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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-Respondent.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Defendant-Respondent Secretary of State Steve Simon's brief concedes that the State's system of felony disenfranchisement has exploded over time. Among the 53,585 persons disenfranchised while living in the community, 45,855 persons are denied the right to vote while on probation following extreme increases in the use, scope, and length of probationary sentences. (*See* Opening Brief of Appellants 14–17 ("Opening Brief").) The Secretary also concedes that the statutory scheme has caused shocking exacerbation of racial disparities, with the scheme disenfranchising as many as 9.95% of all voting age Black Minnesotans in the years since Section 609.165 was adopted. (*See* Opening Brief 15; ADD-49 to ADD-61.)

The Secretary admits that these are "troubling" facts (Brief of Respondent 34 ("Respondent's Brief")), but he offers no evidence—in the legislative record or otherwise—that any purpose is served by continuing to prohibit Appellants and tens of thousands of other Minnesotans from voting. No parsing of his brief, the record in this case, the history of the statutory scheme, or the State's constitutional history yields any governmental interest advanced by disenfranchising persons like Ms. Schroeder and Mr. Darris, who live, work, and participate in their communities.

Indeed, the Secretary's review of the history of Minnesota's disenfranchisement scheme underscores that the Legislature has never expressed any interest in or reason for prohibiting people living in the community from voting. (Respondent's Brief 31.) To the contrary, the Secretary's brief acknowledges that the Legislature's only articulated interest in Appellants' voting rights is to restore them to "effective participating

citizen[s].” (Respondent’s Brief 7, 31.) He fails to explain how that interest could possibly be served by denying Appellants the right to vote. The Secretary also acknowledges that the Legislature could restore Appellants’ voting rights but has instead chosen a legislative scheme that perpetuates their disenfranchisement. (*See, e.g.*, *id.* at 13 n.5, 34.) Rather than establish any affirmative rationale for the practice of disenfranchising persons living in the community, the Secretary resorts to the defense that the scheme must be constitutional because historical practices were even worse. (*See, e.g.*, *id*. at 16–18.) That rationale lays bare the gross arbitrariness of the statutory scheme.

The record leaves the disenfranchisement scheme with no viable constitutional defense. Facing that reality and unable to ground his defense in facts or evidence, the Secretary’s brief repeatedly relies on unsubstantiated pronouncements and assertions that he asks the Court to simply assume. Systematic deprivation of the right to vote cannot be upheld because the practice is just the way it has always been, because the current statutory scheme is not as irrational as previous versions, or because the courts must yield to a naked exercise of legislative discretion no matter how arbitrary. Under any theory of constitutional review, it cannot be acceptable to deny Appellants the right to vote for no reason. The disenfranchisement scheme violates the Constitution’s guarantee of equal protection, due process, and the fundamental right to vote.

Ms. Schroeder and Mr. Darris respectfully request that the Court restore their voting rights. That requested relief serves the only legislative purpose underlying the current disenfranchisement scheme and fulfills this Court’s role in safeguarding the right to vote against legislative deprivations.

ARGUMENT

I. HEIGHTENED RATIONAL-BASIS REVIEW MUST BE APPLIED AND REQUIRES RESTORATION OF APPELLANTS' RIGHT TO VOTE

Because the legislative decision to deny voting rights to persons living in the community on probation, parole, or supervised release disproportionately burdens persons of color, heightened rational-basis review must be applied. And because the Secretary cannot identify any actual stated or substantiated legislative rationale for disenfranchising Appellants, heightened rational-basis review provides an obvious path to reversing, granting them summary judgment, and restoring their right to vote.

A. Heightened Rational-Basis Review Must Be Applied Because the Scheme Disproportionately Impacts Persons of Color

Whether heightened rational-basis review should be applied turns solely on whether the challenged statutory scheme disproportionately burdens racial minorities. *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991).

On this threshold question, the Secretary defies both reason and the facts with the remarkable pronouncement that the statutory scheme "does not cause racial disparities." (Respondent's Brief 24.) He repeatedly makes this assertion while conceding that the legislative choice to disenfranchise persons living in the community until discharge of their sentences results in the disenfranchisement of 4.5% of the Black and nearly 9% of the American Indian voting-age populations, far exceeding the 0.9% of white Minnesotans in the community who are disenfranchised. (*See* Opening Brief 27.) The data on this point are unquestioned and unequivocal, and there is no dispute that the

voting rights of racial minorities are disproportionately denied by the disenfranchisement scheme.

