NO. A20-1264

State of Minnesota

In Supreme Court

Jennifer Schroeder, Elizer Eugene Darris,
Christopher James Jecevicus-Varner,
and Tierre Davon Caldwell,

Appellants,

vs.

Minnesota Secretary of State Steve Simon,
in his official capacity,

Respondent.

BRIEF OF AMICUS CURIAE MINNESOTA ASSOCIATION OF BLACK LAWYERS

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INTRODUCTION AND STATEMENT OF INTEREST

The Minnesota Association of Black Lawyers ("MABL") is a non-profit Minnesota corporation. Founded in 1995, MABL is dedicated to promoting and supporting professional development of Black lawyers, judges, and law students in Minnesota, addressing legal issues affecting the Black community, and advancing education, excellence, and racial equity in the pursuit of justice. MABL's members include over 100 lawyers practicing in the public arena, in private practice, and in civil and criminal matters.

MABL's interest in this case is public.[1] For decades, systemic racism in the criminal-justice system has led to the disproportionate incarceration of Black and indigenous persons. (*See* Add.37 ("It cannot be denied that the criminal justice system has a disproportionate impact on communities of color in Minnesota."); *see also* U.S. Bureau of Justice Statistics, *Prisoners in 2016*, 8 tbl. 6 (2016) (reporting that Black adults are 5.9 times as likely to be incarcerated than white adults).) Black Americans are far more likely than white Americans to be arrested. Once arrested, Black Americans are more likely to be convicted. And once convicted, Black Americans are more likely to receive lengthy prison sentences.[2]

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[1] The undersigned counsel authored this brief in whole. No one but MABL and its counsel made a monetary contribution for the brief's preparation or submission. Minn. R. Civ. App. P. 129.03.

[2] *See, e.g.*, The Sentencing Project, *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance* (Mar. 2018) ("The Sentencing Project U.N. Report").

Minnesota's disenfranchisement statute—Minn. Stat. § 609.165—perpetuates these ingrained disparities by using criminal sentences that include probation or supervised release as a basis to disproportionately strip wide swaths of Black and indigenous persons of the fundamental right to vote. The numbers are staggering. Upwards of 4.5% of otherwise eligible Black voters in Minnesota—and 9% of eligible indigenous voters—cannot exercise their fundamental right to vote due to felony convictions *even though those persons have returned to society* (and in many cases those persons never even served prison time). MABL has a strong public interest in ending what is, in every sense, the unconstitutional thinning of voting ranks among minority populations.

Even under rational-basis review,[3] a statute that perpetuates the effects of the disproportionate criminalization of Black and indigenous communities is decidedly *irrational*. It is also irrational—and quite inconsistent—to impose a broad voting prohibition on ex-felons who have been returned to society through probation or supervised release and have just as much at stake in selecting their representatives or voting on important initiatives as anyone else in the community. (*See* Compl. at 1, ¶ 2 ("Plaintiffs have been deemed safe to live in their communities where they raise their children, contribute to Minnesota's economic, cultural, religious, civic and political life, pay taxes, and bear the consequences of the decisions made by their governments.").)

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[3] MABL agrees with Appellants that the statute is subject to strict scrutiny, not rational-basis review. *Kahn v. Griffin*, 701 N.W.2d 815, 831 (Minn. 2005) ("Because the right to vote is a fundamental right, . . . courts are to analyze potential governmental infringements of that right using a *strict scrutiny* standard of review.") (emphasis in original).

The decisions below do not explain how the statute's purported objective of "promoting the rehabilitation of the defendant and his return to his community as an effective participating citizen"—which was the only objective identified in the district court's decision[4]—can conceivably be achieved by *depriving* those who have been returned to their communities of any ability to participate in the democratic process. As Appellants observe, the legislative history is silent on this important point. (App. Br. at 1.)

