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Jennifer Schroeder, et al.,

Appellants,

vs.

Minnesota Secretary of State Steve Simon,  
Respondent.

Brief of *Amicus Curiae* In Support of Appellants  
The Legal Assistance to Minnesota Prisoners/Reentry Clinic at Mitchell  
Hamline School of Law, The Legal Rights Center, and All Square

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1. **INTRODUCTION**

The Legal Rights Center, the LAMP/Reentry Clinic at Mitchell Hamline School of Law, and All Square work directly with incarcerated and formerly incarcerated people. Given the nature of their work, joint amici are able to describe with particular authority the impact of felon disenfranchisement on their clients and communities, including the types of cases that frequently lead to a loss of voting rights, the impact of felon disenfranchisement on the already marginalized communities that they serve, and the racial and economic disparities that exist at every step of the criminal justice process – from police interactions, to charging decisions, to sentencing outcomes – which ultimately culminate in racial and economic disparities in voting eligibility.

We submit this brief in support of the Appellants in this matter.

2. **IDENTITY AND INTEREST OF AMICI<sup>1</sup>**

The Legal Assistance to Minnesota Prisoners/Reentry Clinic is a law school clinic that represents incarcerated and formerly incarcerated persons on civil matters.

All Square is a nonprofit social enterprise located in South Minneapolis. All Square's mission is to ensure that those impacted by the criminal justice system have the support and opportunities they need to become our country's future leaders, business owners, legal practitioners, and entrepreneurs.

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<sup>1</sup> Counsel for *amici* certify under Minn. R. Civ. App. P. 129.03 that: (1) no counsel for a party wrote this brief in whole or in part; and (2) no person or entity has made a monetary contribution to the preparation or submission of the brief other than *amici*, their members, and their counsel.

The Legal Rights Center (“LRC”) is a community-driven, 501(c)(3) non-profit law firm, providing indigent and low-income adults and juveniles criminal defense services, and focused on restorative justice practices and advocacy.

#### SUMMARY OF ARGUMENT

In 1976, an estimated 1.17 million people were barred from voting due to a criminal conviction. By the 2020 presidential election, that number had increased to 5.17 million people. Chris Uggen, et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020) <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>. In Minnesota, 63,000 people were denied their right to vote. AMERICAN CIVIL LIBERTIES UNION, VOTING RIGHTS RESTORATION (2020), <https://www.aclu-mn.org/en/campaigns/voting-rights-restoration>.

All these people were denied their right to vote solely because of their criminal convictions. This categorical denial of the right to vote to anyone who has been convicted of a felony is disproportional, unjustifiable, and contradicts the purposes of community supervision and Minnesota’s criminal code by increasing recidivism and decreasing rehabilitation.

## ARGUMENT

### **The Right to Vote is an Inalienable Right that Promotes Rehabilitation; There is No Justification for Categorically Denying People Who Have Been Convicted of a Felony the Right to Vote.**

#### *A. Introduction*

It is well settled that constitutional rights do not terminate inside prison cell.

“Prisoners retain the essence of human dignity inherent in all persons.” *Brown v. Plata*, 563 U.S. 493, 510 (2011) *See also Turner v. Safley*, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”). Prisoners retain many fundamental rights despite their incarceration, including the right to be free from arbitrary, irrational, and unconstitutional governmental infringement upon their rights. *See, e.g. Johnson v. Avery*, 393 U.S. 483 (1969) (protecting prisoner’s right to petition the government for the redress of grievances); *Lee v. Washington*, 390 U.S. 333 (1968) (protecting prisoner’s against invidious racial discrimination); *Haines v. Kerner*, 404 U.S. 519 (1972) (protecting the prisoner’s right to due process).

And voting is perhaps the most fundamental right of all. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (noting that every American has “a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”).

“Citizenship status is not a license that terminates upon misbehavior.” *See Trop v.*



*Dulles*, 356 U.S. 86, 92 (1958). If felons remain citizens and retain their civic status during their incarceration, then it follows that they should enjoy the most basic of their civil rights, the right to cast a ballot.

Yet, felon disenfranchisement – a racist practice designed to prevent minorities from participating fully in our democracy—undermines this fundamental right and core tenet of representative government.<sup>2</sup> Viewed as a whole, “felon disenfranchisement stands as anathema to the ideal of American democracy and citizenship.” Joseph A. Camilli, *Minnesota’s Disenfranchisement: An Historical Legal Relic, Rooted in Racism, That Fails to Satisfy A Legitimate Penological Interest*, 33 *HAMLIN J. PUB. L. & POL’Y* 235, 239 (2012). Disenfranchisement creates a class of people who are subject to the laws of our country, yet unable to have a say in how they are governed.