The Secretary's attempt to avoid heightened rational-basis review is grounded in a baseless argument about causation that contradicts the case law, ignores the facts, and fails to respond to Appellants' brief. (*Compare* Respondent's Brief 25–27 *with* Opening Brief 27–29.) Appellants are *not* challenging the disproportionate arrest, incarceration, and conviction of persons of color. They are challenging the *legislative decision to extend disenfranchisement as a collateral consequence of conviction* to the 53,585 persons living in the community on probation, parole, or supervised release. There is no intervening cause between that legislative decision and racial disparities in the right to vote: the legislative classification directly causes the disparate impact. As the Court articulated in *Fletcher Properties*, the Legislature's denial of voting rights to persons living in the community prior to discharge of sentence "adversely affects one race differently than other races." *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 19 (Minn. 2020). That adverse, disparate impact necessitates heightened rational-basis review.

The Secretary's discussion of the facts in *Russell* only highlights the necessity of applying heightened rational-basis review here. (*See* Respondent's Brief 25.) Involving enhanced criminal penalties for crack cocaine, the statute reviewed in *Russell* was racially neutral on its face, and disparate racial impacts arose only after it was applied in practice following arrests and convictions. 477 N.W.2d at 889. Here, the challenged statutory scheme is also racially neutral on its face and results in disproportionate impacts in practice. Even worse, the racial composition of persons living in the community on

probation, parole, and supervised release is a known and established fact. The legislative decision to disenfranchise that population directly causes a disproportionate racial inequity.

In his struggles to distinguish *Russell*, the Secretary also ignores *State v. Garcia*, 683 N.W.2d 294, 300 (Minn. 2004), which applied heightened rational-basis review to invalidate the State's system for crediting time served in juvenile detention. Applying heightened rational-basis review to a statute that extends disenfranchisement as a collateral consequence to persons living in the community is perfectly consistent with heightened review of enhanced sentences in *Russell* and the system for calculating jail time in *Garcia*.[1] And here, knowing that the criminal justice system disproportionately subjects persons of color to community supervision, the Legislature continues to actively prohibit those persons from voting.

The Secretary also wrongly claims that Appellants are alleging discriminatory motives. (Respondent's Brief 23 n.7.)[2] This dodge misses the point of heightened

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[1] The Secretary references *State v. Frazier*, 649 N.W.2d 828 (Minn. 2002), which addressed a challenge to enhanced sentencing for gang-related crimes. The Court declined to apply heightened rational-basis review because the record failed to contain reliable data showing a disparate impact, but it acknowledged that sufficient evidence showing a disparate impact would support evaluating the scheme as a "race-based classification in practice." *Id.* at 36. Here, it is undisputed that Appellants have submitted expert analysis that relies on valid, accurate data showing a disparate impact.

[2] Respondent *again* makes a baseless waiver argument. Appellants have discussed at length the need for heightened judicial review to "smoke out" improper motives and address structural inequities. (*See* Appellants' Opening Brief at the Court of Appeals 43–44; Plaintiffs' Memorandum in Support of Summary Judgment 37–38.)

rational-basis review. The Court in *Russell* did not demand evidence of discriminatory intent as a threshold for applying closer scrutiny of the statute's purpose. Instead, faced with evidence of racial disparities resulting from a statute, heightened rational-basis review effectively shifts the presumption of constitutionality that may otherwise apply. An actual, stated purpose for the statute, backed by evidence and a legislative record, may establish that something other than racial discrimination motivates a legislative classification that causes racial inequities. A flimsy, pretextual rationale suggests something else. *See Russell*, 477 N.W.2d at 890.

Here, the Court confronts a statutory scheme that the Legislature created and refuses to reform, notwithstanding the obvious, ongoing reality in each passing election cycle that the scheme disproportionately disenfranchises persons of color and directly undermines the Legislature's stated interest in eliminating the stigma associated with disenfranchisement. (*See* Respondent's Brief 8, 29–30.) The record offers no basis to exclude invidious discrimination as an animating purpose for the continued existence of a patently arbitrary scheme that disproportionately prevents persons of color from voting. This record triggers the Court's gravest constitutional responsibilities, and heightened rational-basis review provides a critical tool to fulfill them. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (underscoring the need for judicial vigilance to protect the political rights of disadvantaged minorities); *Russell*, 477 N.W.2d at 889 (holding that heightened review is necessary where a legislative scheme "appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principle of equal protection"); *Women of the State of Minn. by Jane Doe v.*

Gomez (hereinafter, "*Gomez*"), 542 N.W.2d 17, 30 (Minn. 1995) (emphasizing the need for Minnesota courts to protect "persons on the periphery of society" and "the rights of each of its citizens").