Nor do the decisions below explain how that legislative objective is met by disenfranchising those who are plainly contributing members to society but whose sentence may include years of supervised release. In this case, for example, Plaintiff Jennifer Schroeder's sentence included one year in prison, *but 40 years of supervised release*. (*See* Compl. at 3, ¶ 7.) Based on that sentence, Minn. Stat. § 609.165 disenfranchises Ms. Schroeder through 2053—a staggering and plainly unreasonable prohibition. Whatever purpose the statute was intended to serve, surely there are alternatives that do not require the blanket and near permanent disenfranchisement of entire segments of otherwise eligible voters that live and work as members of the Minnesota populace.[5]

The statute at issue in this appeal is unconstitutional in its intent and effect. It cannot be explained—much less justified—on the grounds stated below. Measured against

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[4] The court of appeals recognized this same legislative objective. (Add.24.)

[5] The court of appeals correctly noted that the data demonstrating the disproportionate impact the statute has on communities of color are undisputed, as "the secretary did not submit any contrary data or evidence." (Add.5.)

modern equal-protection jurisprudence, the blanket disenfranchisement of ex-felons on probation or supervised release cannot stand.

DISCUSSION

"This right to vote is the basic right without which all others are meaningless. It gives people, people as individuals, control over their own destinies."[6]

I. The criminalization of communities of color in Minnesota.

The disenfranchisement of thousands of Black and indigenous persons in Minnesota is the direct and unfortunate result of the historical criminalization of those populations. As the district court itself found: "It cannot be denied that the criminal justice system has a disproportionate impact on communities of color in Minnesota." (Add.37.)

The data reflect this undeniable reality. Minnesota has an exceedingly high incarceration rate. For every 100,000 residents, 364 are in prison.[7] To put that into perspective, Minnesota's incarceration rate is three times that found in Canada (114 per 100,000), almost four times that found in Italy (96), and five times that found in Norway (74).[8] Mass incarceration has been the norm for decades. And Minnesota has often targeted minority communities.

Minnesota incarcerates its Black and indigenous residents at stunningly higher rates than its white residents. In the 1980s and 1990s, numerous studies found that the Black per-capita incarceration rates in Minnesota were approximately *20 times* higher than white

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[6] Lyndon B. Johnson.

[7] https://prisonpolicy.org/global/2018.html (last visited Nov. 18, 2020).

[8] *Id.*

per-capita rates.[9] This was the highest disparity reported for any state in the Union—a truly unfortunate distinction.[10]

While that ratio has improved in recent years, the numbers are still alarming. Studies show that, for every 100,000 white residents, 216 were incarcerated during 2010.[11] By contrast, for every 100,000 Black residents, 2,321 were incarcerated during 2010.[12] The rate for Minnesota's indigenous community is even more stark: 2,646 out of every 100,000 indigenous persons were incarcerated in 2010.[13] These numbers reflect a cold truth: Minnesota still incarcerates its minority populations at a rate over *1000% higher* than its white population. That is a staggering statistic.

The explanations for the disproportionate and unquestionably widespread incarceration of minorities in Minnesota and elsewhere are many. But they almost uniformly reflect one indelible, undeniable truth: minorities have a markedly different

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[9] Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME AND JUST. 201, 202 (2009), available at https://scholarship.law.umn.edu/faculty_articles/500 (last visited Nov. 20, 2020) ("Frase").

[10] *Id.*

[11] Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity* (discussing data reflected in U.S. Census 2010, Summary File 1), available at https://prisonpolicy.org/reports/rates.hlml (last visited Nov. 18, 2020).