***B. The punishment does not fit the crime.***

It has long been understood that the punishment to which one is subjected should be commensurate with the crime one has committed. This principle extends back to Locke who argued that a man who has been wronged may harm the offender only “so far as calm reason and conscience dictate, what is proportionate to his transgression.” John Locke, *The Second Treatise of Civil Government and A Letter Concerning Toleration* § 8 (1690). The idea that the punishment should fit the crime is present throughout modern sentencing policy. “Punishments vary with the degrees—the evident purpose is to fit the punishment to the crime.” *State v. Bolsinger*, 221 Minn. 154, 161, 21 N.W.2d 480, 486 (1946). This principle underlies the Minnesota Sentencing Guidelines.

However, this is not the case with felon disenfranchisement. Felon disenfranchisement is a collateral consequence imposed without considering the underlying offense or the person who commits the offense.

There is an incredibly wide range of felony offenses – from possessing marijuana to first degree murder – and an incredibly diverse range of people who are convicted of felonies. Imposing the same punishment for every felony offense on every person who has committed a felony is, at best, absurd.

At the time when all felons were in principle subject to capital punishment, it did not do much harm to treat felons who were not executed as civilly dead. After all, they were still alive, gratuitously, and therefore if they enjoyed fewer civil rights than others, they had little ground to complain. When Locke noted that punishment should be proportionate to the transgression, civil death was *per se* reasonable and proportional because it was a lesser punishment than death. This rationale obviously has little basis for application in a time when the concept of felony implies simply that the offense is subject to punishment by a year or more in prison. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895 (1999). The reasonableness of felon disenfranchisement must be reconsidered in the modern context. See Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045 (2002).

This is exactly what three different international courts have concluded. In 2005, the Grand Chamber of the European Court of Human Rights considered the legality of the United Kingdom's criminal disenfranchisement law, which deprived all incarcerated

individuals of the right to vote. *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R. 187 available at [https://www.echr.coe.int/Documents/Reports\\_Recueil\\_2005-IX.pdf](https://www.echr.coe.int/Documents/Reports_Recueil_2005-IX.pdf). The Grand Chamber first found that criminal disenfranchisement must pursue a legitimate aim by proportionate measures. *Id.* Following this principle, the court ruled that the United Kingdom's criminal disenfranchisement law violated the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for “free elections.” *Id.* The court emphasized in its opinion that there was “no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote,” and therefore that the law continued to apply indiscriminately to incarcerated individuals. *Id.* See also Morgan Macdonald, *Disproportionate Punishment: The Legality of Criminal Disenfranchisement Under the International Covenant on Civil and Political Rights*, 40 Geo. Wash. Int'l L. Rev. 1375, 1389 (2009).

The Canadian Supreme Court came to the same conclusion. In *Sauvé v. Canada* (Attorney General), [1993] 2 S.C.R. 438 (Can.), the Court held that Canada's blanket criminal disenfranchisement law violated the Canadian Charter because it failed to meet the necessary proportionality standard. Subsequently, the Canadian Court struck down the amended version of the Canadian criminal disenfranchisement law, which had limited criminal disenfranchisement to those who are incarcerated for two years or more. The Court found that the government failed to demonstrate a proper relationship between the criminals serving two or more years and their respective entitlement to vote. *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, (Can.). See also Morgan Macdonald,

*Disproportionate Punishment: The Legality of Criminal Disenfranchisement Under the International Covenant on Civil and Political Rights*, 40 Geo. Wash. Int'l L. Rev. 1375, 1389 (2009).

Finally, in *Roach v. Electoral Commissioner* (2007) 239 A.L.R. 1 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2007/43.html> (last updated Oct. 3, 2007), the Australian High Court found that the Australian statute barring all incarcerated prisoners from voting violated the Australian Constitution. In reaching this conclusion, the chief justice stated that, in enacting the blanket criminal disenfranchisement law for all incarcerated individuals, Parliament had “abandon[ed] any attempt to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for their offence [and therefore] broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice [(e.g., elections)] by the people.” *Id.* See also Morgan Macdonald, *Disproportionate Punishment: The Legality of Criminal Disenfranchisement Under the International Covenant on Civil and Political Rights*, 40 Geo. Wash. Int'l L. Rev. 1375, 1389 (2009).

