

September 15, 2021

**OFFICE OF
APPELLATE COURTS**

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.

BRIEF OF *AMICI CURIAE*

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Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 *Wis. L. Rev.* 1045 (2002) 16, 20

Brenton Mock, *The Racist History Behind Felony Disenfranchisement Laws*, *Demos* (Feb. 13, 2014), <https://www.demos.org/blog/racist-history-behind-felony-disenfranchisement-laws> 11

Michael B. Sauter, *Black and White Inequality in All 50 States*, 24/7 Wall St. (Aug. 18, 2017), <https://247wallst.com/special-report/2017/08/18/black-and-white-inequality-in-all-50-states-2/> 12

Chris Uggen et al., *Locked Out 2020, Estimates of People Denied Voting Rights Due to a Felony Conviction*, *The Sentencing Project* (Updated Oct. 30, 2020) 12, 13, 14

Jeff Wagner, *Minnesota Ranked 2nd-Worst In U.S. For Racial Equality*, *CBS Minnesota* (Aug. 22, 2017), <https://minnesota.cbslocal.com/2017/08/22/minnesota-racial-inequality/> 12

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We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The Declaration of Independence of July 4, 1776
&

Second paragraph of the *Declaration of Sentiments & Resolutions* offered for the acceptance of the first Women’s Rights Convention, Seneca Falls, New York (July 19-20, 1848)
(emphasis added)

STATEMENT OF *AMICI CURIAE*¹

Amici curiae League of Women Voters Minnesota, Common Cause Minnesota, and the Minnesota Second Chance Coalition (jointly the “Voting Rights *Amici*”) each have solely a public interest in this appeal, namely safeguarding the sacred and fundamental right to the elective franchise. *See DSCC v. Simon*, 950 N.W.2d 280, 292 (Minn. 2020) (“The ‘right to vote is considered fundamental under *both* the U.S. Constitution and the Minnesota Constitution.”) (*quoting Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005)) (emphasis in original)).

League of Women Voters Minnesota

Since 1848, the League of Women Voters (the “League”) has been fiercely committed to securing the sacred right to the elective franchise. The League grew out of

¹ In accordance with Minn. R. Civ. App. P. 129.03, *amici* certify that no counsel or other person other than its counsel and representatives of *amici* authored any part of this brief. The brief has been prepared by Stoel Rives LLP on a *pro bono publico* basis, and no person or entity made any monetary contribution to the preparation or submission of this brief.

80 years of protest over women not being allowed to vote. From the first Women's Rights Convention came the commitment "to secure the sacred right to the elective franchise." *Declaration of Sentiments & Resolutions*, Women's Rights Convention (Seneca Falls, N.Y. 1848). By 1890, the National American Woman Suffrage Association ("NAWSA") was formed with the sole purpose of securing the right to vote for women. The idea that women were individuals with the right to citizenship and authority over their persons, children, and property was revolutionary. Suffragists were opposed and ridiculed by many, even other women who were shocked by the public display of defiance. Weeks before President Woodrow Wilson sent the 19th Amendment to the states on June 4, 1919, the NAWSA created a new organization, the League of Women Voters, to speed up the suffrage campaign in the United States and other countries, to finish the fight, and to aid in the reconstruction of the nation.

Today, the League continues to encourage informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. It envisions a democracy where every person has the desire, right, knowledge, and confidence to participate.

Common Cause Minnesota

Common Cause Minnesota is a state office of Common Cause, a nonpartisan, grassroots organization dedicated to upholding the core values of American democracy. It works to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process.

Minnesota Second Chance Coalition

The Minnesota Second Chance Coalition is a nonpartisan coalition consisting of hundreds of members, including organizations, associations, and individuals. Collectively, its members believe in second chances and advocate for fair and responsible laws, policies, and practices that enable individuals who have been involved in the justice system to fully support themselves and contribute to their communities to their full potential. That includes having an official voice in self-governance as recognized since the Declaration of Independence cited above: people have equal dignity and should have equal say in who represents them and what laws govern them.

Voting Rights *Amici* support reversal

The Voting Rights *Amici* respectfully submit that the district court interpreted Plaintiffs' complaint too narrowly, failing to address their fundamental threshold claim under Article VII of the Minnesota Constitution that conduct falling under the term "felony" today would be unrecognizable to the voters who adopted the Minnesota Constitution, leading to an unconstitutional expansion of felony disenfranchisement, and that the district court reached an incorrect conclusion. The court of appeals similarly ignored this fundamental threshold issue. Accordingly, the Voting Rights *Amici* support reversal of the lower courts' judgments.

ARGUMENT

I. INTRODUCTION

The right to vote is currently enshrined solely in Article VII of the Minnesota Constitution, but was included in both Article I and Article VII of the Constitution as

adopted by the people on October 13, 1857. Article I, Section 2, held that “[n]o member of this State shall be disenfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless be the law of the land, or the judgement of his peers.” (See Appellants’ Addendum (“ADD-”) at 75.) Article VII included then and includes now detailed provisions about the elective franchise the people reserved to themselves. (ADD-76-77.)

While this Court has long recognized that “the *exercise* of the right of suffrage may be regulated by legislation,” the Court has also recognized that “neither the state Legislature nor any other legislative authority can either restrict or extend the right of suffrage or impose conditions which shall in any substantial manner impede its exercise.” *Farrell v. Hicken*, 125 Minn. 407, 410, 147 N.W. 815, 815 (1914) (citing *State v. Erickson*, 119 Minn. 152, 137 N.W. 385 (1912)) (emphasis added).

At issue in this appeal is not a statute purporting to regulate how voting takes place (*e.g.*, the time, day, and place for voting), but instead the unconstitutional restriction of the right of suffrage itself through outright and express denial of that right to tens of thousands of Minnesotans. Specifically, before the Court is not only Minn. Stat. § 609.165, which seeks to restore the voting rights of some who have previously been convicted of a crime classified as a “felony,” but also Minn. Stat. § 201.014 and § 201.054, which criminalize registering and voting by those same persons in the first place. Minn. Stat. §§ 201.014 and 201.054 directly and expressly restrict the right to vote, but are overbroad and violate the Minnesota Constitution.