[12] *Id.*

[13] *Id.*

experience with the criminal-justice system at nearly every level than their white counterparts. As one Minnesota law professor observed:

> Numerous studies have shown that blacks and members of other minorities are disproportionately represented not only among inmate populations and on death rows, but at virtually all the earlier stages of criminal processing. Disparity has been documented in victim surveys reporting race of the perpetrator; in pedestrian and traffic stops, searches, and arrests; in bail and pretrial release decision making; in prosecutorial screening decisions; in the use of prison and jail sentences; and in probation and parole revocations.[14]

The National Research Council has also concluded that continued racial differences in incarceration rates are traceable to systematic racial disparities "from arrest through parole release that have a substantial cumulative effect," as well as policies associated with sentencing for drug offenders.[15]

"The rise of mass incarceration begins with disproportionate levels of police contact with African Americans."[16] Minnesota is no exception. As but one example, a study of traffic stops in Hennepin County during 2000 reported that Black residents accounted for 37% of all traffic stops, while accounting for just 18% of the overall population.[17]

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[14] Frase, *supra* note 7, at 202 (citing studies).

[15] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2004), at 103 ("National Research Council").

[16] The Sentencing Project U.N. Report, *supra* note 2.

[17] *See* Council on Crime and Justice, *African American Males in the Criminal Justice System*, at 2.

Moreover, "[h]ighly disparate arrest rates appear to reflect unusually high rates of socioeconomic disparity between black and white residents."[18]

Police also target communities of color in enforcing local drug laws.[19] This significantly increases the percentage of minorities in the criminal-justice system. Minnesota has some of the harshest drug-sentencing laws in the United States.[20] Combined with some of the lowest thresholds for criminal drug possession, this State incarcerates an unusually large number of individuals for non-violent (and often low-level) drug offenses.[21]

The disparities continue at the charging and pre-trial stages. Pretrial detention increases the odds of conviction. And people who are detained awaiting trial are more likely to accept plea deals that include longer prison sentences.[22] Nationwide, "[s]eventy percent of pretrial releases require [a] money bond, an especially high hurdle for low-income defendants, who are disproportionately people of color."[23]

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[18] Frase, *supra* note 7, at 201.

[19] *Id.* at 243 ("There are critical problems in Minnesota. There is evidence of racial profiling in Minnesota traffic stops and a strong possibility of bias in drug enforcement policies.").

[20] Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 MINN. L. REV. 1913 (2015) ("Haase").

[21] From 1998 to 2005, for example, Minnesota's drug-crime prisoner population *tripled*. Even after the passage of the Drug Sentencing Reform Act, the number of drug-related sentences in Minnesota was 66% greater in 2016 than it was in 2010.

[22] The Sentencing Project U.N. Report, *supra* note 2.

[23] *Id.*

Moreover, access to resources unquestionably impacts trial outcomes. As The Sentencing Project concluded based on its comprehensive statistical analysis of incarcerated populations:

> The United States in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and people of color. The wealthy can access a vigorous adversary system replete with constitutional protections for defendants. Yet the experiences of poor and minority defendants within the criminal justice system often differ substantially from that model . . .[,] which contributes to the overrepresentation of such individuals in the system.[24]

Again, Minnesota is no exception. From 2001 to 2005, for example, Black per-capita felony conviction rates exceeded the white rate by a ratio of 9.3 to 1.[25]

These very real dynamics cannot be explained away with assurances that all defendants are afforded the same presumption of innocence. As David Cole (former Georgetown Law Professor) writes:

> These double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional rights in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought be

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[24] *Id.*

[25] Frase, *supra* note 7, at 244.

> raised by the fact that the prison population is overwhelmingly poor and disproportionately black.[26]

Notably, even though the number of Black persons involved in felony-level violent crimes decreased after the 1990s, incarceration rates have not similarly decreased.[27] This systemic mass incarceration of minority communities has searing effects. As Bruce Western wrote:

> Mass incarceration is . . . a key component in a system of inequality—a social structure in which social inequities are self-sustaining and those at the bottom have few prospects for upward mobility.[28]

II. The automatic disenfranchisement of persons on probation and supervised release disparately impacts communities of color.

Because Minnesota incarcerates its minority communities at a disproportionately higher rate than its white population, it is no surprise that minority communities are disproportionately inflicted with the collateral consequences of felony convictions and related sentences. The statute at issue illustrates this point.

