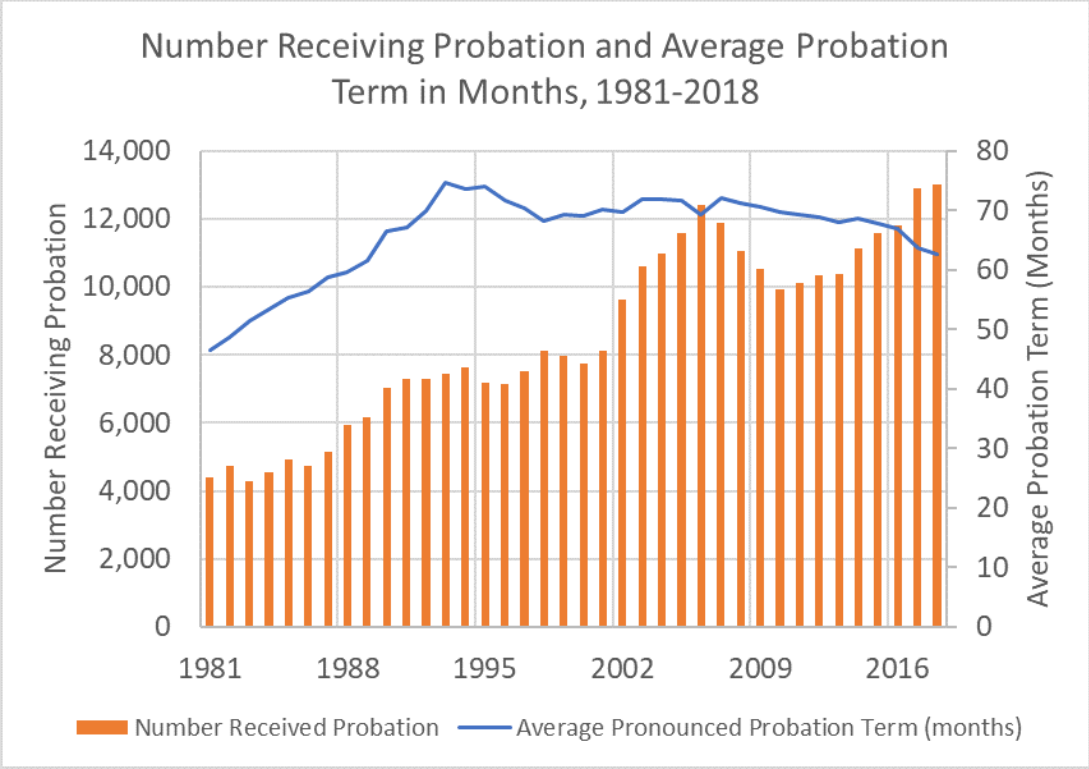
Incarceration increased dramatically during this period, with the State's prison population growing from 1,372 persons in 1974 to 9,178 persons in 2018. (*See id.*) The number of persons living in the community on parole or supervised release similarly increased during this period. And the number of 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—among the highest rates in the country. 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-46.) 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-44.)

These stark numbers are driven by Minnesota's extensive use of probation and long probationary sentences. (*See* ADD-42 to ADD-44.) 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-44.) 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 **1.2%** 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 location of the White Earth Indian Reservation) are disenfranchised while living in the community on probation. (*See* ADD-45.)

The fact that Minnesota disenfranchises a material percentage of persons living in the community may be explained, in part, by the criminal justice system imposing increasingly long probationary sentences. (*See* ADD-46.) "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-47; *see generally* Pryor Aff. #60, Ex. 13.) In some Minnesota counties, probationary sentences **average** more than **eight** years. (*See* ADD-47 to ADD-48.) Here, again, the data show that as Minnesota becomes more racially diverse, the extent of correctional control over its residents expands.

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.