Once again laboring to distinguish *Russell*, the Secretary asserts that the end of "correctional supervision" is an "objective" point at which to restore voting rights, whereas the statutory distinction between powder and crack cocaine was based merely on "abstract or perceived differences" between the two. (Respondent's Brief 26.) But *Russell*'s holding was based not only on the absence of meaningful chemical differences between crack and powder cocaine; the Court also held that the "crack-cocaine distinction . . . fails because the classification *is not relevant to the statutory purpose*," as there was no evidence in the legislative record to support the notion that heavier penalties for possession of small amounts of crack cocaine would further the "statutory purpose of penalizing street level drug dealers." *Russell*, 477 N.W.2d at 890–91 (emphasis added). In *Russell*, the disconnect between the record and the classification's purported purpose demonstrated the infirmity of the statute. *Id.* Here, the legislative record does not contain any indication that the Legislature thinks continued disenfranchisement of persons in the community serves the goals of community supervision. (Respondent's Brief 7.) The opposite is true: the Legislature adopted Section 609.165 recognizing that voting promotes rehabilitation (*id.*), a legislative judgment that is confirmed by experts in this case, social science, and amicus briefs submitted by both prosecutors and probation

officers. (ADD-64 to ADD-66.)[3] There is nothing "objective" about banning persons living in the community from voting, while claiming an interest in their rehabilitation to participating citizens. The stark disconnect between the stated legislative goals and the effects of the scheme further justifies heightened rational-basis review.

The Secretary fares no better by claiming that invalidating the current statutory scheme would make Appellants dependent on a pardon to restore their voting rights. (Respondent's Brief 26.) That argument assumes away Appellants' requested relief and the courts' ability to grant it, and the Secretary cannot argue (and has not argued) that the courts lack the authority to determine when Appellants' voting rights must be restored. Nor has he contested that restoration of voting rights would be the appropriate remedy should the Court conclude that the Legislature has failed to establish a genuine and substantial basis to disenfranchise Appellants and others living in the community on probation, parole, or supervised release. That relief is narrowly tailored, easily administered, and perfectly consistent with Article VII and separation of powers principles.

Finally, the Court should reject the Secretary's attempt to deflect Appellants' constitutional challenge by miscasting their claims as "policy concerns" that can be left to

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[3] *See, e.g.,* Brief of the American Probation and Parole Association 4-7 ("When an individual identifies as a responsible citizen, including by participating in volunteer work, community involvement, and voting, it benefits his or her transition back into the community."); Brief of Amicus Curiae Ramsey County Attorney's Office 8 ("[R]estoring voting rights to those on probation, parole, or supervised release fosters their re-engagement with society and the community, thereby increasing their likelihood of success under supervision.").

the Legislature. (Respondent Brief 27.) Unjustified deprivation of voting rights strikes at the fabric of the State's constitutional system, making it essential that the courts exercise particular care in reviewing any "statute that denies some residents the right to vote." *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 733 (Minn. 2003) (internal quotation marks and citation omitted). The Secretary asks this Court to stand aside in deference to legislative and prosecutorial reforms while failing to offer a shred of evidence that any of the referenced reforms have even marginally addressed the State's ongoing and deplorable practice of disproportionately disenfranchising persons of color. (Respondent's Brief 27.)

Moreover, as the Secretary acknowledges, the harsh reality is that the Legislature repeatedly refuses to reform the disenfranchisement scheme. (*See* Respondent's Brief 8–9 (citing numerous bills introduced "in almost every regular legislative session" spanning 2009–2021).) Ms. Schroeder and Mr. Darris are seeking relief from this Court because the legislative process continues to deprive them and over 53,000 similarly situated Minnesotans of the right to vote. Judicial review is the *only* recourse of the disenfranchised, so it is essential that courts vigorously examine a statutory scheme that deprives citizens of the right to vote.

By classifying persons living in the community on probation, parole, or supervised release as ineligible to vote, the statutory scheme disproportionately disenfranchises persons of color. That is a fact. Heightened rational-basis review must be applied.

B. Heightened Rational-Basis Review Necessitates Appellants' Relief

The Secretary fails to engage with Appellants' thorough review of the independent reasons why the disenfranchisement scheme cannot withstand heightened rational-basis review. (*See* Opening Brief 30–38.) His only response is to rely on the same legislative pronouncements that restoration of voting rights is "desirable" to "promote rehabilitation," to return persons to "effective participating citizen[s]," and to "remov[e] the stigma and disqualification to active community participation resulting from the denial of [] civil right." (Respondent's Brief 7–8, 30–31.) In short, the Secretary underscores that the Legislature's sole stated interest lies in all of the benefits that follow from restoration of voting rights, and he cannot point to any reason or rationale why the adopted legislative scheme nonetheless denies restoration of voting rights to Appellants and others living in the community.

Indeed, the Secretary's brief confirms that review of the record here is far simpler than the record before the Court in *Russell*. In *Russell*, the legislative record supporting the challenged statute at least contained an effort at fact-finding and expert testimony supporting the law, no matter how misguided. *Russell*, 477 N.W.2d at 890. Here, the Legislature has announced that it seeks to promote democratic participation and restoration of voting rights, without *any* explanation, evidence, fact-finding, or stated reason why it adopted a scheme that denies those rights to Appellants.

