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No. A20-1264

STATE OF MINNESOTA
IN SUPREME COURT

Jennifer Schroeder, et al.,

Appellants,

vs.

Minnesota Secretary of State Steve Simon,

Respondent.

BRIEF OF RESPONDENT

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LEGAL ISSUES

1. Does Minn. Stat. § 609.165 infringe on a fundamental right to vote under the Minnesota Constitution by automatically restoring voting rights upon completion of a felony sentence?

   The court of appeals held that the law does not infringe on Appellant's voting rights because the Minnesota Constitution does not provide a fundamental right to vote while serving a felony sentence. (Add. 8-14.)

   Apposite authorities:

   Minn. Const. art. VII, § 1
   Washington v. Glucksberg, 521 U.S. 702 (1997)
   Richardson v. Ramirez, 418 U.S. 24 (1974)
   Skeen v. State, 505 N.W.2d 299 (Minn. 1993)

2. Does Minn. Stat. § 609.165 violate the equal protection clause of the Minnesota Constitution?

   The court of appeals held both that Appellants are not similarly situated in all relevant respects to persons who are treated differently by the law and that the law survives rational-basis review. (Add. 19-25.)

   Apposite authorities:

   Fletcher Properties, Inc. v. City of Minneapolis, 947 N.W.2d 1 (Minn. 2020)
   Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010)

3. Does Minn. Stat. § 609.165 violate the substantive due process clause of the Minnesota Constitution?

   The court of appeals held the law has a rational basis and is constitutional. (Add. 25-27.)

   Apposite authorities:

   Fletcher Properties, Inc. v. City of Minneapolis, 947 N.W.2d 1 (Minn. 2020)

STATEMENT OF THE CASE

The Minnesota Constitution provides that a person with a felony conviction cannot vote, "unless restored to civil rights." Minn. Const. art. VII, § 1. Appellants challenge the constitutionality of a statute, Minn. Stat. § 609.165, that automatically restores voting rights to people with felony convictions when they complete their sentences. A unanimous court of appeals affirmed summary judgment for Respondent Secretary of State Steve Simon. The court held that the statute does not implicate a fundamental right to vote because the constitution expressly strips people with felony convictions of the right to vote and leaves it to the legislature to determine whether and how to restore those rights. The court further held that the law has a rational basis and does not violate their rights to equal protection or substantive due process.

FACTS

Felony disenfranchisement has been part of Minnesota law since before statehood and is in the state constitution. For the past 160 years, the legislature has enacted various laws specifying when and how people with felony convictions regain the right to vote. In 1963, the legislature enacted the challenged statute, section 609.165. This law expanded on and simplified these prior laws by restoring voting rights automatically upon completion of sentence, instead of leaving restoration to the governor or a court's discretion.

Felony Disenfranchisement Before and at Statehood

The loss of voting rights following a criminal conviction is a longstanding practice that has its roots in ancient Greece, common law, and colonial America. *See, e.g.*, Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United*

States 62-63 (2000). Rationales for the practice varied, but typically focused on the loss of rights being a collateral consequence for breaking the social contract and serving as a form of "civil death." *E.g.*, *Green v. Bd. of Elections of City of N.Y.*, 380 F.2d 445, 451-52 (2d Cir. 1967); Jeff Manza & Christopher Uggen, *Locked Out* 23-26 (2006); Christopher Uggen et al., *Criminal Disenfranchisement*, 1 Ann. Rev. of L. & Soc. Sci. 307, 309-10 (2005). The practice was encompassed in the Fourteenth Amendment when ratified in 1868. U.S. Const. amend. XIV, § 2 (permitting abridgement of voting rights for "participation in rebellion, or other crime").

The practice is similarly longstanding in Minnesota. Minnesota's felony-disenfranchisement laws pre-date those in the federal and state constitutions. When Congress authorized the Territory of Minnesota to form in 1849, it directed that certain people could vote in the first territorial election—namely free white men and others subject to various residency and loyalty restrictions—and that, moving forward, voting qualifications "shall be prescribed by the legislative assembly." Organic Act of 1849, Pub. L. 30-121, 9 Stat. 403, 406, § 5. By 1851, the Territory of Minnesota expressly limited the voting rights of those convicted of a felony, providing that "nor shall any person convicted of treason, felony, or bribery, unless restored to civil rights, be permitted to vote at any election." Minn. Terr. Stat. ch. 5, § 2 (1851).[1]

[1] The historical statutes cited in this brief are publicly available at https://www.revisor.mn.gov/statutes/archive. The constitutional-convention debates are preserved at https://perma.cc/G322-TSXD (Republican) and https://perma.cc/A6TU-KLRE (Democrat). Courtesy copies of the statutes and other historical documents are also in the district court record. (Behrens Aff. Exs. 1-12, Doc. No. 53.)