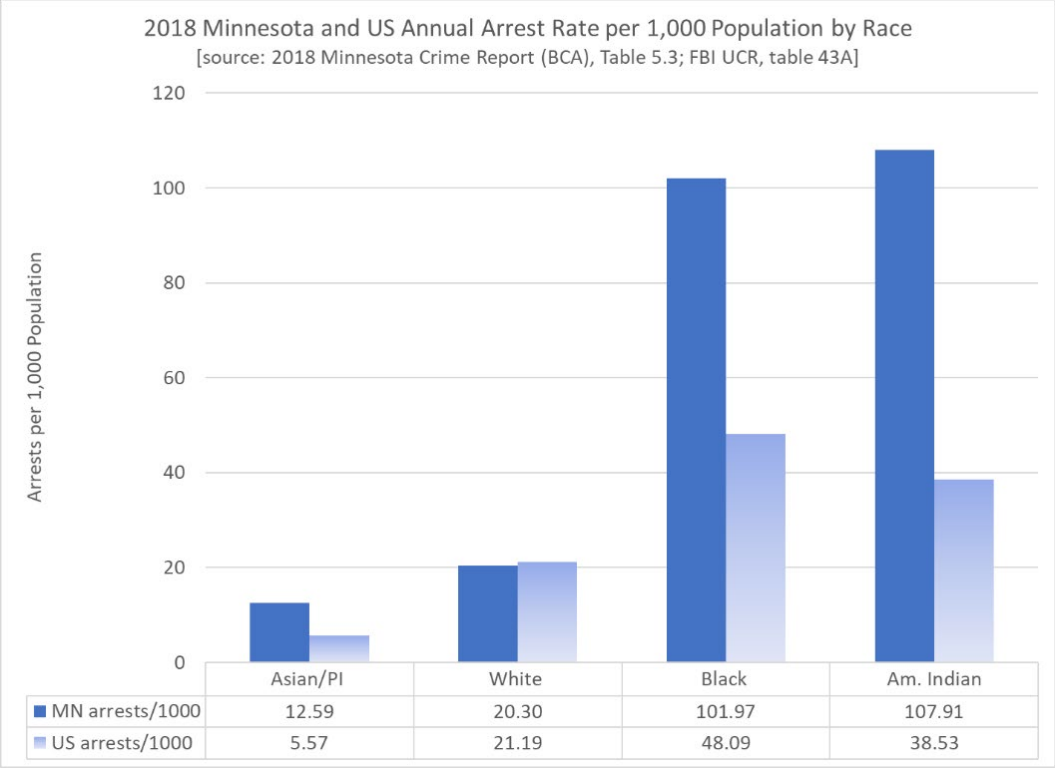
(*See* Pryor Aff. #60, Ex. 10 at 10-17.) Thus, Minnesota is disenfranchising thousands of its residents for committing drug crimes that did not even exist when Article VII was framed and adopted.

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-45 to ADD-46.) After eliminating any possible double counting, there are **53,585** Minnesotans disenfranchised while living in the community, which includes 45,855 on probation, 7,697 on supervised release, and 28 on parole. (*See* ADD-48.) That translates to a rate of 1,244 per 100,000 voting-age adults. (*See id*.)

E. 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-49 to ADD-55.) 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-50.) 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:

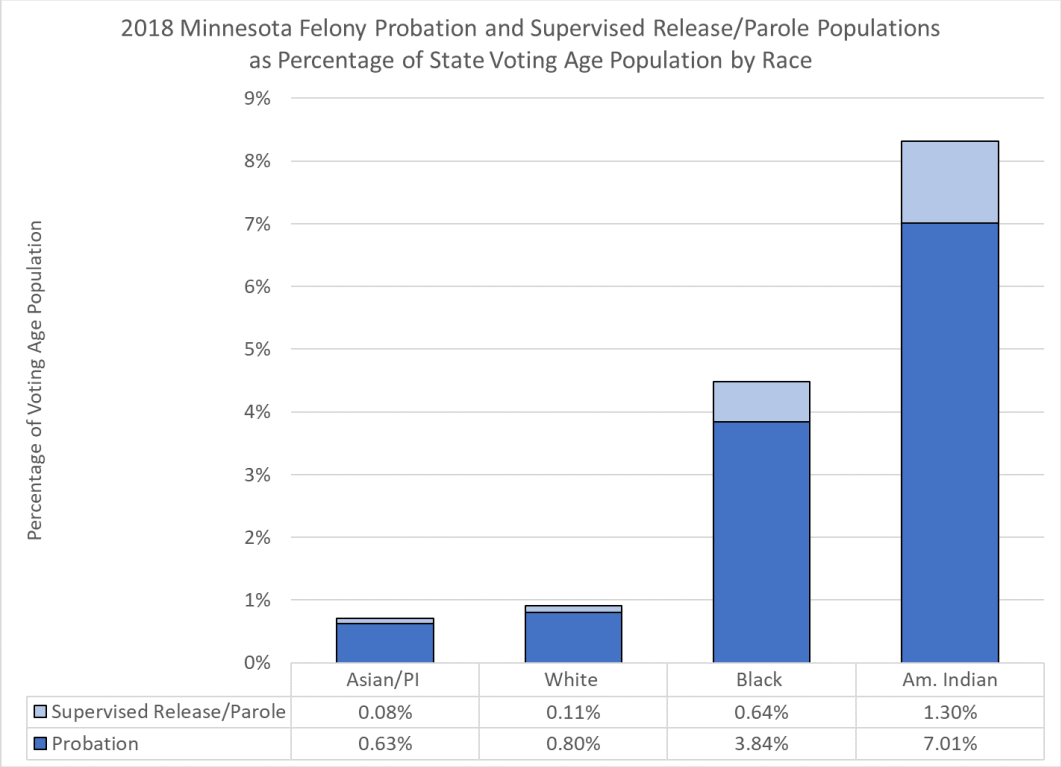


(*See* ADD-50 to ADD-51.)