The Secretary's defense boils down to his refrain that the Court should deny Appellants constitutional relief because their fate may have been worse prior to adoption of the statutory scheme. (Respondent's Brief 31.) Thankfully, that is not a valid

constitutional defense. The only relevant question is whether the Legislature has an actual, genuine, and substantial interest in continuing their disenfranchisement, not whether historical practices have imposed even greater deprivations of the right to vote.

Moreover, for all of the Secretary's reliance on the State's history of felony-disenfranchisement, it is striking that he cannot point to anyone at any time in the State's history who has articulated some governmental purpose advanced by the practice. (*See, e.g.*, *id*. at 31 n.9 (confirming that neither the framers nor the State's constitutional history identify any interest served by felony disenfranchisement).)[4] The Court faces the startling reality that Appellants are disenfranchised while no one—not the framers, not the Legislature, not the Secretary, not any of the historical records introduced by the parties—has articulated any purpose served by it, much less a genuine and substantial one.

In sum, applying heightened rational-basis review, the Court should strike down the legislative scheme. And because there are no genuine disputes of fact, the Court should reverse and remand with instructions to enter summary judgment for Appellants and to restore their right to vote.

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[4] Contrary to the Secretary's footnote 9, of course Appellants do not argue that the Article VII felony-disenfranchisement provision should itself be invalidated for lack of a stated purpose. The point is that neither the framers nor anyone else in the cited historical record articulated a purpose for disenfranchisement that could have informed the Legislature's decision to disenfranchise persons living in the community. Likewise, the constitutional history supports a narrow interpretation of the provision. *See infra* Section II.A.

II. STRICT SCRUTINY APPLIES TO A STATUTORY SCHEME THAT DISENFRANCHISES CITIZENS

If the Court agrees that the disenfranchisement scheme should be invalidated under heightened rational-basis review, it need not proceed further. If the Court considers additional arguments, the Secretary's arguments fare no better.

The Secretary's efforts to avoid strict scrutiny should be rejected. Minnesota courts have long understood that the fundamental voting rights outlined in Article VII are essential to the design of our constitutional system and democratic governance. *See Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978); *Erlandson*, 659 N.W.2d at 733; *Kahn v. Griffin*, 701 N.W.2d 815, 832 (Minn. 2005). Because voting is the foundation of representative democracy, Minnesota courts should strictly scrutinize any statutory scheme—including both Section 609.165 and Section 201.145—that deprives tens of thousands of Minnesotans the right to vote.[5]

As a threshold matter, the Secretary does not refute the fundamental principle articulated in *Ulland*, *Erlandson*, and *Kahn* that it is vital for courts to closely review restraints on voting. (*See* Opening Brief 41, 44.)[6] In *Erlandson*, for instance, the Supreme

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[5] The Secretary makes no argument that the disenfranchisement scheme can survive strict scrutiny. Strict scrutiny ensures that any denial of voting rights is well-considered and narrowly tailored to achieving a compelling purpose. (*See* Opening Brief 49–51.) Courts should harbor serious concerns about any statutory scheme that denies voting rights without good reason, and the Secretary's failure to even attempt to supply one underscores the need to apply strict scrutiny in the first instance.

[6] Indeed, the Secretary's only effort to distinguish these cases is to conclude they "involved alleged infringements on an existing, undisputed fundamental right to vote,"

Court recognized that all other rights follow from the right to vote and are "illusory" without it. 659 N.W.2d at 729. It is therefore deeply troubling for the State to deny tens of thousands of otherwise eligible Minnesotans the right to vote and then attempt to minimize judicial review of, and the need to explain the rationale for, that practice. The Secretary's position cannot be squared with the Supreme Court's recognition of the "paramount importance of the right to vote" and its role as the foundation of democratic governance. *Id.* at 730.

A. Strict Scrutiny Applies to the Fundamental Right to Vote Established in Article VII

The Secretary offers no more than passing engagement with the text of Article VII and instead breezily concludes that it "unambiguously negates any claim to a fundamental right." (Respondent's Brief 14.) That pronouncement is not consistent with the text, structure, or history of Article VII.

As the Secretary concedes, the framers considered *and rejected* a provision making it clear that voting rights would not be restored absent legislative restoration. (*Id.* at 4.) By claiming that Appellants cannot vote unless and until the Legislature restores their rights, the Secretary nonetheless reads Article VII as though it includes that intentionally omitted language. According to the Secretary's interpretation, Article VII should be read to state that Appellants remain disenfranchised "unless *fully* restored to

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whereas here the Secretary claims there is no fundamental right. (Respondent's Brief 20.) That, of course, assumes the conclusion. And it does not answer the overwhelming consensus in Minnesota's caselaw that voting *is special*, and any law that impedes upon voting deserves close scrutiny.

civil rights *by the legislature*." Of course, Article VII says no such thing, because the framers deliberately declined to adopt such language. (Opening Brief 10–11.) Instead, the actual adopted text uses the passive phrase "unless restored to civil rights" that is wholly consistent with restoring the right to vote upon restoration of the right to live in the community.