Repeatedly barred from voting, four Minnesotans with modern-day “felony” convictions sued Secretary of State Simon, claiming that their disenfranchisement by Minn. Stat. § 201.014, subd. 2, violates their voting rights under the Minnesota Constitution. The district court rejected Plaintiffs’ claims, holding that “a person who has been convicted of a felony does not have a fundamental right to vote in Minnesota until restored to civil rights.” (ADD-34-35.) On the basis of that conclusion, the district court reviewed Plaintiffs’ claims under a rational-basis test. (ADD-35-36.)

The court of appeals affirmed, holding that “it appears that appellants are asking this court to reconsider the wisdom of article VII, section 1, itself” (ADD-14-15), which the court stated it “may not do” (ADD-15). The court of appeals further affirmed on the basis that appellants cannot establish a fundamental right (ADD-21), rejected application of a heightened review (ADD-22, ADD-23), concluded that the appellants’ claims failed under the rational-basis test (ADD-25), and held that appellants had not established a substantive due-process violation (ADD-25-27). The Voting Rights *Amici* respectfully submit, however, that the lower courts’ repeated failure to address the critical threshold question whether each of the Plaintiffs-Appellants was in fact “convicted of . . . any felony” as that term was understood at the time of the adoption of the Minnesota Constitution in 1857 requires reversal. If this Court agrees with the Voting Rights *Amici*, the voting rights of the overwhelming majority of persons impacted by the Secretary’s current administration of Minnesota’s voting laws will be restored before reaching any of the due process and equal protection issues raised in this appeal, and proper deference

will be given to the rights and liberties reserved by Minnesota’s citizens to themselves.²

As Appellants have cogently recognized in their Brief at 12, 13, 18, 23-24, 45, and 51, conduct prohibited and punished as a felony in the Minnesota Territory and at the time of adoption of the Minnesota Constitution in 1857 was much more limited than what today’s criminal felony statutes proscribe. To wit, there are now more than six times the number of felony-level crimes in Minnesota Statutes than there were in 1857. Precluding from voting all persons convicted of crimes under modern-day and endlessly expanded contours of the term “felony” unlawfully hollows out the elective franchise rights reserved to the people by the Minnesota Constitution. Because Minn. Stat. § 201.014, subd. 2(1), broadly prohibits voting by persons convicted of a felony and not (yet) restored to civil rights, without making a distinction between, on the one hand, conduct that would have qualified for felony punishment in 1857 (or that would be sufficiently analogous as to fall within the 1857 voters’ anticipation) and associated felony disenfranchisement and, on the other hand, conduct which qualifies for felony-level punishment in 2021 but that falls outside the narrow 1857 felony-disenfranchisement exception, Minn. Stat. § 201.014, subd. 2(1), cannot survive constitutional scrutiny, and the lower courts’ judgments should be reversed.

² While the claims of the remaining two Appellants would be rendered moot by the Court’s agreement with the Voting Right *Amici*’s position herein, the Court could—and should—retain jurisdiction because the case is functionally justiciable and raises important public issues of statewide significance that should be decided immediately. *Kahn*, 701 N.W.2d at 821-22 (citing *State v. Brooks*, 604 N.W.2d 345, 347-48 (Minn. 2000)).

II. FACTUAL BACKGROUND

The Minnesota Legislature has historically sought both to expand and contract the right to vote. For example, in 1868, the Legislature passed a bill giving African-American men and other non-white men the right to vote, preceding the ratification of the 15th Amendment by two years. The Legislature passed a bill in January 1919 giving women the right to vote for presidential electors and in September 1919 ratified the 19th Amendment. On the other hand, in 2012 the Legislature sought to impose significant obstacles for certain groups to exercise their voting rights by proposing a constitutional amendment imposing strict voter-identification requirements. *See League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636 (Minn. 2012). After an education campaign, voters rejected the proposed amendment. By submitting proposed legislation restricting the right to vote to the people for their approval, the Legislature appropriately recognized that it does not have the right to decrease the right to vote without the people's consent, which consent can only be obtained through amendment of the Minnesota Constitution.

Chapter 201 of the Minnesota Statutes prohibits persons convicted of a felony from registering to vote and voting until their rights are restored through discharge. *See* Minn. Stat. § 201.014 (eligibility to vote), § 201.054 (registration), § 609.165 (restoration of civil rights). Under Minn. Stat. § 609.165, subd. 2, discharge is obtained either through (i) expiration of the sentence or (ii) by entry of a court order if either the imposition of the sentence was stayed or execution of the sentence was stayed.

Minn. Stat. § 609.135, subd. 2(f) (2020), requires that a “defendant shall be discharged six months after the term of the stay expires, unless the stay has been revoked

or extended..., or the defendant has already been discharged.” Minn. Stat. § 609.14, subd. 1(b) (2020), allows that “[w]hen it appears that the defendant violated any of the conditions of probation during the term of the stay, but the term of the stay has since expired, the defendant’s probation officer or the prosecutor may ask the court to initiate probation revocation proceedings under the Rules of Criminal Procedure at any time within six months after the expiration of the stay. The court also may initiate proceedings under these circumstances on its own motion.”

While it would seem easy to determine whether a court order discharging a person’s felony conviction was entered, there is no statutory path to confirm that one’s sentence has expired. It is, for example, unclear whether the existence of a small and unknown outstanding amount on a restitution order precludes sentence expiration and who makes this determination. It is also unclear whether only Minnesota felonies are included or also felony convictions handed down in other states. It is furthermore unclear how one can conclusively determine if one is permitted to once again vote, keeping in mind that numerous people are on “administrative probation” but do not have a probation officer.

Surprisingly, even the path of discharge through entry of a court order is not clear. The Minnesota Legislative Auditor, in a comprehensive 2018 evaluation report regarding voter registration, provided an example regarding the voting rights of a fictional Bob Johnson. The example has Mr. Johnson previously convicted of a felony but the execution of his sentence was stayed. *See Voter Registration, 2018 Evaluation Report, Office of the Legislative Auditor, State of Minnesota (2018), at 80–81,*

<https://www.auditor.leg.state.mn.us/ped/pedrep/voterreg.pdf>. The Legislative Auditor reports that courts enter retroactive voting-right-restoration orders, *id.*, which, according to the Evaluation Report, means that a person with a felony conviction who voted between the expiration of the stay of execution and the entry of the order voted legally, even if no court order restoring voting rights had been issued at the time of voting:

Exhibit A.1: It may be unclear whether some felony offenders are eligible to vote on election day.