Disproportionate disenfranchisement of racial minorities is the inevitable result of the disparate impacts that pervade the State's criminal justice system. (*See* ADD-51.) 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

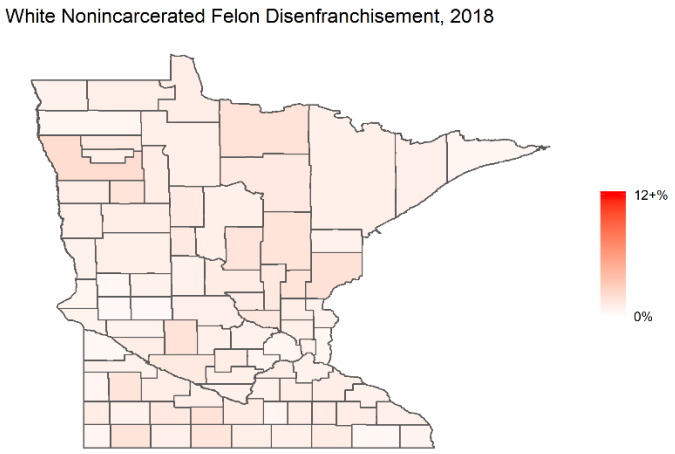
[3] The denominator used to calculate these rates is total population rather than voting-age population, so arrest rates would likely be higher if excluding young minors. (*See* ADD-50.)

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:

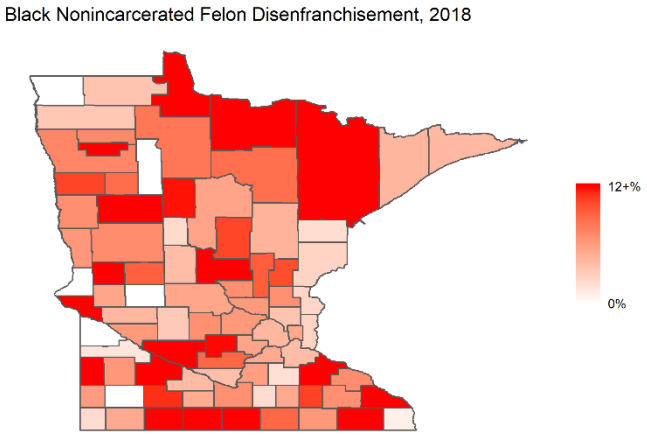


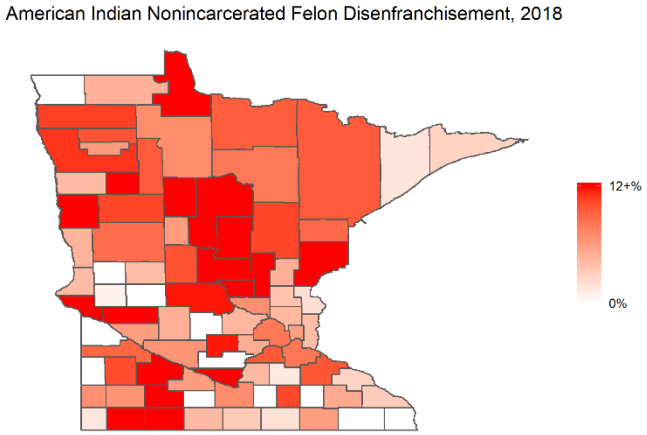
(*See* ADD-52.) Among other effects, disproportionate disenfranchisement of communities of color systematically dilutes their political influence and subordinates their standing in the political process. (ADD-63.)

The geographic variation in community-supervision rates by race compounds the disparities in some Minnesota counties. (*See* ADD-52 to ADD-55.) There is a relatively uniform, and uniformly low, rate for whites:



(*See* ADD-53.) 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-54 to ADD-55.)

F. The Absence of Any Government Interest in Disenfranchising Members of the Community

Neither the Legislature nor Appellee has ever claimed that disenfranchisement of persons living in the community furthers some government purpose. Indeed, 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-62 to ADD-63; 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-62 to ADD-63; *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-62 to ADD-63; 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.*)

Appellee has never argued that any governmental interest supports Appellants' disenfranchisement or the Legislature's refusal to restore the right to vote to members of the community. And the record is entirely devoid of any facts suggesting that any such governmental interest exists.

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.