Appellants urge the Court to adhere to the text of Article VII and its simplest, plain meaning: that Appellants are restored to the right to vote when they have been restored to the right to live in the community and can participate in the civil rights relevant to voting. Appellants can, and do, move about the community, speak freely, politically associate, and exercise every other political right *except* voting. (*See id.* at 5.) The Secretary does not argue otherwise. Under the text of Article VII, Appellants have been restored to civil rights and should be allowed to cast ballots.[7]

The Secretary's review of historical evidence supports, rather than rebuts, the clear textual command of Article VII. For example, he argues that the framers "understood" that restoration would occur through "pardon or the legislature," as evidenced by the fact

[7] The Secretary's cited cases do not establish anything to the contrary. (Respondent's Brief 13–14.) In *Minnesota Voters Alliance v. Simon*, 885 N.W.2d 660 (Minn. 2016), the Court never considered whether Article VII provides a fundamental right to vote to people convicted of felonies living in the community. Indeed, the claim at issue—that it was *too easy* for people like Appellants to vote—assumed they lacked that right. *Id.* at 661. *State ex rel. Arpagaus v. Todd*, 29 N.W.2d 810, 811 (Minn. 1947), addressed whether being convicted of a crime classified as a felony under federal law, but a misdemeanor under Minnesota law, implicated Article VII's felony exception. The Court concluded that the Respondent's misdemeanor did not count as a felony, so it never reached any issue applicable here. Finally, stray references in various cases about the effect of a governor's pardon (*see* Respondent's Brief 14-15) do not interpret Article VII.

that they considered adding text to that effect. (Respondent's Brief 16.) But the framers *rejected* that clause, indicating that they understood no such thing. Moreover, the Secretary concedes that community supervision did not exist at ratification, so penal consequences and state control over all rights and freedoms of persons convicted of a felony ended with incarceration. (*See* Opening Brief 12.)

Moreover, the framers considered and rejected permanent disenfranchisement, supporting the constitutional expectation that voting rights would be restored upon return to the community. (ADD-73.) In fact, as the Secretary acknowledges, the first restoration law adopted in 1867 (nine years after ratification) codified that intention by "automatically restor[ing] civil rights to those who completed a prison sentence." (Respondent's Brief 5.) The State's earliest legislators understood restoration to be an entitlement for those restored to life in the community.

Rather than providing any evidence that the framers intended to preclude restoration of voting rights until action by the Legislature, the Secretary relies on subsequent state laws adopting various restoration schemes long after ratification. (*Id.* at 16–17.) Fortunately, the courts do not accept the persistence of historical injustices as evidence of their constitutionality, and the referenced laws shed no light on the proper interpretation of the text or original meaning of Article VII.

Finally, the Secretary provides no answer to Appellants' argument that both the structure and purpose of Article VII necessitate the narrowest permissible interpretation of all exceptions to universal suffrage. (Opening Brief 44–45.) Interpreting Article VII to restore voting rights upon release from incarceration prioritizes Article VII's broad grant

of universal suffrage, limits legislative discretion to expand disenfranchisement, and provides a textually grounded, narrow reading of the felony-disenfranchisement provision.

B. The Court Should Apply Strict Scrutiny Even if Article VII Grants the Legislature Discretion in Restoring Rights

Even if the Court accepts the Secretary's faulty interpretation of Article VII that withholds restoration of voting rights until legislative action, the exercise of that legislative discretion must be subject to meaningful judicial review. The Secretary expressly concedes that, even under his interpretation of Article VII, "nothing [prevents] the legislature from [] expanding rights under section 609.165." (Respondent's Brief 34, *see also id*. at 13 n.5.) Thus, he recognizes that the Legislature has made a choice to deprive Appellants of the right to vote. The notion that such legislative discretion is effectively unreviewable—with the consequence that the courts must stand aside and rubber stamp legislative acts unnecessarily perpetuating disenfranchisement—is anathema to the Minnesota Constitution and this Court's jurisprudence. (*See* Opening Brief 40–41.)

The Secretary does not contest that the Court should and would strictly scrutinize any effort by the Legislature to expand the sanity or mental-capacity exceptions beyond their narrowest terms. He cannot explain why this Court should decline to apply the same review to a legislative scheme that expands the felony disenfranchisement until the discharge of sentence. And this failure is accompanied by the Secretary's recognition that the scope of felony disenfranchisement has wildly expanded since ratification given the

Legislature's power to create new felonies and enlarge the criminal justice system. (Respondent's Brief 19.) Strict scrutiny provides an essential mechanism to place boundaries on the Legislature's discretion to deprive people of the right to vote.