This is not to say that disenfranchisement should never be imposed. Discerning judges may well want to impose this punishment in cases of voter fraud, insurrection, or other crimes against democracy or the state. The issue is the manner in which disenfranchisement imposed, without discretion and without consideration of whether the punishment fits the crime or the person who committed the crime, that is unjustified.

Indeed, imposing fewer people would likely make the punishment a more effective

tool. As it currently stands, this punishment has no discernable effect in reducing crime and does not mark someone as having committed a crime grievously which violates the social contract. By making disenfranchisement discretionary, and therefore more visible, both its deterrent effect and its retributive effect would be magnified. But, as the law currently operates – categorically denying all persons who have been convicted of a felony the right to vote – is unjustifiable.

The manner in which the Legislature has dealt with another constitutional right – the possession of guns – is instructive. Although the Legislature has imposed a blanket prohibition on possessing guns for those convicted of felonies, the Legislature has also decided that only persons who have been convicted of certain offenses, “a crime of violence,” are never allowed to possess guns. Minn. Stat. § 624.713, subd. 1(2).<sup>2</sup> By making a distinction between violent crimes and other offenses, the Legislature has at least attempted to make the collateral consequence fit the crime.<sup>3</sup>

In contrast, the Legislature has denied everyone that has committed a felony, no matter the offense or the person, the right to vote. There is not even an attempt to make the punishment proportional.

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<sup>2</sup> The definition of “crimes of violence” is a bit – more than a bit actually – of a misnomer because it encompasses serious offenses such as murder in the first degree, as well as peaceful possession of a controlled substance. Minn. Stat. § 624.712, subd. 5

<sup>3</sup> But even a person who has been convicted of a violent crime has the opportunity to request that he or she be allowed to possess a gun. Minn. Stat. § 609.165, subd. 1d.

***C. There is no justification for categorically denying people who have been convicted of a felony the right to vote.***

In addition to being a fundamental human right, allowing people who are incarcerated to vote has several positive practical effects. For example, allowing incarcerated people to vote would enhance their rehabilitation. Civic participation – like voting – has been linked to reduced recidivism and supports public safety goals.

Christopher Uggen & Jeff Manza, *Voting & Subsequent Crime & Arrest: Evidence from a Community Sample*, 36 COLUM. HUMAN RIGHTS L. REV. 193 (2004). This is particularly important because most incarcerated persons return home. Nicole D. Porter, *Voting in Jails*, THE SENTENCING PROJECT (May 7, 2020)

<https://www.sentencingproject.org/publications/voting-in-jails/>.

Protecting the right to vote while incarcerated also maintains continuity for electoral participation and supports lifelong voter participation. Research suggests that voting behavior is a habit, and even one failure to vote lowers the chance of voting later. *Id.* Thus, allowing those in prison to vote ensures they will remain civically engaged upon release.

Further, voting in prison is likely to have generational benefits for overall voter participation. Studies have shown that parental voting is a predictor of child voter turnout. See Elisabeth Gidengil et. al, *Political Socialization and Voting: The Parent-Child Link in Turnout*, 69 POL. RES. Q. 373, 377 (2016). Allowing people to vote while incarcerated allows them to set an example of civic participation for their children upon release. Given that an estimated 1.7 million children in the United States have an

incarcerated parent, allowing individuals in prison to create or continue a habit of voting will only strengthen our democracy: “If you’ve had the behavior modeled in your home by your parents consistently voting . . . when you become a little older you’ll feel it’s your duty and responsibility to register and vote.” David Murphey & P. Mae Copper, *Parents Behind Bars: What Happens to Their Children?*, CHILD TRENDS 1 (2015)

<https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>

Despite the practical benefits of allowing people to vote while in prison and the lack of evidence supporting the notion that restoring the vote to this population would upend law and order, the majority of states, including Minnesota, continue to deny incarcerated citizens this fundamental right. Nicole Lewis et al., *What Do We Really Know About the Politics of People Behind Bars?*, THE MARSHALL PROJECT (Mar. 11, 2020),

<https://www.themarshallproject.org/2020/03/11/what-do-we-really-know-about-the-politics-of-people-behind-bars>.