SUMMARY OF ARGUMENT

Appellants bring constitutional claims under the equal protection guarantee, the due process clause, and Article VII of the Minnesota Constitution. Because the standard of constitutional review is so integral to analysis, Appellants structure their argument to address every possible standard of review that could be applied to their claims. First, Minnesota's heightened rational-basis review is necessarily triggered by the profound disparate impacts caused by the disenfranchisement scheme with respect to the voting rights of persons of color. Second, if the Court does not reverse when applying heightened rational-basis review, it should apply strict scrutiny because the State's disenfranchisement scheme infringes on the fundamental right to vote. Third, an arbitrary, unjustified statutory scheme that denies voting rights for no reason is unconstitutional even if the Court applies standard rational-basis review or the balancing test applicable to electoral regulations burdening the right to vote.

Appellants respectfully ask the Court to ensure that Minnesota courts continue to fulfill their role to protect the right to vote by reviewing and ultimately invalidating a statutory scheme that denies thousands of Minnesotans the right to vote while they live, work, and participate in the community. The State's constitutional order depends on effective judicial review of a statutory scheme that disenfranchises Appellants and: 1) perpetuates a legislative decision to disproportionately deny persons of color the right to vote; 2) embodies a legislative choice to expand felony disenfranchisement far beyond

anything required by Article VII or contemplated by the framers, while contradicting the essential role that the right to vote plays in the State's constitutional system; and 3) lacks *any* supporting purpose that has been substantiated, *or even articulated*, in the legislative or judicial records. It cannot be acceptable for the Legislature to deprive Appellants of the right to vote for no reason, while the courts refuse to provide any meaningful review of that decision.

Minnesota's disenfranchisement scheme is unconstitutional under *any* standard of constitutional review.

ARGUMENT

I. THE PROFOUND RACIAL INEQUITIES CAUSED BY THE FELONY DISENFRANCHISEMENT SCHEME REQUIRE HEIGHTENED RATIONAL-BASIS REVIEW THAT THE SCHEME CANNOT WITHSTAND

The disenfranchisement scheme imposes a substantially disproportionate burden on persons of color and therefore triggers heightened rational-basis review. The heightened "rational basis test under the Minnesota Constitution requires [] factual support . . . to establish a genuine and substantial" basis for disenfranchising Appellants. *Russell*, 477 N.W.2d at 890. Because the State has no legitimate interest in denying the right to vote to persons living in the community and the record contains zero factual support for any purpose served by the disenfranchisement scheme, the scheme is indefensible.

A. Heightened Rational-Basis Scrutiny Must Be Applied

Minnesota's heightened rational-basis review applies because the statutory scheme disproportionately deprives persons of color of the right to vote. In *Russell*, 477 N.W.2d at 889, this 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 to ensure its independence from federal law. The *Russell* court expressly sought to require "a more stringent standard of review as a matter of state law" for legislative classifications giving rise to equal protection concerns that do not trigger strict scrutiny. *Id.* While Minnesota's heightened rational-basis review has applied to equal protection claims "since the early eighties," *id.* at 888, *Russell* held that 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.

This 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, there is no dispute about the fact that the disenfranchisement scheme "demonstrably and adversely affects" persons of color differently than white Minnesotans. *See id.* at 19. In *Russell*, heightened rational-basis review was necessary because "a greater percentage of blacks than whites" were adversely affected by the statute. *Russell*, 477 N.W.2d at 887. While *Russell* involved enhanced criminal penalties for crack cocaine, the current disenfranchisement scheme criminalizes voting for 53,585 Minnesotans who are no longer incarcerated but are nonetheless deprived of the right 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).[4] And all of the following facts are undisputed:

- Minnesota's arrest rates of Black and American Indian Minnesotans are more than five times higher than arrest rates of white Minnesotans.
- 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-49 to ADD-55; Pryor Aff. #60, Ex. 1 at 1-17.)

In important respects, the Legislature's perpetuation of the statutory system of disenfranchisement is at least as alarming as *Russell* because the demographic makeup of impacted Minnesotans is known and established. Systemic racial discrepancies and racism pervading the criminal justice system result in greater numbers of persons of color on probation, parole, or supervised release. For example, a national study of the criminal justice system found that "Blacks and Hispanics are sentenced to prison more often and

[4] 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.

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).) Against this established backdrop and the stark, undeniable math that persons of color are disproportionately subject to legislative disenfranchisement, the Legislature chooses to add disenfranchisement to all other racial disparities arising in the criminal justice system. The result is a legislative scheme that disenfranchises many times more Black Minnesotans and American Indian Minnesotans who live in the community than white Minnesotans—the very definition of disparate impact. The statutory scheme that Appellants challenge directly causes that impact.

Minnesota's disenfranchisement scheme is especially pernicious because it converts the racial imbalances in the criminal justice system into political marginalization and structured political inequality.[5] *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (holding that constitutional scrutiny by the courts is most needed when the political rights are deprived and when the rights of discrete and insular minorities are implicated). A legislative classification that causes the disproportionate disenfranchisement of racial minorities—with many thousands of voters of color denied the right to vote—is an affront to the 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.