Much of the Secretary's argument hinges on the misdirection that Section 609.165 is a restoration statute that does not expressly bar people living in the community from voting. (*See, e.g.*, *id.* 20–21.) That argument faces two problems. First, Section 609.165 restores voting rights at discharge of sentence, but it also has the necessary effect of *denying* restoration to people on community supervision prior to that point. And Section 201.145 affirmatively ensures that they are blocked from registering to vote in every passing election cycle. There is no distinction between disenfranchising an eligible voter and refusing to restore a voter to eligibility—either way, the voter is precluded from voting by an act of legislative discretion. The Secretary's assurance that Section 609.165 does not "burden" the right to vote (Respondent's Brief 21) provides no comfort to Ms. Schroeder, who faces multiple decades of disenfranchisement as a result of the Legislature's scheme and whose right to vote now depends on this Court's exercise of judicial review. Because the Legislature actively deprives Appellants of the fundamental right to vote, courts should ensure that the statutory scheme is narrowly tailored to accomplishing a defined and compelling government interest. *See Ulland*, 262 N.W.2d at 415 (requiring strict scrutiny of legislative schemes that infringe the right to vote).

Second, while the Secretary relies on the argument that Section 609.165 improved historical practices, that history *supports* the need to apply strict scrutiny. Unbridled legislative discretion would mean that the Legislature could *permanently* disenfranchise

Appellants by refusing to restore voting rights at all. Likewise, the Secretary's position would preclude judicial scrutiny of legislative retrenchment that revokes Section 609.165, limits restoration, reverts to historical practices, or restores voting rights based on the Legislature's choice of criteria. The Secretary's suggestion that the Court should look the other way because the scheme could be worse is exactly the type of rationale that should trigger close judicial scrutiny.

C. Federal Law Is Not Relevant to Appellants' Claims Under the Minnesota Constitution

Throughout his brief, the Secretary invokes federal cases declining to strictly scrutinize various state felony-disenfranchisement schemes under the 14th Amendment. (*See* Respondent's Brief 13–15, 17, 29–30, 36.) His attempt to turn the Court's attention away from the Minnesota Constitution wholly ignores the reasons why these cases do not apply. (*See* Opening Brief 46–49.)

First, as Appellants explained, the federal case law turns on the Supreme Court's conclusion that the text and history of the 14th Amendment expressly left state felony-disenfranchisement schemes to the states. (*Id.* at 46–47.) The constitutionality of Minnesota's statutory scheme under the Minnesota Constitution is not a federal question, and the federal cases do not speak to Appellants' claims before this Court. Indeed, while the Secretary repeatedly relies on *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court remanded the issue to the state courts in that case.

Second, the Secretary has no response to this Court's long history of vigilantly protecting the rights of Minnesotans under the Minnesota Constitution when federal law

leaves gaps. (Opening Brief 47.) Appellants' requested relief from this Court fits squarely in this tradition. *See Kahn*, 701 N.W.2d at 833–34 (explaining Minnesota affords "greater protection for the right to vote [] under the Minnesota Constitution" if federal precedent fails to adequately protect that right); *Gomez*, 542 N.Wd.2d at 31 (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"). The Minnesota Constitution is "a font of individual liberties, [with] protections often extending beyond those required by the Supreme Court's interpretation of federal law." *Kahn*, 701 N.W.2d at 824 (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)). Especially now, as Minnesotans increasingly face federal courts declining to vigorously protect the right to vote under federal law, the Minnesota Constitution provides an essential bulwark to safeguard voting rights and the integrity of the State's constitutional democracy.

Minnesota courts are especially vigilant when plaintiffs lack political standing and are therefore most in need of recourse from the courts. *See Gomez*, 542 N.W.2d at 30. Relegated "to the periphery of society" and barred from the political process, Appellants are exactly the type of litigants most in need of judicial protection and stringent constitutional review of the very laws depriving them of fundamental rights and denying them political standing.

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, it cannot survive 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

1. Appellants Are Similarly Situated to Eligible Voters

The Secretary baldly asserts that Appellants are not similarly situated to those who possess the right to vote, a pronouncement that assumes the conclusion of the legal test and cannot be squared with the Secretary's own logic and case law.

The Secretary's brief acknowledges that the question is whether a plaintiff is "similarly situated to those treated differently in all *relevant* respects" and that this analysis "is not *contextless*." (Respondent's Brief 22 (emphases added) (citing *Fletcher Props.*, 947 N.W. at 22).) Exactly so. Appellants' brief detailed why—with respect to all of the capacities, freedoms, and responsibilities *relevant* to voting—there is no difference between Appellants and any eligible voter. (Opening Brief 36–38.) Appellants are free to discuss politics with their neighbors, volunteer for campaigns, and attend the polls. The Secretary provides no response. Instead, asserting that Appellants are differently situated due to terms of community supervision, he fails to explain how that is relevant to the act of voting.