But it does not have to be this way. A few states and democratic governments demonstrate the benefits of prisoner voting. Maine and Vermont guarantee voting rights for all citizens, including those in prison. *See* Uggen, et al., *supra*. In addition, prisoners in the territory of Puerto Rico maintain the right to vote and the District of Columbia recently acted to re-enfranchise incarcerated citizens. Julie Zauzmer & Ovetta Wiggins, *D.C. and Maryland have new policies allowing prisoners to vote. Making it happen is hard.*, WASH. POST (Sep. 28, 2020),

<https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/>.

Voters in these jurisdictions vote via absentee ballots based on their pre-incarceration address rather than the address where they are incarcerated. This practice keeps them engaged and invested in the communities to which they will return.

Anecdotal evidence from interviews with or letters from incarcerated individuals in these jurisdictions suggests that being able to vote imparts a sense of civic responsibility and keeps them engaged in their future while beyond bars. One Maine inmate credited his ability to vote from prison as galvanizing, saying that taking time to learn about politics while in prison increased his motivation to participate in politics. Nicole Lewis et al., *For Those Serving Long Sentences, Politics is a Lifeline*, THE MARSHALL PROJECT (Mar. 12, 2020), <https://www.themarshallproject.org/2020/03/12/for-those-serving-long-sentences-politics-is-a-lifeline>. He pointed to heated arguments about politics with fellow inmates as proof that “we do care about what’s happening out in the real world. It does affect us. It affects us all.” *Id.*

Another man incarcerated in Maine described a sense of responsibility in casting a vote for who would run the country and his govern his local community when he is released in 2021. Hope Reese, *Here’s What It’s Like to Vote From Inside Prison*, Vox (Oct. 14, 2020), <https://www.vox.com/first-person/21514289/election-2020-voting-rights-felon-prison-in-maine>. “[I] believe voting really does make a difference. I want to help elect somebody who looks out for the people and not for themselves.” *Id.*

The United States is an outlier among industrialized democratic nations in its



nearly uniform prohibition on inmate voting. Twenty-one countries (primarily in Europe) impose no restriction on voting from prison and fourteen more countries allow some but not all prisoners to vote. *International Comparison of Felon Voting Laws*, <https://felonvoting.procon.org/international-comparison-of-felon-voting-laws>. All foreign constitutional courts that have evaluated disenfranchisement law have found the automatic, blanket disqualification of prisoners to violate basic democratic principles. *American Civil Liberties Union, Out Of Step With The World: An Analysis Of Felony Disenfranchisement In The U.S. And Other Democracies* 4 (2006), [https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep\\_20060525.pdf](https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf).

In most nations that allow incarcerated citizens to vote, the government even facilitates prison voting; it occurs without incident, and in some cases with high rates of participation. *Id.* Further, correctional officials in these countries have argued publicly that doing so is good policy because it may increase public safety by “enhancing the formative, rehabilitative effects of incarceration.” *Id.* at 5. The United States’ disenfranchisement policies are unlike those of any other advanced democracy and are increasingly at odds with modern understandings of international law. *Id.* at 34.

In addition to harming the people directly involved, disenfranchisement creates significant problems for democracy and for our nation’s future. It leads to a dramatic distortion of representation at local and state levels and creates an inaccurate picture of community populations for research and planning purposes.

***D. Restoration of Voting Rights to People Serving Felony Sentences Under Community Supervision is Consistent with the Purpose of Community Supervision and Reinforces the Values and Behaviors that Lead to Successful Probation and Parole Outcomes.***

Probation allows offenders to serve their sentences in their communities subject to certain conditions, some of which are imposed at the discretion of the relevant court. U.S. PROB. & PRETRIAL SERV.: DISTRICT MINN., *Conditions of Supervision*, <https://www.mnp.uscourts.gov/conditions-supervision> (last visited Nov. 21, 2020).

By design, probation requires individuals to integrate with a certain community for a given number of years in order to further the goal of rehabilitation. Probation ensures that probationers are not passive members of their communities but are invested through productive contribution, active rehabilitation, and consistent maintenance of relationships.

Despite this extensive involvement in their communities, felony probationers lose several legal rights -- including their right to vote-- suffering what has been termed a “civil death.” See Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 MINN. L. REV. 1913, 1913 (2015),

[https://www.minnesotalawreview.org/wp-content/uploads/2015/09/Haase\\_4fmt\\_PDF.pdf](https://www.minnesotalawreview.org/wp-content/uploads/2015/09/Haase_4fmt_PDF.pdf).