[5] Multiple amicus parties have petitioned the court to speak on this exact issue.

The Court of Appeals' analysis on this point badly misses the mark by relying on its observation that the disenfranchisement scheme does not cause all of the racial disparities in the criminal justice system. (*See* ADD-23.) Even if true, the challenged legislative classification directly causes the disproportionate disenfranchisement of persons of color.[6] The Legislature has made—and continues to perpetuate—the decision to use the deep racial imbalances resulting from the criminal justice system to classify individuals living in the community as ineligible to vote. Thus, the statutory scheme 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.[7]

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[6] In addition to committing legal error, the Court of Appeals made *sua sponte*, impermissible, and unsupported factual findings regarding racial disparities in the criminal justice system. Attempting to draw inferences from the data set forth in Professor Uggen's report, the Court of Appeals departed from the record and any argument made by any party or amicus to conclude that disparities in rates of incarceration are more racially disproportionate than the racial composition of those on probation, parole, or supervised release. (ADD-5.) Professor Uggen's report did not state the population of voting-age white Minnesotans, nor did he specify and compare the share of white Minnesotans in prison to those on parole or probation. (*See generally* ADD-42 to ADD-67.) Thus, the Court's reasoning was simply unfounded, and all the more unjustified by the fact that Respondent never submitted any expert analysis or data, Respondent has never disputed the facts in Professor Uggen's report, and the Court of Appeals engaged in unsupported inferential leaps on appeal from summary judgment. In any event, the incarceration disparity between Black, American Indian, and white Minnesotans is irrelevant here: the sole issue germane to *Russell* and Appellants' claims is the disproportionate disenfranchisement of people of color living in the community.

[7] The Court of Appeals also erred by declining to apply heightened rational-basis review based on its description of the scheme as racially neutral on its face. (ADD-23.) *Russell* squarely rejected that logic by requiring heightened rational-basis review based on the

Heightened rational-basis review exists precisely to assess whether the Legislature had a sound basis to enact laws that result in disparate racial impacts. The statutory scheme here is indisputably one such classification. The Court should therefore apply heightened rational-basis review to determine whether any sound reason exists to tether voting rights to discharge of sentences, notwithstanding the extreme racial inequities caused by that legislative decision.

B. The Disenfranchisement Scheme Cannot Survive Heightened Rational-Basis Review

Once the Court determines that it should apply heightened rational-basis review, it necessarily follows that the current disenfranchisement scheme should be invalidated for two, independent 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 or others living in the community on parole, probation, or supervised release as ineligible to vote.

1. No actual or stated legislative purpose supports depriving Appellants of the right to vote

The current disenfranchisement scheme cannot survive Minnesota's heightened 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

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impact of the statute, not facial discrimination or discrimination based on improper purpose. 477 N.W.2d at 889.

supervised release. A critical component of heightened rational-basis review is scrutiny of an actual, stated, substantiated, and valid government interest in the classification, as opposed to a hypothetical or speculative interest:

> 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.

If the scheme in *Russell* did not pass constitutional muster, the disenfranchisement scheme clearly cannot. In *Russell*, the court had a legislative record, a stated legislative purpose, and some legislative fact finding to review—and found that record inadequate. Here, however, the Legislature has failed to provide any record or explanation for its decision to deprive members of the community of the right to vote. Absent pure conjecture or guesswork, the Court cannot find any record of a legislative purpose served by Legislature's decision to disenfranchise persons on community supervision. *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 legitimate 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. Indeed, the history of Section 609.165 fails to identify any reason to disenfranchise persons on probation, parole, or supervised release, and the legislative history instead *negates* any possible legislative purpose to disenfranchise those living in the community. Explaining the need for automatic discharge of sentences, the 1962 Advisory Committee comments state only that it is "desirable to promote the rehabilitation of the defendant and his return to this community as an effective participating citizen." (ADD-69.) That is the full

legislative explanation for a scheme that *does the very opposite* by refusing to return Appellants to "effective, participating citizens" and denying them the right to vote even as they live in the community. 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. Thus, while 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, the statutory classification contradicts that interest by denying Appellants the ability to participate as effective citizens.

Moreover, 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. 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-62 to ADD-63.) 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-63 to ADD-64.) Thus, continued exclusion of Appellants from the political process directly contradicts the

Legislature's stated interest in promoting their involvement in the community as effective participating citizens.

The record also confirms that disenfranchisement of persons on parole, probation, or supervised release serves no sound criminal-justice purpose, because it 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 21–23.) Disenfranchisement does not function as meaningful deterrence or effective punishment. (*Supra* at 22.) 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.*) Nor is there any evidence that the Legislature specifically intended disenfranchisement as a punishment when adopting sentencing provisions in the criminal code. 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.