Section 609.165 defers restoration of voting rights until "discharge" of the sentence. When this statute came into effect, there were only a few thousand felons subject to disenfranchisement. In the past five decades, however, two things have occurred that

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[26] David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, at 8-9 (1999).

[27] National Research Council, *supra* note 13, at 60.

[28] Bruce Western, *Punishment and Inequality in America*, at 196 (2006).

dramatically change the landscape and that strip voting rights from minorities living in their communities on probation or supervised release based on previous felony convictions.

First, incarceration rates have skyrocketed.[29] And as discussed above, the incarceration rates are disproportionately and exceedingly high for Minnesota's communities of color.

Second, Minnesota employs probation and supervised release with very high frequency. Minnesota's (adult) supervised probation rate, for example, is 150% higher than the national average.[30] And in 2016, Minnesota had the "fourth highest rate of community supervision among the 48 states."[31] The numbers are creeping higher. In 2016, for example, 2.28% of Minnesota's adult population was on some form of supervised probation. In 2018, that number increased to 2.326%.[32] That year, a full 53,585 adult Minnesotans were on felony supervised probation, deprived of their franchise.[33]

Minnesota felony sentences also include unusually long probation periods, exacerbating the problem. From 1981 to 2018, for example, the average length of probation

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[29] Expert Report of Christopher Uggen, at 18.

[30] *Id*. at 2.

[31] Haase, *supra* note 18.

[32] Expert Report of Christopher Uggen, at 2.

[33] Christopher Uggen and Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. J. SOC. REV. 777 (2002).

in this State was more than five years.[34] This exceeds the average prison sentence for non-life felony-level crimes.[35] In outlying counties—such as Brown, Otter Tail, and Big Stone, the felony probation period averaged over eight years from 2001 through 2018.[36]

Moreover, probation is increasingly used in cases involving felony-level drug convictions. From 1991 to 2016, the number of sentences that included probation increased 187% for felony-level drug convictions.[37] Over the same period, the use of probation as a component of non-drug-related sentences increased by only 42%.[38]

Simultaneously, the growth of Minnesota's supervised probation populations has disproportionately included persons of color. This has had a clearly disproportionate impact on disenfranchisement of Black and indigenous communities. In 2016, Black Minnesotans represented more than 20% of the total disenfranchised voters,[39] while indigenous Minnesotans made up almost 7% of disenfranchised voters.[40] In 2018, compared to white nonincarcerated Minnesotans, Black disenfranchisement rates were 4.9

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[34] Haase, *supra*, note 18.

[35] *Id.*

[36] Expert Report of Christopher Uggen, at 6.

[37] *Sentencing Practices: Controlled Substances Offenses Sentenced in 2016* (Jan. 2018) at 15 (extrapolated from data in Table 3).

[38] *Id.*

[39] Expert Report of Barbara Carson, at 17.

[40] Minnesota Justice Resource Center (2019) (cited in Carson report).

times higher while disenfranchisement rates for indigenous Minnesotans were (stunningly) 9.0 times higher.[41]

In outlying counties, the numbers are difficult to comprehend. In some counties, over *10% of the Black voting age population* is disenfranchised due to supervised probation.[42] In other counties, over 10% of the indigenous voting age population is disenfranchised.[43] And in some counties, over 10% of the Black *and* indigenous population is disenfranchised.[44] By comparison, no county in Minnesota had a white disenfranchisement rate that exceeded 2.2% based on supervised probation.

Like incarceration-rate statistics, these numbers are irrefutable. They reflect that section 609.165 operates disproportionately to disenfranchise large segments of Minnesota's communities of color. MABL suggests this Court start *there* in its analysis of the constitutional infirmity of the statute.

III. No legislative explanation is offered for a statute that so clearly perpetuates ingrained racial disparities.

The district court seemed to appreciate the reality that ingrained disparities in Minnesota's criminal-justice system are a direct cause of continued disparities in the disenfranchisement of Black and indigenous Minnesotans:

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[41] Expert Report by Christopher Uggen, at 10.

[42] *Id.* at 13.