- | | |
|-------------------|--|
| June 3, 2013 | <ul style="list-style-type: none">• Bob Johnson pleads guilty to a felony offense.• The court imposes a prison sentence but stays execution of the sentence for three years. Johnson is put on probation.• The State Court Administrator's Office notifies the Secretary of State's Office of Johnson's conviction.• County election staff mark Johnson's voter record in the Statewide Voter Registration System as "Challenged – Felony." |
| June 3, 2016 | <ul style="list-style-type: none">• Johnson's stay expires, but he has not been discharged from probation. |
| November 8, 2016 | <ul style="list-style-type: none">• Johnson goes to his polling place to vote.• The election judge asks Johnson to complete the oath for challenged voters because "Challenged – Felony" is printed next to Johnson's name on the voter roster.• Johnson completes the oath for challenged voters and votes. |
| December 30, 2016 | <ul style="list-style-type: none">• The State Court Administrator's Office notifies the Secretary of State's Office to restore Johnson's voting rights, with a discharge date of June 3, 2016. |

SOURCE: Office of the Legislative Auditor.

Id. at 81. The Legislative Auditor's report states that "[b]ecause the court had not discharged Johnson, one might think he was not eligible to vote. However, as Exhibit A.1 shows, several weeks later the State Court Administrator's Office reported the restoration of Johnson's voting rights to the Secretary of State's Office, with a discharge date of June 3, 2016. At this later date, it appeared Johnson was eligible to vote on November 8." *Id.* If the fictional Mr. Johnson's vote was, in fact, lawful, it would take a very daring person to exercise their elective franchise, given that both registering to vote

and voting while ineligible are felonies under Minn. Stat. § 201.014, subd. 3, and Minn. Stat. § 201.054, subd. 2, as noted above, and that prosecutors “shall” promptly investigate and prosecute if probable cause exists, Minn. Stat. § 201.275(a). And if voting during this six-month timeframe is, in fact, lawful, numerous persons entitled to vote undoubtedly fail to exercise their elective franchise because the risk of being charged with a felony is a strong deterrent factor, impacting liberty, housing, and employment. Moreover, as the district court recognized and as shown in Appellants’ Brief at 18-21, the impact of felony disenfranchisement is disproportionately felt by communities of color, who are arrested, charged, and convicted at rates far in excess of their presence in Minnesota society.

A [November 13, 2020, article in The Quadriga](#), the official blog of the Mitchell Hamline Law Journal of Public Policy and Practice, pointedly notes that

[t]he broad felony disenfranchisement laws we see today had their genesis in the post-Civil War South and the 13th Amendment, which although outlawed slavery, carved out an exception allowing states to impose involuntary servitude to those convicted of crimes. The purpose of the exception was to allow the South’s faltering economy post-Civil War by providing cheap Black labor through convict leasing. At least 90% of individuals forced into convict leasing were Black who were often arrested and convicted under an all-white criminal justice system for petty offenses. The motivation for the wide felony disenfranchisement laws was to prevent newly enfranchised Black citizens from voting.

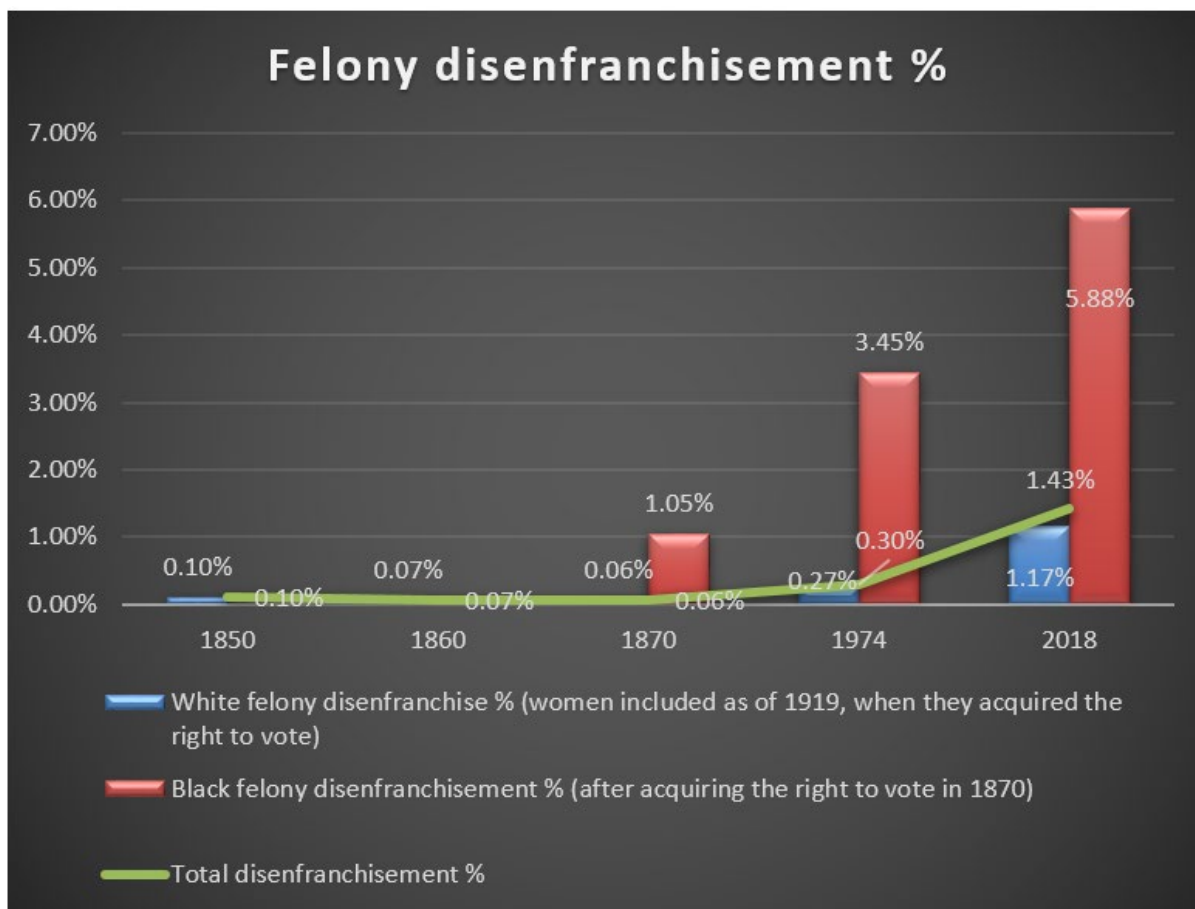
Adela Carrasco & Todd Howland, *Minnesota Should Lead the U.S.’s Unfinished Journey from Slavery to Granting All U.S. Citizens the Right to Vote*, The Quadriga (Nov. 13, 2020) (footnotes omitted), <https://mitchellhamline.edu/law-journal/2020/11/13/minnesota-should-lead-the-u-s-s-unfinished-journey-from-slavery-to->