That is, though felony probationers can, and often must, contribute and otherwise become invested in their communities, they cannot vote. See Minn. Stat. §§ 609.165.2, 201.145.

This is the case even though voting has been shown to have rehabilitative and integration benefits. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1903-04 (2015),

[http://users.soc.umn.edu/~uggen/Uggen\\_Stewart\\_MLR\\_15.pdf](http://users.soc.umn.edu/~uggen/Uggen_Stewart_MLR_15.pdf).

In describing these benefits, Uggen and Stewart state:

The right to vote is perhaps the most visible and most direct symbol of civic inclusion in a democratic society . . . . Moreover, there is a robust negative correlation between voting and subsequent recidivism, suggesting that the prosocial nature of voting may contribute to the civic reintegration of current and former felons.

*Id.*

Ultimately, the felony disenfranchisement scheme affects many Minnesotans. This is clear not only in looking at LRC client statistics and anecdotes, but also in viewing the statistics regarding felony probationers statewide.

*1. Felony Disenfranchisement has Cognizably Affected LRC Clients on Probation, Preventing Them from Realizing the Rehabilitative Benefits of Voting.*

Felony disenfranchisement is a collateral consequence the LRC is well familiar with. On average the Legal Rights Center represents clients in around one hundred felony cases per year. In 2019, 60% of our clients who faced felony charges, and whose cases did not result in dismissal or acquittal, were disenfranchised as a result of their felony conviction. This was the case even though 88% of those cases, which is a significant majority of them, involved charges that were not serious enough to trigger a presumptive prison sentence under the Minnesota Sentencing Guidelines.

While these statistics indicate the breadth of felony disenfranchisement among the LRC's clients, they fail to capture the intimate ways in which the inability to vote has pervaded the LRC's clients' lives. One such client, Mr. Otis Clayburn, voted for the first time during this election at 66 years old. Telephone Interview with Mr. Otis Clayburn, (Nov. 13 & 20, 2020). For the past forty or so years, Mr. Clayburn has been in and out of the criminal justice system, serving time in prison as well as on felony probation. *Id.* Like

all felony probationers, he was disenfranchised during each of his felony sentences. Thus, due to his criminal history, he was unable to vote for significant portions of his life, and even during elections in which he was eligible he did not vote.

This was the case even though voting has always been important to Mr. Clayburn's family. *Id.* Each member in his family votes, including his sister, with whom he is very close. *Id.* Prior to the 2020 election, Mr. Clayburn reached out to his LRC attorney to receive assistance in voting. With his attorney's help he was able to vote for the first time in his life. *Id.* Mr. Clayburn was extremely proud of his accomplishment, even going so far as to take a picture of himself at the voting booth to show his sister. He said that when he called her to tell her about his first time voting, her happiness for him was apparent. *Id.* In discussing the importance of his experience, Mr. Clayburn stated the voting allowed him to assert an important part of being an American citizen, a piece that he had been unable to assert for many years prior. *Id.* It is a right that Mr. Clayburn expects to exercise from this day forward and that he wants to encourage his nieces and nephews to exercise. *Id.*

Mr. Clayburn's experience reflects the benefits that come from the right to vote. Doing so was not only a magnanimous moment which further connected Mr. Clayburn with his family but has also inspired him to pass along to younger members of his family the right's importance. However, Mr. Clayburn's experience also indicates a serious limitation of felony disenfranchisement. That is, these are benefits Mr. Clayburn has not realized until now at 66 years old. Ultimately, his experience makes clear that, if a goal of probation is to rehabilitate offenders and integrate them with their communities, voting has benefits which should be realized *during* probation, not afterwards. Voting helped Mr.

Clayburn feel more connected to his family, and thus fostered in him feelings of responsibility towards, and investment in, his community. These are exactly the types of values that we seek to encourage in probationers. There is every reason to think that they will lead to further prosocial behavior, and result in reduced recidivism and increased public safety.