[43] *Id.* at 14.

[44] *Id.* at 13-14.

> It cannot be denied that the criminal justice system has a disproportionate impact on communities of color in Minnesota. Stemming from that, any right or restriction that is triggered by a criminal conviction will similarly disproportionately impact these same communities.

(Add.37.) But the court minimized the judicial import of those findings as representing simply a "strong public policy basis for Minnesota to reconsider its restrictions on voting." (*Id.*) For its part, the court of appeals concluded that section 609.165 does not itself "adversely affect one race differently than other races." (Add.23.)

The undisputed racial disparities in the operation of the statute, however, are constitutionally significant. As discussed below, they command a different standard of review. And more than that, they put a thumb on the scale that can only be offset by a legitimate government purpose—a purpose that is entirely absent from the legislative record here.

A. At a minimum, the statute is subject to heightened rational-basis review.

The equal protection clause denies to states "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Dependents of Ondler v. Peace Officers Ben. Fund*, 289 N.W.2d 486, 489 (Minn. 1980) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972)).

In determining whether a statute violates the equal protection clause, Minnesota courts apply several levels of scrutiny. The highest level, strict scrutiny, is applied "[i]f an equal protection challenge under the Minnesota Constitution involves either a suspect classification or a fundamental right," and requires the classification to be narrowly tailored

and reasonably necessary to further a compelling government interest. *In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015).

Other classifications are subject to rational-basis review.[45] Under rational-basis review, "a law . . . does not violate the equal protection principle of the Minnesota Constitution when it is a rational means of achieving a legislative body's legitimate policy goal." *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 19 (Minn. 2020). This rule, however, is subject to an important exception:

> [U]nder the equal protection guarantee of the Minnesota Constitution, [Minnesota courts] hold lawmakers to a higher standard of evidence when a statutory classification demonstrably and adversely affects one race differently than other races, even if the lawmakers' purpose in enacting the law was not to affect any race differently."

Id. As discussed above, the facts are overwhelming that the statute at issue affects communities of color disproportionately to their white counterparts. The district court acknowledged as much. Thus, at a minimum, the Court should apply the heightened rational-basis review.

Under that standard, this Court has articulated that *actual* proof that a statutory classification serves the legislative purpose is required. *Id.* This requirement differs from the federal standard because it requires a "tighter fit between the government interest and the means employed to achieve it in the form of actual evidence (as opposed to hypothetical

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[45] The intermediate level of scrutiny applies only to gender-based classifications. *In re Guardianship, Conservatorship of Durand*, 859 N.W.2d 780, 784 (Minn. 2015). This case does not involve a gender-based classification.

or conceivable proof) that the challenged classification will accomplish the government interest." *Id.* at 19, n.12 (citing *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991)). The Court explained the impact of this heightened standard in *Fletcher*:

> [W]here a law demonstrably and adversely affects one race differently than other races, even if the lawmakers' purpose in enacting the law was not to affect any race differently, our precedent under the Minnesota Constitution requires more of lawmakers (actual as opposed to theoretical factual justification for a statutory classification)—and demands of this court more searching scrutiny—than does the Fourteenth Amendment.

Id. at 27. In such circumstances, Minnesota courts apply "a more searching level of scrutiny and less deference to legislative enactments challenged under the Minnesota Constitution's Equal Protection Clause than would be applied under the Fourteenth Amendment to the United States Constitution." *Id.* at 23. That heightened standard of rational basis review applies here.

In *Fletcher*, one of the Supreme Court's most recent equal protection cases, the Court laid out three steps in an equal-protection inquiry. The first step is to identify the relevant group of similarly situated persons, and the second step is to identify the distinction at issue. *Id.* at 27–28. The third step is to determine whether a law affecting only certain members of the group (here, by disenfranchising them) is a rational means of achieving the State's purpose for adopting the law (in this case, the felony disenfranchisement scheme). *Id.* at 28. The first two steps of the inquiry determine whether the Court should apply a heightened standard of scrutiny to its analysis in the third step of the inquiry.