[granting-all-u-s-citizens-the-right-to-vote/](#).³

Disenfranchisement is particularly troublesome because of its explosive growth. The record shows that in 1850 in Minnesota, “the percentage of persons subject to felony disenfranchisement would have been less than 0.1%.” (Index 56 at 12 (citations omitted).) By 1860, Minnesota’s population had grown more than 28-fold, but the percentage of Minnesotans subject to felony disenfranchisement was still less than 0.1%. (*Id.* (citations omitted).) While Minnesota’s population has grown steadily since that time, the felony-disenfranchisement rate has increased exponentially. By 1974, the percentage of Minnesotans subject to felony disenfranchisement had tripled. (*Id.* at 13 (citations omitted).) By 2018, that percentage had increased more than 4.7-fold compared to 1974, to 1.43%. (*Id.* (citations omitted).) Shockingly, in 2018, the African-American felony-disenfranchisement percentage was 5.88% of the Black voting-age population, or more than 4 times the total disenfranchisement rate (Index 56 at 14 (citations omitted)).⁴ These facts are graphically reflected below:

³ See also Brentin Mock, *The Racist History Behind Felony Disenfranchisement Laws*, Demos (Feb. 13, 2014), <https://www.demos.org/blog/racist-history-behind-felony-disenfranchisement-laws>.

⁴ An August 18, 2017, report listed Minnesota as the second-most unequal state in the country behind only Wisconsin. The report found that black Minnesotans are ten times more likely to end up in jail or prison than whites, and that the median income for a black household was \$30,306, while a white household’s income was more than double that number at \$66,979. The study further found that the unemployment rate for black Minnesotans was 8.8% compared to 3% for white Minnesotans, and that the homeownership rate for black people was 21.7%, but more than tripled for white people at 76%. Critically, race relations experts reported that these statistics are directly connected, tying low-income jobs, (continued . . .)



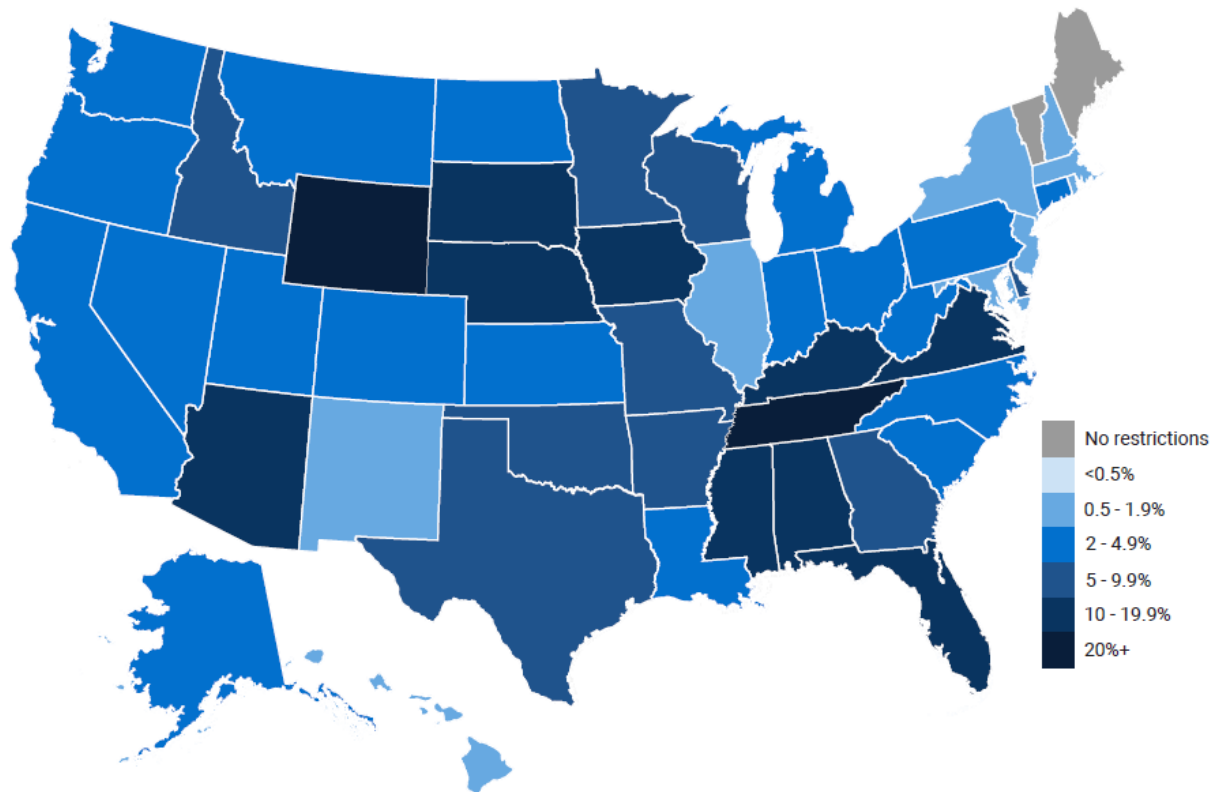
An October 15, 2020, report by The Sentencing Project shows that this discrepancy is continuing to grow exponentially, with a stunning disenfranchisement rate of 7.24% of Minnesota’s African-American population in the year 2020. See Chris Uggen et al.,

(... continued)

unemployment, and a lack of affordable housing to being forced to work outside of the labor market in the underground economy and ending up in jail. Then-Minneapolis NAACP President Jason Sole rightfully asked, “If I can’t get housing, if I can’t get a job, what do you really want me to do? Those are the most basic needs we have.” (See Jeff Wagner, *Minnesota Ranked 2nd-Worst In U.S. For Racial Equality*, CBS Minnesota (Aug. 22, 2017), <https://minnesota.cbslocal.com/2017/08/22/minnesota-racial-inequality/> and Michael B. Sauter, *Black and White Inequality in All 50 States*, 24/7 Wall St. (Aug. 18, 2017), <https://247wallst.com/special-report/2017/08/18/black-and-white-inequality-in-all-50-states-2/>.)