The Secretary's case law further illustrates the defects in his analysis. In *Frazier*, 649 N.W.2d at 837–38, the court evaluated the evidence regarding the relevance of gang

activity to criminal sentencing enhancements. *Moreland v. United States*, 968 F.2d 655, 659–60 (8th Cir. 1992), evaluated a challenge to a state's refusal to credit pre-sentencing time served in a halfway house, so the inquiry involved a detailed review of the facts. *See id.* at 660–61 (explaining that presentencing halfway homes involve the "least restrictive conditions possible"). Here, the challenged law is about voting, but the Secretary's analysis does not *mention* voting or how Appellants are differently situated with respect to the act of casting a ballot.

As the Secretary acknowledges, the specific factual context matters, and courts do not apply abstract categories in a vacuum to decide whether individuals are similarly situated. (Respondent's Brief 22.) But that is exactly what the Secretary asks this Court to do by vaguely alluding to restrictions or conditions that might be entailed in community supervision, while entirely failing to describe how those restrictions are relevant to voting. *See Fletcher Props.*, 947 N.W.2d at 22 (holding that it would "beg the question" and "render the equal protection principle meaningless" to rely on the challenged classification itself as the basis to decide whether Appellants are similarly situated to others). It is undisputed that Appellants are not subject to any restrictions that provide a basis to preclude them from voting, and they are therefore similarly situated to eligible voters.

2. The Disenfranchisement Scheme Is Arbitrary

Unlike most cases reviewing statutes for a rational basis, here there is a clear and explicitly stated legislative purpose for the legislative scheme that is indisputably undermined by the statute. Having admitted that the legislative purpose of the scheme is

rehabilitation and that voting furthers rehabilitation, the Secretary cannot deny that *delaying* restoration of voting rights contradicts the statute's purpose.

Both the legislative and factual record demonstrate that disenfranchisement undermines the Legislature's stated goal of restoring persons on probation, parole, or supervised release to participating citizens. (*Supra* at 9.) Additionally, voting reduces recidivism and thereby furthers the purposes of community supervision. (ADD-62-3; *see infra* at Section IV.) No sound reason supports disenfranchising Appellants because they are on probation and supervised release, and denying them the right to vote negates the stated purpose of the challenged laws.

On this record, the Secretary's references to rational-basis review conducted by other courts facing different records (Respondent's Brief 29) fail to resolve the core problem that the Minnesota Legislature has identified the right to vote as important to rehabilitation and restoration of life in the community while adopting a scheme that undermines that goal. Having identified the legislative interest, it is arbitrary to adopt a scheme that undermines those aims.

Finally, the Secretary makes vague, fact-free references to discharge of sentences being the point at which "debts to society have been satisfied" and "criminal sanctions" have ended. (*Id.* at 28.) This effort to invent a rationale for the disenfranchisement scheme out of whole cloth is entirely divorced from any fact in the legislative or litigation record. Nor does the Secretary define or explain how disenfranchisement functions as a currency to pay off "debts" to society. Even if this Court did consider that made-up goal, the real facts show that disenfranchisement fails entirely as a criminal sanction or

deterrent. (ADD-63 to ADD-64.) The Secretary is asking this Court to uphold the rationality of a law that disenfranchises tens of thousands of Minnesotans—one that actively works at cross-purposes to the stated goal of the law and that is demonstrably less efficient to administer than restoration of voting rights to all persons living in the community—based on no more than an assertion manufactured for litigation. It is not appropriate for the Secretary to make things up in a *post hoc* attempt to defend the practice of barring Appellants from the ballot box.

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

While the disenfranchisement scheme cannot survive any degree of scrutiny, it must certainly be invalidated if this Court applies anything more than the toothless version of rational-basis review promoted by the Secretary. Despite this reality, the Secretary provides ***no*** response to Appellants' argument that, at a minimum, this Court should apply the balancing test applicable to any governmental burden on the act of voting. (*See* Opening Brief 53–54.)

Kahn held that, given the constitutional significance of the right to vote, even minor burdens on voting that do not trigger strict scrutiny must still be carefully reviewed. *Kahn*, 701 N.W.2d at 832. "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. And *Minnesota Voters Alliance*, 890 F. Supp. 2d at 1116, specifically held that expansion of Article VII exceptions beyond their narrowest

terms should be reviewed under the *Kahn* test. At bare minimum, the disenfranchisement scheme should be subject to such review.

Likewise, the Secretary does not attempt to argue that the disenfranchisement scheme can survive any balancing test. It cannot, for the reasons set forth in Appellants' briefs. (*Supra*, at 10–12, 22–24; Opening Brief 30–36, 49–55.) This Court can reverse on these concessions alone.