Appellants and 53,585 Minnesotans are currently disenfranchised while the Legislature has failed to articulate a legislative purpose and to develop a factual record

for denying them the right to vote.[8] The Legislature has never provided any legitimate basis for its decision to deprive members of the community of the right to vote. Under *Russell*'s heightened rational-basis review, the disenfranchisement scheme cannot withstand that scrutiny.

Finally, *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 motives, 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.

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[8] 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.

Most troubling, without a history showing that the Legislature ever considered a valid purpose for disenfranchising members of the community, the Court cannot foreclose racial discrimination, implicit bias, or other race-based motives for a system that continues to disproportionately disenfranchise and disempower communities of color. And as Professor Uggen explains, "the adoption and expansion [of felony disenfranchisement] laws in the United States is closely tied to the divisive politics of race and the history of racial oppression." (ADD-56.) That remains true with regard to the Legislature's ongoing perpetuation of the system, which continues to recur even as the racially inequitable results of the statutory scheme are obvious. Indeed, increasing rates of disenfranchisement of racial minorities has tracked increases in their share of the electorate. (ADD-60.)

Simply put, equal protection under the Minnesota Constitution must at least mean that a legislative scheme cannot disproportionately deprive persons of color of voting rights without explanation and for no good reason. That is exactly the injustice the Court faces 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.* The lack of any stated legislative purpose supporting the current disenfranchisement scheme should end the inquiry altogether, but if not, there is no genuine and substantial basis for classifying Appellants as ineligible to vote.

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; Darris Aff. #58.) In marked contrast to incarceration, they now have all of the rights, freedoms, community nexus, 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 v. Steffen*, 487 N.W.2d 896, 904–05 (Minn. Ct. App. 1992) (rejecting classification based on criteria not "relevant to its asserted purpose"), *aff'd* 504 N.W.2d 198 (Minn. 1993).

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 right 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 parole, probation, or supervised release to be the same as incarcerated prisoners. The result of the Legislature's crude, unconsidered classification is that Appellants have been misclassified as similarly situated to incarcerated prisoners who lack all but the most basic civil rights.

Likewise, there is no genuine and substantial connection between the fact of community supervision and the right to vote. With respect to civil rights, there are no material differences between the restrictions that can be placed on those convicted of felonies rather than, for example, gross misdemeanors.[9] 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. And restrictions that may accompany community supervision have no relation to the act of voting. It is arbitrary to disenfranchise those living in the community on probation, parole, or supervised release when they possess all civil rights necessary to vote.

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

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[9] *See, e.g.*, Minn. Stat. § 609.135 subd. 1(a)(2) (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.

extent that it denies the right to vote to people living in the community on probation, parole, or supervised release.

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

The Court need not proceed further if it concludes that the disenfranchisement scheme cannot survive heightened rational-basis review. If the Court declines that straightforward basis for reversal, it should apply strict scrutiny 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 Because It Deprives Appellants of the Fundamental Right to Vote

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).[10]

This 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

[10] *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.

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.

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 supports application of strict scrutiny

The Court should reject the Court of Appeals' faulty reasoning that strict scrutiny does not apply because Article VII, rather than the statutory scheme, is the law that deprives Appellants of their right to vote. (ADD-17 to ADD-19.) That holding cannot be squared with uniform and undisputed understanding of all parties 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.) Nothing in Article VII requires Appellants' *continued* disenfranchisement, and it is undisputed that the Legislature has *chosen* to adopt a statutory scheme that denies Appellants the right to vote. The disenfranchisement scheme is a deliberate legislative decision to deny voting rights to persons living in the community, and a discretionary denial of voting rights should be strictly scrutinized.

For at least three reasons, the text, history, and historical context of Article VII confirm that it should be understood to restore voting rights to persons living in the community and, at a minimum, does not *require* Appellants' disenfranchisement.

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 been "restored to civil life in the community."[11] And that reading of Article VII is confirmed

[11] The text at the Republican Constitutional Convention supports Appellants' interpretation of Article VII. The framers considered but ultimately declined to include language expressly stating that, "*the Governor or the Legislature may* restore such person to civil rights" (*See* 2/25/20 Defendant's Memorandum Supporting Summary Judgment #52, at 3–4; ADD-73.) They instead opted for 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-

by the fact that it does not contain any express grant of authority making the Legislature the arbiter of when or how to restore civil rights; its text instead uses a passive tense consistent with automatic restoration of voting rights upon release from incarceration.

Second, the framers' intentions are consistent with the text indicating that Article VII restores the right to vote upon release from incarceration. The framers expressly and deliberately rejected permanent disenfranchisement. (*Supra* at 10–11.) At ratification, the criminal-justice system's control over offenders necessarily ended with release from incarceration. (*Supra* at 11–12.) 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.[12] And the framers did not express any intent or interest in disenfranchising persons living in the community following incarceration. Given the broad grant of the franchise in Article VII 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 plainly intended voting rights to be 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

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enfranchise them, they could easily have done so with the original language or something like it. They adopted the current text instead.