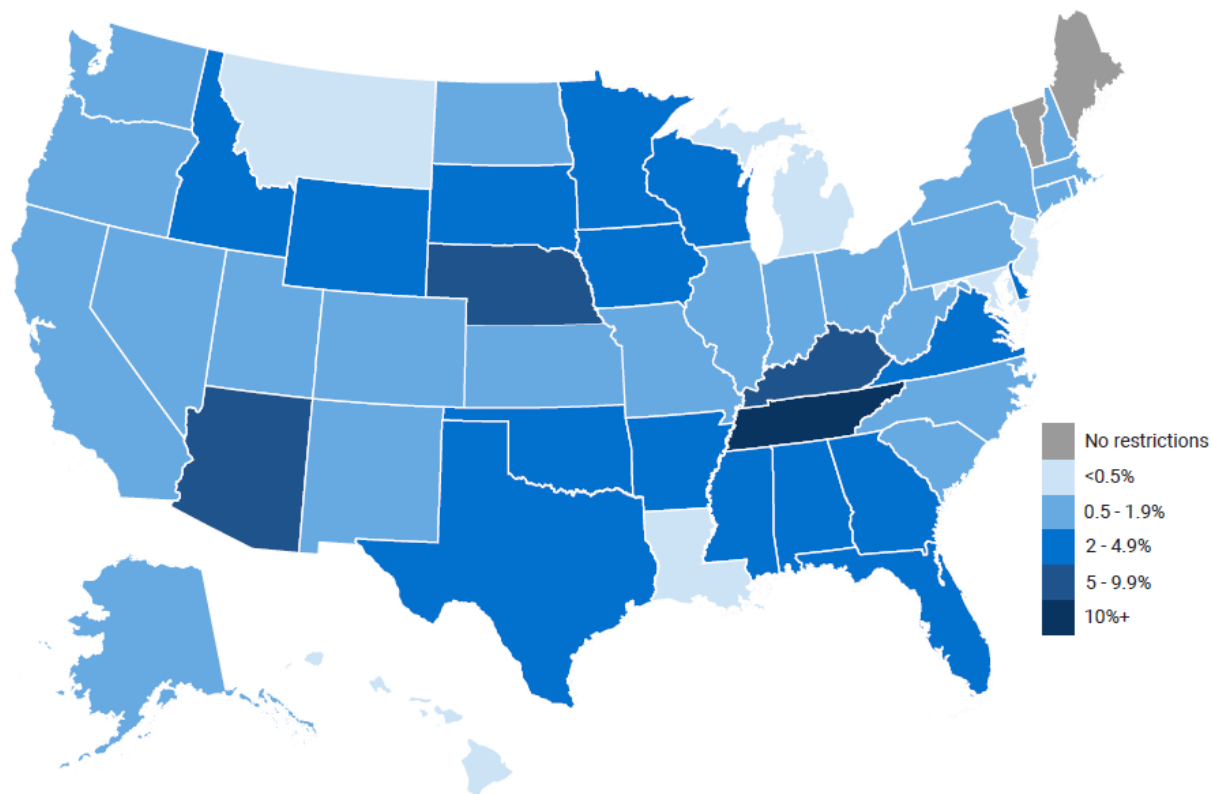
Locked Out 2020, Estimates of People Denied Voting Rights Due to a Felony Conviction, The Sentencing Project at 17 (Updated Oct. 30, 2020).⁵ The report reflects very high minority disenfranchisement rates in all but two States:

Figure 5. African American Felony Disenfranchisement Rates, 2020



⁵ Download available at <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

Figure 6. Latinx Felony Disenfranchisement Rates (Available Data), 2020



Id. at 11-12.

Whether felony disenfranchisement is a violation of a basic human right, as the authors of the [November 13, 2020 article in The Quadriga](#) argue, or a permissible societal choice, is not for this Court to decide today. However, as this Court has recognized, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729 (Minn. 2003) (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992), in turn quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). Because voting is “preservative of all rights,” see, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)), the elective franchise must be vociferously protected by the courts. To this end, the Voting Rights

Amici respectfully seek this Court’s thoughtful, in depth, and conscientious analysis essential to protecting the elective franchise guaranteed by the Minnesota Constitution to tens of thousands of Minnesotans who the Secretary currently and unconstitutionally bars from exercising that franchise.

III. ARTICLE VII OF THE MINNESOTA CONSTITUTION RESERVES TO THE PEOPLE A FUNDAMENTAL RIGHT TO VOTE, SUBJECT ONLY TO A LIMITED EXCEPTION

The Secretary of State has consistently argued below that no “fundamental right” is at stake here, such that all regulation at issue is subject only to “traditional [rather than heightened] rational-basis review” or “strict scrutiny review” because “the Minnesota Constitution does not create a fundamental right to vote while serving a felony sentence in the community.” (Index 52 at 9-10.) But while the Secretary has recognized that Plaintiffs’ challenge is broader and that it encompasses the challenge that most modern “felonies” were not recognized when the Minnesota Constitution was adopted (Index 72 at 5), he conveniently did not brief this issue below. Because the lower courts did not address the issue either and because this is a threshold issue, their decisions are incomplete, requiring reversal.