Appellants' brief identifies several potential groups of similarly situated persons. The first potential group is comprised of non-incarcerated, participating members of communities. (App. Br. at 45.) The distinction within that group is between the enfranchised members of the community who have not been convicted of a felony and are not on community supervision, and the disenfranchised members of the community who have felony convictions, have served their sentences, and remain on community supervision. This distinction adversely affects Black and indigenous Minnesotans due to the disproportionate rates at which persons of color are arrested, convicted, and incarcerated in Minnesota. (*See* discussion, *supra*).

The second potential group Appellants identify is comprised of those who have been restored to civil rights. (App. Br. at 45.) The distinction in this group is a significant one: people released from incarceration without community supervision are re-enfranchised, and those released with some kind of community supervision restrictions are not. Upon examination of this distinction, it is clear that Minnesota's disenfranchisement scheme adversely affects Black and indigenous Minnesotans when compared to its effect on white Minnesotans. Minnesota has large racial differences in the rate of supervision, which directly leads to greater disenfranchisement for Black and indigenous Minnesotans: the disenfranchisement of Black Minnesotans is 4.9 times the white disenfranchisement rate, and indigenous disenfranchisement is *9.0 times* the white rate. (Add.51.) Black Minnesotans make up only 6.8% of the population, but comprise 34.5% of Minnesota's prison population, 17.2% of people on probation, 23.9% of people on supervised release,

and 23.8% of people on parole.[46] Racial bias exists in Minnesota's criminal-justice system, and that bias influences sentencing and contributes to the racial disparity of people under correctional supervision in Minnesota.[47] Again, the distinction within this group creates an overtly adverse impact on Black and indigenous Minnesotans, and the heightened rational basis standard of review is therefore appropriate.

The third potential group consists of those persons subject to community supervision for any type of conviction. The distinction in this group is also important: those on community supervision for a gross misdemeanor are not disenfranchised, while those on community supervision for a felony are disenfranchised. This distinction, too, has a demonstrably adverse effect on Black and indigenous Minnesotans. As discussed above, racial bias in Minnesota's criminal-justice system leads to racial disparities in sentencing. This bias may even be embedded in sentencing guidelines themselves. For instance, in *Russell*, this Court reviewed statutes and sentencing guidelines under which the presumptive sentence for possession of three grams of crack cocaine was an executed 48 months imprisonment. 477 N.W.2d at 887. The presumptive sentence for possession of an equal amount of cocaine powder, on the other hand, was a stayed 12 months of imprisonment and probation. *Id.* The Court found that over 96% of those charged with possession of crack cocaine were Black, and approximately 80% of those charged with

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[46] Expert Report of Barbara Carson, at 17.

[47] *Id.* at 16.

possession of cocaine powder were white. *Id.* at n.1. The Court held that there was no genuine reason to classify users of crack cocaine differently from users of cocaine powder and that the disparate treatment was not justified. *Russell* and the statutes it analyzed are just one example of the disparate racial impact that can be built into the laws themselves, making it more likely for persons of color to receive higher sentences—even felony sentences in situations where white defendants might only receive a misdemeanor sentence. As to this distinction, too, the heightened standard of rational basis review must be applied.[48]

No matter which of these groups this Court determines is appropriate for its inquiry, the distinction of which persons within that group receive voting rights is administered in a way that has a demonstrable, overt adverse effect on Black and indigenous Minnesotans. Therefore, this Court's precedents require a heightened standard of rational basis review, consisting of "a more searching level of scrutiny and less deference to legislative enactments." *Fletcher*, 947 N.W.2d at 23.

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[48] Rejecting the heightened standard, the district court reasoned that, "[a]s an automatic process, the re-enfranchisement under Minn. Stat. § 609.165 affects all persons convicted of felonies equally." (App. Add. 10.) But the same could have been said of the crack-cocaine statute struck down in *Russell*: it treated all persons possessing crack cocaine the same. The infirmity of that statute, however, was premised on its disproportionate effect on minorities.