[12] 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.

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. The Court would not hesitate to apply strict scrutiny to a statutory scheme that expanded those exceptions beyond their narrowest possible reading. *See, e.g.*, *Minnesota Voters Alliance v. Ritchie*, 890 F. Supp. 2d 1106, 1116 (D. Minn. 2012) (noting 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). Indeed, it would be constitutionally dangerous to claim that the Legislature somehow possesses wide or unreviewable discretion to define those exceptions. And 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).

Third, evaluating the constitutionality of Minnesota's felony disenfranchisement scheme 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 12–18.) That is true in terms of the raw numbers of individuals impacted, ever-lengthening terms of community supervision, the extraordinary expansion of crimes now categorized as felonies, and the starkly disproportionate impact of the scheme on persons of color. (*Supra* at 12–21.) 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.

Finally, even if, *arguendo*, Article VII grants the Legislature discretion to decide when to restore civil rights, that discretion must be exercised in a manner consistent with all constitutional protections, including the guarantee of equal protection. For Appellants, there is no distinction between passive refusal to restore voting rights and active deprivation of their right to vote: their disenfranchisement is the result in either case.

Given the role of voting in the State's constitutional order as codified in Article I, Article VII, and this Court's case law, it is not enough for the Legislature to deny the right to vote simply because it can. Courts should instead scrutinize whether there is a purpose for disenfranchisement, and that is the role of strict scrutiny. *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"). Likewise, any discretionary deprivation of voting rights must accord with the Constitution's guarantee of equal protection, which requires subjecting the disenfranchisement scheme to judicial scrutiny and demanding that there be a purpose for it.

In sum, it is the statutory scheme that is the obstacle to Appellants voting, and this Court should apply strict scrutiny to the 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. Federal Case Law Supports This Court's Reliance on Minnesota's Long History of Protecting the Right to Vote

The Court of Appeals erred by relying on *Richardson v. Ramirez*, 418 U.S. 24 (1974), as a basis to interpret and apply the Minnesota Constitution. (ADD-20 to ADD-21.) Indeed, *Richardson* requires independent consideration of state law and supports granting Appellants relief under the Minnesota Constitution. *Richardson* was decided by the U.S. Supreme Court adjudicating a challenge brought under the 14th Amendment to

the federal Constitution. *Richardson* held that Section 2 of the 14th Amendment expressly reserves felony disenfranchisement to the states as a matter of state law, largely eliminating a role for federal courts to review challenges to felony disenfranchisement under the federal Constitution. *Richardson*, 418 U.S. at 54. *Richardson* explicitly avoided ruling on whether the felony-disenfranchisement scheme at issue in that case violated the state's constitution, and remanded that issue to the state court, but that is exactly what Appellants' claims require from the Court here. *See, e.g.*, *id.* at 26–27, 40 n.13 (explaining that the only issue on appeal was the constitutionality of the felony disfranchisement scheme under the *federal* constitution). Federal case law interpreting the 14th Amendment has no bearing on Appellants' claims.

Given the lack of federal law to apply, Minnesota courts must look to the Minnesota Constitution 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). This Court has repeatedly held that Minnesota law will expand protection of constitutional rights 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.W.2d 17, 31 (Minn. 1995) (hereinafter *Gomez*). That is particularly true where the federal Constitution does not safeguard rights. "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 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").

Kahn specifically confirms that Minnesota courts must separately and stringently protect voting rights, particularly given the lack of federal court review of felony disenfranchisement schemes. Indeed, *Kahn* provided a thorough examination of a plaintiff's request for heightened protection of voting rights beyond federal law and declined to do so in that case only where infringements of voting rights are subject to strict scrutiny under both the Minnesota and federal Constitutions. 701 N.W.2d at 832. ("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."). In "right-to-vote cases in Minnesota," strict scrutiny must be applied. *Id.* at 831. And while the *Kahn* court also accepted federal principles for reviewing the electoral regulations at issue in that case, it did so because "the basic civil liberties of the citizens of our state" were not undermined by "following federal precedent." *Id.* at 833. Given "other facts and circumstances," *Kahn* ruled that "a successful argument may be made that greater protection for the right to vote exists under the Minnesota Constitution." *Id.* at 834. Appellants' challenge to Minnesota's disenfranchisement scheme presents exactly the circumstances that necessitate greater protection of the right to vote under the Minnesota Constitution. In marked contrast to the challenge to the date of an election reviewed in *Kahn* that did not deprive anyone of the right to vote, Appellants challenge a vast system of disenfranchisement that denies voting rights 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, particularly where the federal courts have left the issue to the states. *Id.* at 830–31.