Contrary to the Secretary’s failure to even recognize the overarching principle that the people expressly reserved the elective franchise to themselves, the district court recognized that “[i]n Minnesota voting is a fundamental right.” (ADD-34 (*citing Kahn*,

701 N.W.2d at 830; *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978)).⁶ This Court reaffirmed this fundamental right as recently as October. *See DSCC*, 950 N.W.2d at 292 (“The ‘right to vote is considered fundamental under *both* the U.S. Constitution and the Minnesota Constitution.’” (citation omitted) (emphasis in original)).

As applied, this fundamental right is only subject to a limited exception. As the parties have recognized below, the loss of voting rights following certain criminal convictions is a long-standing practice akin to “civil death” that has its roots in ancient Greece, common law, colonial America, and the law governing the Minnesota Territory, and is a practice that continued in the 1857 Minnesota Constitution. *See* Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 Minn. L. Rev. 1913, 1913, 1917-20 (2015) (describing the origins of the punishment of “civil death”); Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045, 1049 & n.13, 1059-60 (2002) (describing “civil death” as the condition in which a convicted person is said to be “dead in law” because he could not perform any legal function). However, modern-day application of the felony disenfranchisement exception has extended it far beyond its original limited scope. *See* Haase, *supra*, at 1920-23 (describing the modern scope of felony disenfranchisement as so much greater than originally contemplated that it has, in effect, transformed into a concept entirely dissimilar from its origin).

Indeed, the district court recognized that “felony disenfranchisement is a serious

⁶ Like the Secretary of State, the court of appeals disregarded this basic principle in its analysis, despite extensive briefing by the Voting Rights *Amici* of the issue.

issue that affects tens of thousands of Minnesotans” today and has “a disproportionate impact on communities of color across Minnesota and the United States.” (ADD-40.) Unfortunately, neither lower court addressed the proper scope of the felony-disenfranchisement exception. The Voting Rights *Amici* respectfully submit that the scope of the exception requires review in this case, having properly been raised and recognized by the parties below and having been factually raised by Appellants in their brief to this Court.⁷

IV. THE LOWER COURTS FAILED TO PROPERLY DELINEATE THE LIMITED CONSTITUTIONAL EXCEPTION TO THE FUNDAMENTAL RIGHT TO VOTE

A. Without Constitutional Amendment, the Legislature Cannot Restrict Rights Reserved by the People to Themselves, Including the People’s Right to Vote

Exceptions to constitutional rights must be narrowly construed to prevent unwarranted usurpation of powers reserved to others. *Inter Faculty Org. v. Carlson*, 478 N.W.2d 192, 194 (Minn. 1991). That generally-applicable rule is even more important as applied to the elective franchise, because, as noted above, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined,” *Erlandson*, 659 N.W.2d at 729 (citation omitted), and because voting is “preservative of all rights,” *see, e.g., Reynolds*, 377 U.S. at 561-62 (quoting *Yick Wo*, 118 U.S. at 370).

It should be axiomatic that the meaning and scope of “felony” in Article VII of the Minnesota Constitution cannot be modified by the legislative branch when Article I,

⁷ See Index 56 at 9-11; Index 72 at 5; Appellants’ Court of Appeals Brief at 78; Appellants’ Supreme Court Brief at 12, 13, 18, 23-24, 45, and 51.

section 1, thereof unambiguously leaves that power to the people. This section provides that “[g]overnment is instituted for the security, benefit and protection of *the people*, in whom *all political power is inherent*, together with *the right to alter, modify or reform* government whenever required by the public good.” (Emphases added.) By recognizing that the political power resided with the people before any of it was granted to a common government and by reserving to themselves the rights to alter, modify, or reform the government, and not granting that power to the elected legislative or executive branches (or to the judiciary), all political power not voluntarily ceded to the state continues to reside with the people.

B. The Minnesota Legislature Can Only Disenfranchise Minnesotans Convicted of Conduct That Constituted a Felony in 1857 or That Could Reasonably Be Anticipated in 1857 to Be Rendered a Felonious Crime

As relevant here, Article VII of the Minnesota Constitution provides that “[t]he following persons shall not be entitled or permitted to vote at any election in this state: ... a person who has been convicted of treason or felony, unless restored to civil rights.” Because the right to vote is “fundamental,” *DSCC*, 950 N.W.2d at 292, and thus reserved to the people unless ceded, the lower courts were required to first determine the meaning and scope of the term “felony” in Article VII.

When examining constitutional provisions, Minnesota courts’ task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of the language. *State v. Lessley*, 779 N.W.2d 825, 833 (Minn. 2010). Importantly, Minnesota courts construe the ordinary meaning of the words of a constitutional provision “in the light of the social,

economic, and political situation of the people at the time of its adoption . . .” *Id.* (quoting *State v. Hartman*, 700 N.W.2d 449, 453 (Minn. 2005); *Rice v. Connolly*, 488 N.W.2d 241, 247 (Minn. 1992)).⁸

Reviewing the meaning and scope of the term “felony” in Article VII through the eyes of the 1857 voters who adopted the Constitution, the term can only describe conduct that was believed to be sufficiently criminal in 1857 to qualify as a felony at that time, or which the Constitution-adopting voters could reasonably anticipate would or could be rendered a felonious crime: serious violent crimes like murder, assault, rape, kidnapping, and arson. Minn. Stat. Ch. 89 (1858) (murder, assault, rape, kidnapping); Minn. Stat. Ch. 90 (1858) (arson); *see also* Minn. Stat. Ch. 93 § 1 (1863) (treason). Moreover, because felony sentencing in 1857 was limited to imprisonment in state prison, every person convicted of a felony in Minnesota either served the entirety of their sentence in prison or was punished with death. Minn. Stat. Ch. 87 § 3 (1858). Therefore, felony disenfranchisement was reserved for a small range of severe conduct and only applied to a very small number of imprisoned Minnesotans. *See Haase, supra*, at 1923. This

⁸ The same principle has been applied to the interpretation of statutes. *See, e.g., State v. Atwood*, 925 N.W.2d 626, 632 (Minn. 2019) (“[T]he best clue to understanding the Legislature’s intent is to look to the meaning of ‘information’ when the statute was enacted.”); *State v. Milliman*, 802 N.W.2d 776, 779 (Minn. Ct. App. 2011) (“At the time of the enactment of section 551.01 [(1990)], the common meaning of the word ‘attorney’ was a lawyer who is licensed to practice law.”); *Opay v. Experian Info. Sols., Inc.*, 681 N.W.2d 394, 396 (Minn. Ct. App. 2004) (“We agree with the district court that the plain meaning of ‘mail’ did not include electronic transmissions when the statute was enacted, and the plain meaning of the unmodified term ‘mail’ as currently used in the statute does not include electronic transactions.”).

treatment is consistent with the concept of “civil death”: an extreme punishment reserved for the most serious of crimes. *See* Ewald, *supra*, at 1059-60; Haase, *supra*, at 1918-20 (describing that civil death was used “when it is . . . clear beyond all dispute, that the criminal is no longer to live upon the earth, but is to be exterminated as a monster and a bane to human society”).