B. The statute serves no purpose when applied to persons on probation and supervised release.

Faced with a statute that so clearly impacts Black and indigenous communities differently than white communities, the final question is straightforward: what is the legislative justification for the statute? Put differently, is there a sound public-policy reason to excuse the indisputably detrimental effect the law has on Minnesota's communities of color?

To this end, the Court cannot hypothesize a legislative basis for the statute's classification. *State v. Holloway*, 916 N.W.2d 338, 348 n.7 (Minn. 2018); *see also Russell*, 477 N.W.2d at 889. The Court must instead assess the law's *actual* intended purpose, and then must examine actual evidence, not just hypothetical or conceivable proof, as to whether the means employed actually achieve that governmental interest. *Fletcher*, 947 N.W.2d at 19, n.12, 27.

Here, the legislative record includes *no justification* for keeping persons on probation or supervised release from the voting booth and participating in perhaps the most fundamental aspect of a democracy. The *only* explanation the district court identified was that the legislature wanted "to promote the rehabilitation of the defendant and return to his community as an effective participating citizen." (Add.37.)

That explanation may support the continued disenfranchisement of persons actually serving prison sentences, but it does not explain why that penalty extends to persons on probation or supervised release. Indeed, a person who has been granted probation or supervised release has already been "return[ed] to his community."

The preferred legislative justification for disenfranchising tens of thousands of otherwise eligible Minnesota voters supports Appellants' position that the legislature never intended the statute to apply to those persons. Regardless, this Court should be persuaded by the stark reality that, as Black and indigenous persons on probation and supervised release are increasingly disenfranchised, the legislature has said nothing to justify the application of the statute to those persons. Under the prevailing standard of review, that legislative silence ends the inquiry, as the Court cannot presume any legislative purpose. The statute is unconstitutional as applied to Minnesotans on probation or supervised release.

IV. This Court must strike down an unconstitutional statute—not punt to the legislature.

Finally, MABL stresses that this is not simply a matter for the legislature to change. Confronted with an unconstitutional law, the Court's obligation is to strike it down—not wait for the legislature to correct the problem. *See, e.g.*, *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 914 N.W.2d 678, 703 (Wis. 2018) (Bradley, J., concurring) ("[F]ailure to strike down an unconstitutional law harms all of the people of this state in potential perpetuity."). As the United States Supreme Court observed a century ago, a court must strike down an unconstitutional law even if the law was "designed to promote the highest good." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). The Court reasoned: "The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach

it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards." *Id.*

Moreover, as the district court observed in this case, the legislature has not amended the statute despite repeated opportunities: "The last four regular Minnesota legislative sessions have included bills that proposed changes to Minn. Stat. § 609.165. None of these efforts—to date—have succeeded in changing Minn. Stat. § 609.165." (Add.31 (internal citations omitted).) This is precisely MABL's point. Left to its own devices, the legislature has shown that it will not fix the statute's unconstitutional infirmity. In the meantime, increasingly disproportionate numbers of Black and indigenous community members are deprived of their franchise.

This Court has the power to end harm in plain sight: the unconstitutional application of section 609.165 to persons on probation or supervised release, which predominantly includes minorities. MABL encourages the Court to exercise that important power.

CONCLUSION

This is a significant case with serious ramifications for Minnesota's Black and indigenous communities. The statute at issue here perpetuates gross racial disparities in Minnesota's criminal-justice system. And it does so without serving any recognized legislative purposes. The Court should deem the statute unconstitutional as applied to Minnesotans on probation or supervised release.

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Dated: September 16, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *amicus* Minnesota Association of Black Lawyers certifies that this brief complies with Minn. R. Civ. App. P. 132.01. The brief was prepared in Times New Roman 13-point, proportionately spaced typeface using Microsoft Word 2019. The brief contains 4,997 words, including headings, footnotes, and quotations.

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Dated: September 16, 2021

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