*2. Felony Disenfranchisement Not Only Affects LRC Clients, but Many Minnesotans on Probation Statewide, Often for Long Periods of Time.*

The experience of many of the LRC's clients summarizes the effects of felony disenfranchisement in but one organization in one county in Minnesota. Statewide, probation statistics indicate the additionally troubling implications of the scheme. Minnesota places particular emphasis on probation—so much so that nearly 75% of Minnesota's felony offenders end up on probation each year. Kelly Lyn Mitchell, *It's Time to Rethink Probation Lengths in Minnesota*, U. MINN. ROBINA INST. CRIM. L. & CRIM. JUST. BLOG (Jan. 13, 2017) <https://robinainstitute.umn.edu/news-views/it%E2%80%99s-time-rethink-probation-lengths-minnesota>. Of the some 95,000 people on probation in 2018, almost half of those individuals were on felony probation, totaling a little over 46,000 people. MINN. DEP'T CORRECTIONS, 2018 PROBATION SURVEY 4 (2019), <https://www.leg.mn.gov/docs/2019/other/190697.pdf> (finding that there were 46,084 felony probationers in 2018); PRISON POL'Y INITIATIVE, *Minnesota Profile*, <https://www.prisonpolicy.org/profiles/MN.html> (last visited Nov. 21, 2020). As a matter of sheer numbers, the number of people on felony probation in Minnesota in 2018 is larger than the current individual populations of 66 of Minnesota's 87 counties. MINN. STATE.

DEMOGRAPHIC CTR: DEP'T ADMIN., *Latest Annual Estimates of Minnesota and its 87 Counties' Population and Households, 2019* (last updated Aug. 2020), <https://mn.gov/admin/demography/data-by-topic/population-data/our-estimates/>.

Not only are many people in Minnesota not able to vote, but they are unable to do so for long periods of time. The law in Minnesota is that probation “shall be for not more than four years or the maximum period for which the sentence of imprisonment might have been imposed, whichever is longer.” Minn. Stat. § 609.135.2(a). *See also* Mitchell, *supra*.

“This opens up a wide range of possible probation terms from 4 years to 40 years (the maximum possible sentence short of life under Minnesota law).” Mitchell, *supra*.

According to data collected by the Minnesota Sentencing Guidelines Commission between 2016 to 2018, judges assigned quite a bit longer than four years of probation for felonies.

MINN. SENT'G GUIDELINES COMMISSION, 2018 PROBATION REVOCATIONS 15 (2020), <https://mn.gov/msgc->

[stat/documents/reports/2018/2018MSGCReportProbationRevocations.pdf](https://mn.gov/msgc-stat/documents/reports/2018/2018MSGCReportProbationRevocations.pdf). This data illustrates the statewide average felony probation terms for six categories of offenses, including Person, DWI, Drug, Crim Sex, Property, and Other. *Id.* The closest average terms to the minimum of four years were for Other offenses at 4.5 years (53.5 months), followed by Person offenses at 4.7 years (55.9 months), and Property offenses at nearly 5 years (59.4 months). *Id.* From there, the average probation terms continue steeply upwards, with the highest average felony terms being for Drug offenses at nearly 6 years (71.4 months), DWI offenses at 6.3 years (75.9 months), and, lastly, Crim Sex crimes at 12.4 years (149.2 months). *Id.* This means that an offender sentenced to probation for

felony-level possession of marijuana could invest in and graduate from an undergraduate or professional level program, have several children, or maintain a career long enough to be eligible for promotion during their probation term—but they cannot vote.<sup>4</sup>

Lastly, while felony disenfranchisement affects most probationers for a long period of time, its effects are harsher on some based simply on where they live. Given the wide range of possible term lengths, the period of probation that felony offenders receive on average often varies widely from county to county, despite having been convicted of the same crimes. MINN. SENT’G GUIDELINES COMMISSION, *supra*, at 15, 18. *See also* Mitchell, *supra*. For example, while the average probation term in the fourth judicial district (Hennepin county) was 3.2 years (38.8 months), the average probation term in the seventh judicial district (Becker, Benton, Clay, Douglas, Mille Lacs, Morrison, Otter Tail, Stearns, Todd, Wadena counties) was 7.3 years (87.8 months). *Id.* To break it down further, someone who is convicted of criminal sexual conduct in the seventh judicial district would receive 15.5 years (186 months) of probation on average, even though that same individual would receive only 5.6 years (67 months) of probation on average in the fourth judicial district for the same offense. *Id.* at 16.

In nearly every judicial district, around 45% or more of the probation terms assigned from 2010 to 2015 were 5 years in length. Kelly Lyn Mitchell, Exec. Dir., U. Minn.