As an exception to a fundamental right, the 1857 Minnesota voters who adopted the Minnesota Constitution cannot be deemed to have waived future generations’ elective franchise as punishment for conduct they could not anticipate would or could be criminalized as a “felony.” Computer crimes, for example, cannot have been deemed to have entered into the mind of the 1857 voter—both because it was nonexistent technology and because such a non-violent crime would not have been classified a felony at that time. Indeed, in 1857, there were only approximately 75 felony-level crimes in Minnesota statutes. *See* Haase, *supra*, at 1920 (*citing* Minn. Stat. Chs. 93-101 (1866)). As noted by Appellants, by August 1, 2014, there were over 375 felony-level crimes in Minnesota’s state statutes. (Appellants’ Brief at 12 (*citing* ADD-57 n.31); *see also* Minn. *Sentencing Guidelines and Commentary* (Aug. 1, 2014) at 96-123.)⁹ Today, there are more than 460. *See* Minn. *Sentencing Guidelines and Commentary* (Aug. 1, 2020) at

⁹ Available at https://mn.gov/sentencing-guidelines/assets/2014%20Minnesota%20Sentencing%20Guidelines%20and%20Commentary_tcm30-33911.pdf.

104-26.¹⁰ Most of those felony-level crimes do not fall within the limited felony-disenfranchisement exception envisioned by the 1857 Constitution-adopting voters, and thus cannot result in felony disenfranchisement now.

As this Court recognized in *Lessley*, “[t]he Minnesota Constitution is, in essence, a contract between the people and those persons whom the people choose to put in a position of having sovereign power.” *Lessley*, 779 N.W.2d at 833. This is a “*limited contract*” and “the Bill of Rights [Article I] is the part of that contract that reserves rights to the people and protects them from the improper exercise of government power.” *Id.* (emphasis added). While Section 2 of Article I of the 1857 Constitution was removed as part of the 1974 modernization and reformation of the Minnesota Constitution and deemed to be sufficiently included in Article VII, this Court has explicitly recognized that the 1974 modernization and reformation “was not intended to change the interpretation of the [Constitution] ... only to make the Constitution more readable and stylistically correct.” *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 159 (Minn. 2017) (quoting *Butler Taconite v. Roemer*, 282 N.W.2d 867, 868 n.1 (1979) (even the removal of a phrase in the 1974 restructuring of the Minnesota Constitution “was not intended to change the interpretation of the section”)). In fact, the official representation made to the voters in 1974 in conjunction with the modernization and reformation was that the changes were meant to “improve [the constitution’s] clarity ... without making *any*

¹⁰ Available at <https://mn.gov/msgc-stat/documents/Guidelines/2020/August2020MinnSentencingGuidelinesCommentary.pdf>.

consequential changes in its legal effect[.]” *Wiebesick*, 899 N.W.2d at 159 (alterations in original; emphasis added) (*citing* Act of Apr. 10, 1974, Ch. 409, 1974 Minn. Laws 787, 819 (titled “[a]n act proposing an amendment to the Minnesota Constitution in all its articles; reforming its structure, style and form” and containing the text of the question presented to the voters)).¹¹ The 1974 Minnesota Constitutional Study Commission therefore instructed that the courts should look exclusively “to the meaning of the original [1857] document” in interpreting the 1974 constitution, *see* Commission Comments, *reprinted at* 1 Minn. Stat. Ann. 129, 133 (1976), while a severability clause provided that “if a change included in the proposed amendment is found to be . . . other than inconsequential . . . the change shall be without effect and severed from the other changes.” Act of Apr. 10, 1974, Ch. 409, at 819, § 2. Thus, the Bill of Rights’ strict protection over the elective franchise remains, and the people’s elective franchise rights, as preserved in Articles I and VII of the 1857 Constitution, were not surrendered in 1974 and were not able to be limited by the Legislature before or after that modernization, without the voters’ consent, to be expressed through amendment of the text of the Constitution.

Unlike ordinary law, a constitution is not “alterable when the legislature shall please to alter it.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). As Justice Anderson

¹¹ *See also Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 617 n.7 (Minn. 2017) (“The 1974 amendments were stylistic, not substantive.”); *State v. Hamm*, 423 N.W.2d 379, 381 n.1 (Minn. 1988) (“[T]he revision and restructuring of the state constitution in 1974 was never intended to change long-standing constitutional interpretations.”), *superseded on other grounds by* Minn. Const. art. I, § 4.

remarked in *Ritchie*, “[c]onstitutions bind the people and their public assemblies to the basic and fundamental value choices embodied in a constitution. This binding of the people to the basic or fundamental law embodied in a constitution reflects the people’s mistrust of any governmental authority placed above them. It is through a constitution that the people protect themselves and preserve their basic rights and freedoms from the Sirens’ song of the future tyranny of public assemblies or the ‘ill humors,’ that may emanate from the people themselves.” 819 N.W.2d at 674 (dissenting) (citing *The Federalist* No. 78 (Alexander Hamilton)). Thus, “Minnesotans have bound themselves to both the United States Constitution and the Minnesota Constitution in order that they may be free.” *Id.* (paraphrasing Cicero, *Pro Cluentio* 146).¹² As applied, that protection prevents an unwitting expansion of the “felony conviction” exception through the Minnesota legislature’s “ill humors” of an enormous expansion of conduct denominated as a “felony;” an expansion that furthermore so happens to have an enormously disproportionate and discriminatory effect on the basis of race and absence of wealth.