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

The Secretary concedes that "Appellants present strong policy reasons for changing the law," before he makes various rifle-shot arguments about the factual record. (Respondent's Brief 34.) Those arguments are procedurally improper, legally wrong, and factually baseless.

Procedurally, the Secretary stipulated to cross-motions for summary judgment, acknowledging that no genuine issue exists as to any material fact. He did so while failing to submit any expert reports, to conduct any expert discovery, to make any evidentiary challenge to the expertise or admissibility of Appellants' experts and their materials, or to argue to the district court that any factual dispute provides a basis to deny Appellants' motion for summary judgment. Litigants cannot wait until appeal to dispute the facts.

As to the law, contrary to the Secretary's suggestion, Appellants have never relied on "popularity" or policy arguments as a basis to challenge their disenfranchisement. (*Id.*) Instead, Appellants simply invoke the core legal principle that every version of

constitutional review requires the courts to assess whether the challenged governmental action furthers a valid legislative purpose. A constitutional defense must start with some rational reason for a deprivation of constitutional rights. The Secretary offers nothing. The Secretary's quibbles with the social-science research cited in Appellants' expert reports (*see id.*) cannot mask that he fails to point to anything in the legislative record—or a shred of evidence in this case—providing a governmental purpose served by depriving Appellants of the right to vote. That is a fatal legal defect regardless of politics or public opinion.

The Secretary's quibbles aside, he concedes all of the core facts entitling Appellants to relief: the Legislature has never offered an affirmative reason to disenfranchise persons on probation, parole, or supervised release; the Legislature's sole stated interest related to the voting rights of persons in the community is in restoring them to effective citizenship; refusing to restore Appellants' voting rights until the discharge of their sentences is a legislative choice; the factual record contains no evidence indicating that Appellants' disenfranchisement serves the stated interest or some other purpose; the scheme disenfranchises tens of thousands of Minnesotans living in the community; and a disproportionate number of disenfranchised persons in the community are persons of color. (*Compare* Opening Brief 4–22 *with* Respondent's Brief at 5–9, 34–36.)

Instead of disputing any of these salient points, the Secretary questions the statistical robustness of social-science studies finding that voting lowers recidivism. (Respondent's Brief 34.) He does not point to any contrary evidence. Nor is this a case

where the Legislature has relied on evidence regarding some purported benefit to disenfranchisement, leaving the courts with a conflicting factual record. To the contrary, the Legislature's judgment *accords* with the social science research by recognizing that restoration of voting rights eliminates stigma and promotes rehabilitation and further reintegration into the community. (*Id.* at 7–8.)[8] The Secretary never explains why the Legislature made the arbitrary decision to adopt a legislative scheme that works at cross-purposes with its stated interests, a fact fatal to the statutory scheme.

Ultimately, the Secretary recognizes that the public's interest is served by electoral participation. (Respondent's Brief 35.) Unable to rely on any facts or even an argument indicating that the legislative decision to disenfranchise persons in the community serves a governmental purpose, he invokes cases from other courts involving different legal schemes, constitutional principles, factual records, and claims. (*Id.* at 36.) Yet again, he does not point to a factual record developed in any of his cited cases offering this Court a basis to conclude that Appellants' continued disenfranchisement serves some purpose. Under the Minnesota Constitution, the legislative scheme that perpetuates that result is therefore unconstitutional.

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[8] The research on recidivism in the record confirms the obvious reality that active participation in the political process advances rehabilitation to life in the community. (*See, e.g.*, ADD-35 ("[V]oting is significantly correlated with lower crime," and voters "are thus less likely to be arrested and incarcerated.").) Multiple amicus briefs provide compelling additional support on this point (*see, e.g.*, D.C., *et al.* Amicus Brief 8–15; All Square, *et al.* Amicus Brief 24–25; City of Saint Paul and City of Minneapolis Amicus Brief 14–15; Minnesota Association of Black Lawyers Amicus Brief 19–20), including amici responsible for administering criminal justice (*infra* at 8 n.3).

CONCLUSION

Unless this Court reverses, Ms. Schroeder and Mr. Darris face years of disenfranchisement for no good reason, even as they live in the community. Tens of thousands of other Minnesotans—and disproportionately, persons of color—face the same injustice. There is no sound legislative purpose for this scheme. For the foregoing reasons, Appellants respectfully request that this Court reverse the Court of Appeals, declare that the practice of disenfranchising persons living in the community on probation, parole, or supervised release violates the Minnesota Constitution, and remand for entry of an order granting Appellants' requested relief including restoration of their right to vote.

Date: October 22, 2021

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State of Minnesota
In Supreme Court

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

Plaintiffs-Appellants,

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 6,995 words. This brief was prepared using Microsoft Word 2016 software.

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