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<sup>4</sup> The Commission implemented a 5-year cap on most probationary terms effective August 1st, 2020. Dana Ferguson, *Minnesota Sentencing Commission Passes 5-Year Probation Cap*, TWIN CITIES PIONEER PRESS (Last updated Jan. 9, 2020, 7:34 P.M.), <https://www.twincities.com/2020/01/09/minnesota-sentencing-commission-passes-5-year-probation-cap/>. However, because it does not apply retroactively, the numbers provided above better describe the current pool of probationers in Minnesota. *See id.*

Robina Inst. Crim. L. & Crim. Just., Reducing Racial & Regional Disparities in Probation and Sentencing, Presentation at the MSGC September Meeting 6 (Sept. 12, 2019) (presentation available at <https://mn.gov/msgc-stat/documents/meeting%20materials/2019/October/CJIProbationPresentation.pdf>). In six of the ten judicial districts, 20% or more of the terms assigned in the same time period were longer than 5 years. *Id.*

In looking at terms that were longer than five years, “13% [of probationers were] sentenced to felony probation terms of 10 years” and 5% were “sentenced to terms of 15-40 years.” *Id.* at 16. Using these percentages, this means that, of the 46,000 people currently on felony probation, approximately 2,000 individuals are serving 15 to 40 yearlong probation terms. These numbers illustrate that in fact many felony probationers in Minnesota are unable to vote for not only years, but decades.

The number of people on felony probation, the average term lengths, and the variation in term lengths all paint a picture of the felony disenfranchisement scheme’s implications. Generally, felony disenfranchisement prevents a vast number of individuals, sometimes for a very long time, from fully participating in the communities in which the conditions of probation require them to become integrated and invested. However, while it is certainly more troubling that individuals may spend as much as forty years unable to vote, the inability to vote affects each probationer in personal ways. Specifically, the inability to vote actually prevents the effectuation of the probation goal of rehabilitation, regardless of probation term length. Many of the 46,000 individuals currently on felony probation in Minnesota would benefit from the connectedness that comes with voting, but



instead, like Mr. Clayburn and many of the LRC's other clients, are prevented from doing so by the felony disenfranchisement scheme.

*3. The Restoration of Voting Rights to Felony Offenders Under Community Supervision Helps Achieve the Purposes of Community Supervision in Minnesota.*

The restoration of voting rights to felony offenders under community supervision aids in reducing recidivism. *See generally* UGGEN & MANZA, *supra* (concluding that civic reintegration through voting likely plays a role in reducing recidivism). Restoration of voting rights helps in achieving the purposes of the Criminal Code as well as the purposes of community supervision.

Subject to certain limitations, the Criminal Code generally instructs the commissioner of corrections to grant parole when it “would be most conducive to rehabilitation and would be in the public interest.” Minn. Stat. § 609.12 subd. 1 (2020). The aforementioned general purposes of the Criminal Code dictate that aiming to reduce recidivism is one of the primary factors instructing whether the commissioner of constructions should grant parole. *Supra* Part IV.A. This is supported by the public's interest in restoring civil rights to formerly incarcerated individuals and its interest in reducing recidivism. *See supra* Part III.

Courts have the ability to impose probation instead of, or in conjunction with, confinement. Minn. Stat. § 609.02 subd. 15 (2020). “The purpose of probation is to deter further criminal behavior, punish the offender, help provide reparation to crime victims and their communities, and provide offenders with opportunities for rehabilitation.” *Id.* One of the primary purposes of probation is also to reduce recidivism, which incorporates specific

deterrence and rehabilitation. *See supra* Part IV.A (explaining how reducing recidivism is demonstrative of rehabilitation and deterrence ).

*4. The Restoration of Voting Rights to Felony Offenders Under Community Supervision Aids in Reducing Recidivism.*

The right to vote has long been held to be one of the most precious and fundamental rights we hold. *Harper*, 383 U.S. at 670. The right to vote “is a fundamental matter in a free and democratic society.” *Reynolds*, 377 U.S. at 561–62. As such, voting can be understood as “the type of activity that builds ties to and respect for the American society.” *See generally* Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. Rev. 330 (1993) (concluding that in addition to its instrumental purpose, voting in America “has symbolic value and provides an institutionalized and ritualistic means of practicing the central principles of the political ethos at the core of the American identity.”). This is supported by research surrounding voter turnout, demonstrating the individuals vote “in part because elections give them an opportunity to express their civic identities.” *See* Alexander Schuessler, *A Logic of Expressive Choice* 64 (2000); *see also* Dennis F. Thompson, *Just Elections* 22-24 (2001). As such, voting is not just an invaluable right for its instrumental purpose in democracy, but also for its expressive purpose. Therefore, voting “should be encouraged for those who have exhibited illegal, deviant behavior in the past. By voting, those with criminal histories may create the very type of relationship with society that deters illegal behavior.” WINKLER, *supra*, at 387.