To paraphrase the U.S. Supreme Court in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1738 (2020), if the Minnesota Legislature could add to, remodel, update, or detract from constitutional protections inspired only by its own imagination, we would risk amending the Constitution outside the process reserved for the people under article I, section 1 of the Minnesota Constitution. Thus, while it is tempting to simply hold that

¹² See also Preamble to both the 1857 and 1974 Constitutions, providing that “We, the people of the State of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to *ourselves* and *our* posterity, do ordain and establish this Constitution.” (Emphasis added.)

“felony” means “felony” and that the Legislature may fill that word with whatever conduct it can imagine and render unlawful, that shortcut is in fact in direct conflict with long-standing principles of constitutional and statutory interpretation, and unlawfully and unconstitutionally expands a limited *exception* to the people’s reservation of the elective franchise to themselves. Thus, the Minnesota Legislature can only disenfranchise Minnesotans who have been convicted of conduct that constituted a felony in 1857 or of conduct that could reasonably be anticipated by the voters who adopted the Constitution in 1857 to be rendered a felonious crime. Any further expansion of the exception can only be accomplished by amendment of Minnesota’s Constitution, by the people. Amendment attempts by the Legislature are void.

V. MINN. STAT. § 201.014, SUBD. 2(1)—RENDERING CERTAIN PERSONS NOT ELIGIBLE TO VOTE—IS BROADER THAN THE LIMITED CONSTITUTIONAL EXCEPTION TO THE FUNDAMENTAL RIGHT TO VOTE AND THEREFORE UNCONSTITUTIONAL

The Voting Rights *Amici* concede that statutes are deemed constitutional and will be found unconstitutional ““with extreme caution and only when absolutely necessary.”” *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 9 (Minn. 2020) (citation omitted); *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989); *City of Richfield v. Local No. 1215, Int’l Ass’n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979). Voting Rights *Amici* further concede that “[a] party challenging the constitutionality of a statute ‘must meet the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional.’” *Otto v. Wright County*, 899 N.W.2d 186, 191 (Minn. Ct. App. 2017) (citation omitted), *aff’d*, 910 N.W.2d 446 (Minn. 2018). Here, that burden is met,

and as Chief Justice Marshall said more than 200 years ago, a court “when impelled by duty to render [a constitutional interpretation], would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes.” *Fletcher v. Peck*, 10 U.S. 87, 128 (1810).

It is undisputed that Minn. Stat. § 201.014, subd. 2(1), which renders certain individuals ineligible to vote, does not distinguish between conduct that constituted a felony in 1857, such as murder, or could reasonably be anticipated by an 1857 voter to be rendered a felonious crime (which under the 1857 Constitution admittedly stripped the convicted person of the right to vote, subject to restoration of civil rights) on the one hand and conduct that could not possibly have been foreseen as a felony in 1857 on the other hand. *See, e.g.*, Minn. Stat. § 82A.13, subd. 2(2) (2020, first adopted in 1985) (untrue statement or material omission in connection with the offer or sale of any membership camping contract) and § 82A.25 (2020) (violation of § 82A.13 is a felony punishable by a fine of not more than \$5,000 or imprisonment of not more than five years or both); Minn. Stat. § 116C.835, subd. 1(a) (2020, first adopted in 1983) (punishing repeated violation of provisions of the Midwest Interstate Low-Level Radioactive Waste Compact as a felony). A conviction of conduct that in 1857 was not a “felony” or that was far removed from any possible conception by the 1857 voter of a “felony” cannot be deemed by that 1857 voter to have given the state license to disenfranchise today’s voters. As noted above, such an expansion of the *exception* to the elective franchise is only possible through amendment of the Constitution, which amendment must be approved by the people rather than the Legislature, *quod non*.

While the Legislature may, within its constitutional boundaries, determine that “modern-day” misconduct should be punishable as a “felony-level” crime, it does not have the power under the Minnesota Constitution to attach to each conviction of such “modern-day felonies” the collateral consequence of voter disenfranchisement. Because Minn. Stat. § 201.014, subd. 2(1), fails to differentiate between “1857-type felonies” and “modern-day felonies” and because most “modern-day felonies” are entirely outside the realm of the limited felony disenfranchisement exception approved by the 1857 voters, the statute is impermissibly broad.

The conclusion that Minn. Stat. § 201.014, subd. 2(1), is impermissibly broad triggers the canon of constitutional avoidance, which requires the judiciary, if at all possible, to interpret a statute to “preserve its constitutionality.” *Hutchinson Tech., Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005); see Minn. Stat. § 645.17(3) (2020) (“[T]he legislature does not intend to violate the Constitution of the United States or of this state.”). But “a limiting construction should be imposed only if an unconstitutional statute is ‘readily susceptible to such a construction.’” *State v. Turner*, 864 N.W.2d 204, 210–11 (Minn. Ct. App. 2015) (quoting *United States v. Stevens*, 559 U.S. 460, 481 (2010)). A “rewrite” of the law is not permissible. *Id.* at 211. Here, the Voting Rights *Amici* can perceive of no way to narrow the scope of Minn. Stat. § 201.014, subd. 2(1), to remove the offensive conduct, rendering the statute not susceptible to a narrowing construction. As a result, the entire statute falls. *Turner* at 211 (“[A]lthough appellant’s conduct was reprehensible and defamatory, we cannot uphold his conviction under an unconstitutional statute.”).

CONCLUSION

The Voting Rights *Amici* agree with Appellants that the elective franchise is our Constitution's fundamental expression of the dignity and humanity of its citizens and that the right to vote is the essential guarantor that political power remains accountable to those subject to its exercise, as set forth in the Declaration of Independence. The Voting Rights *Amici* respectfully submit that Minn. Stat. § 201.014, subd. 2(1), is unconstitutionally overbroad and cannot be rewritten to render it constitutional. Accordingly, the Voting Rights *Amici* agree with Appellants that Minnesota's system of felony disenfranchisement is constitutionally intolerable and that the lower courts' judgments to the contrary must be reversed.

Respectfully submitted,

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Dated: September 16, 2021

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font, 13-point or larger. The length of this brief is 6,605 words. This brief was prepared using Microsoft Word for Office 365 MSO.

Respectfully submitted,

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