In short, neither *Richardson* nor the 14th Amendment speaks to the constitutional limits of felony disenfranchisement under the Minnesota Constitution and the need for Minnesota courts to review the Legislature's decision to enact a statutory scheme that disenfranchises Appellants. And *Kahn* makes it clear that Minnesota courts must strictly scrutinize any statutory scheme that unnecessarily extends or perpetuates disenfranchisement.

C. The Disenfranchisement Scheme Cannot Survive Strict Scrutiny

Because strict scrutiny must be applied to the disenfranchisement of persons living in the community on probation, parole, or supervised release, Appellee 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); *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*, 487 N.W.2d at 903 (internal quotation

marks and citation omitted). The disenfranchisement scheme clearly fails that exacting standard.

The current disenfranchisement does not serve any governmental purpose, much less a compelling one. The starting place for examining the government's interest must be the legislative record, and the government must substantiate some justification for infringing constitutional rights. *See, e.g.*, *Russell*, 477 N.W.2d at 889 (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 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); *Gomez*, 542 N.W.2d at 21–24, 31 (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. And all of the infirmities rendering the statutory scheme unconstitutional under heightened rational-basis review make it impossible to survive strict scrutiny. *See supra* Section I.B.

Additionally, 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)). 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 Appellee 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 Appellee 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 is 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.

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

III. THE STATE'S DISENFRANCHISEMENT SCHEME CANNOT SURVIVE ANY OTHER STANDARD OF CONSTITUTIONAL REVIEW

Even if the Court declines to invalidate the disenfranchisement scheme under heightened rational-basis review or strict scrutiny, the scheme cannot survive any other version of constitutional review. That includes standard rational-basis review or the balancing test applicable to laws that burden the right to vote.

A. The Disenfranchisement Scheme Cannot Survive Rational-Basis Review

The sheer arbitrariness of the disenfranchisement scheme is exposed by the fact that it cannot withstand even rational-basis review. As set forth in Section I.B.1., the Legislature stated an intention to return persons living in the community to active citizenship and then adopted a classification negating that stated purpose. The challenged scheme is wholly irrational.

Moreover, no rational legislative purpose justifies disenfranchising persons who, with respect to all of the capacities, freedoms, and responsibilities attendant to voting, are similarly situated to all eligible voters.[13] *See supra* Section I.B.2.

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[13] In opposing the Petition for Review, Respondent made the obviously false assertion that Appellants somehow waived their constitutional claims by failing to request review of the Court of Appeals' holding that Appellants are not similarly situated to eligible voters. That assertion is wrong: Appellants expressly requested review of that holding in their third Issue for Review and specifically argued that Appellants are similarly situated to eligible voters. Respondent's waiver argument is also baseless legally because there are multiple independent reasons for the Court to review the challenged scheme, including: a) classifications that treat persons differently with respect to fundamental rights require strict scrutiny; b) statutes effecting disparate racial impacts require heightened review; and c) the exclusion of Appellants from the statewide voter registration system constitutes a burden on the right to vote triggering, at a minimum, the balancing test addressed in Section III.B.2.

Finally, Appellants' requested relief is indisputably more efficient to administer than the disenfranchisement scheme. Section 201.145 highlights the mechanics involved in excluding persons living in the community from the statewide voter registration system, and the scheme creates legal jeopardy for disenfranchised members of the community who vote while ineligible. *See* Minn. Stat. § 201.014 (criminalizing voting while ineligible due to felony disenfranchisement). In contrast, Appellants seek the basic right to register and vote like any other member of the community, allowing election officials to treat them like any other person who appears at a polling station.

B. The Burden on the Right to Vote Imposed by the Scheme Cannot Be Outweighed by Any Governmental Purpose

Even when heightened 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, this Court reiterated Minnesota's typical reliance on the "analytical approach" used by the U.S. Supreme Court to review electoral procedures or 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 indirectly burden 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. Here, Section 201.145 plainly burdens Appellants' right to

vote by excluding them from the statewide voter registration system, so, at a minimum, this balancing test much be applied if more rigorous standards of review are not.

In *Minnesota Voters Alliance*, 890 F. Supp. 2d at 1116, 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 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.* 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, to protect the right to vote, courts carefully scrutinize any expansion of Article VII exceptions beyond their narrowest terms.

The disenfranchisement scheme cannot survive any balancing test 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 Appellee concedes that the Legislature's extension of felony disenfranchisement to persons living in the community is *not* necessary or required. 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.

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: September 9, 2021

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No. A21-1264

State of Minnesota
In Supreme Court

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-Appellee.

Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132 regarding length and format for a brief. The length of this brief is 13,657 words. This brief was prepared using Microsoft Word 2016 software.

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