Terrein Gill, an All Square Fellow alum and current Development Assistant, explains that “when we are denied our right to vote after returning to the community, we

lose the ability to enhance our own neighborhood through channels that were designed to do just that. How does a community that has been disinvested in change when its members can't participate in its democratic processes?" Interview with Terrein Gill, All Square Fellow, in Minneapolis, Minn. (Oct. 2, 2020).

Christopher Uggen, Associate Professor of Sociology and McKnight Presidential Fellow at the University of Minnesota, sought to perform a quantitative and qualitative analysis so as to better understand the relationship between voting and crime. *See generally* UGGEN & MANZA, *supra*. Ultimately, he found that empirical evidence supported his hypothesis, demonstrating that "the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society." UGGEN & MANZA, *supra*, at 213. Based upon his analyses, Uggen concluded that "to the extent that felons begin to vote and participate as citizens in their communities, it seems likely that many will bring their behavior into line with the expectations of the citizen role, avoiding further contact with the criminal justice system." UGGEN & MANZA, *supra*, at 215. As such, restoration of voting rights is an important factor in reducing recidivism.

##### *5. Felony Offenders Under Community Supervision Contribute to Society.*

Christopher Uggen's research looks at voting and political participation as a fundamental form of civic participation. *See generally* UGGEN & MANZA, *supra*. However, formerly incarcerated All Square Fellows contribute to society and engage with their communities in a number of additional ways.

Formerly incarcerated Fellows have gone on to enroll in law and paralegal schools, start a catering company, generate a novel podcast, develop a mobile car detailing clinic,

become team members of city-wide transformative justice team, found an environmentally-conscious online wedding boutique, and more. These contributions to society are also subject to State and Federal income taxes, which formerly incarcerated Fellows are obliged to pay. As exemplified by All Square Fellows, formerly convicted felons contribute to society in meaningful ways, even while serving their sentences through undergoing community supervision, paying outstanding fines, or otherwise. Yet, these individuals are not afforded the right to vote.

Formerly incarcerated Fellows and board members, who are most impacted by legal disparities, are shaping and transforming the legal discipline. A Fellow alum is a second-year law student at Mitchell Hamline School of Law. Another was accepted to paralegal school. Yet another Fellow wants to pursue law school and a career as a prosecutor once he completes his undergraduate degree. Founding board member, Calvin Duncan, is a formerly incarcerated paralegal who just commenced his first year of law school. And board member Bruce Reilly is a formerly incarcerated lawyer who completed his law degree in 2012.

## *Conclusion*

Laws denying convicted felony offenders the right to vote can be traced to ancient Greece and Rome. Robin L. Nunn, *Lock Them Up and Throw Away the Vote*, 5 Chi. J. Int'l L. 763, 765 (2005) (citations and quotations omitted). Historically, the goal of penal systems in that tradition was to subject offenders to a kind of “civil death” as further punishment for their crimes. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 917 (2004).

Although the United States rejected many European practices with independence, it held on to the practice of denying people who had been convicted of crimes their right to vote. *Id.* This was not a particularly controversial policy because the United States categorically denied many other groups – including Blacks, Native Americans, and women – the right to vote. *Lock Them Up and Throw Away the Vote*, 5 Chi. J. Int'l L. 763 at 765.

The United States has since recognized that categorically denying people the right to vote was wrong. It is time to recognize that categorically denying people who have been convicted of a felony the right to vote is also wrong. Although disenfranchisement did not start in Minnesota, it should end here. The over 60,000 individuals in Minnesota who are disenfranchised solely because they were convicted of a felony should have their right to vote restored.

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**CERTIFICATE OF BRIEF LENGTH**

The undersigned certifies that the brief submitted herein contains 6072 words and complies with all limitations and requirements set forth in Minnesota Rules of Civil Appellate Procedure 132. The word count is stated in reliance on Microsoft Word for Mac, Version 16.43, the word processing system used to prepare this brief.

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