Nearly identical language was enshrined in the state constitution when Minnesota became a state in 1858: "The 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." Minn. Const. art. VII, § 2 (1858).

The constitution does not include a process for restoring civil rights. Debates from the 1857 constitutional convention reflect the framers' recognition that civil rights could be restored in two ways: by an individual pardon or by legislative action. Delegates briefly debated whether disenfranchisement should be permanent. (Add. 72-74.[2]) They reviewed language similar to that ultimately enacted: "No person shall be qualified to vote at any election who shall be convicted of treason—or any felony . . . *Provided,* That the governor or the Legislature may restore any such person to civil rights." (*Id.* at 73.) When one delegate moved to strike all language after "felony" (which would remove the restoration clause), others highlighted that doing so would "cut off the power of the Legislature to restore civil rights" and eliminate the governor's power to restore rights through a pardon. (*Id.*) The motion ultimately did not pass. (*Id.* at 74.)

[2] Because of the contentious political climate, Democrat and Republican delegates held separate meetings during the constitutional convention and then resolved differences through a conference committee. Mary Jane Morrison, *The Minnesota State Constitution: A Reference Guide* 1 (2002). Both conventions' debates were separately published. *Id.* The discussion cited above is from the Republican convention. The Democrat debates reflect recognition of the provision but only brief, non-substantive discussions. *See, e.g.*, *The Debates and Proceedings of the Minnesota Constitutional Convention* 422-23, 580 (St. Paul, E.S. Goodrich 1857). The operative phrasing reviewed by the Democrat group was identical to that ultimately put in the constitution. *Id.* at 423.

The constitutional bar on voting until restored to civil rights remains today. In the 1970s, a state commission studied whether and how to reform the constitution, including the voting-rights provisions in Article VII. *See* 1971 Minn. Laws ch. 806, § 3, subd. 2, at 1541. While the commission heard testimony "urging the removal of the constitutional restrictions on the voting rights of felons," it ultimately left any changes to the legislature. Minn. Const'l Study Comm'n, *Final Report and Committee Reports*, *Bill of Rights Committee Report* 5 (1973). As part of an effort to reorganize and clarify the constitution, however, in 1974 voters approved a revised constitution that moved the felony-disenfranchisement provision from section 2 to section 1 of Article VII. 1974 Minn. Laws ch. 409, at 799-800. While slightly reworded, the substance remained the same: "The 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 . . . ." Minn. Const. art. VII, § 1.

Statutes Restoring Voting Rights

In the more than 100 years between statehood and the enactment of section 609.165 in 1963, the legislature enacted numerous laws that varied whether and how those convicted of felonies were restored to civil rights. Those laws were in addition to the restoration that could occur through a pardon, which has existed since statehood, first through the governor and then through a pardon board. *E.g.*, Minn. Const. art. V, § 4 (1896); Minn. Const. art. V, § 4 (1858); Minn. Gen. Stat. ch. 117, § 233 (1858). In 1867, the legislature automatically restored civil rights to those who completed a prison sentence

without having any disciplinary violations while incarcerated. 1867 Minn. Laws ch. 14; Minn. Stat. § 243.18 (1961).

The legislature later created restoration processes for those who accumulated disciplinary violations while in prison, those serving felony sentences in jail, and those who completed sentences on parole or probation. For example, in 1887, the legislature provided that, on a complete release from prison, the prison director was to certify the release to the governor, who then had discretion to restore rights. 1887 Minn. Laws ch. 208, § 16, at 334; Minn. Stat. § 243.79 (1961). For those who served a felony sentence in jail, they could achieve restoration initially by waiting at least a year after their judgment of conviction and then applying to a court and having three witnesses testify to their good character. 1907 Minn. Laws ch. 34, §§ 1-2. The court had discretion to restore rights. *Id.* The legislature later removed the waiting period and reduced the number of witnesses to two, who would attest to the person's "general" good character. 1913 Minn. Laws ch. 187, §§ 1-2, at 238-39; Minn. Stat. §§ 610.45-.46 (1961).

In 1911, the legislature directed that, when granting a final discharge from supervision, the parole board was to recommend whether the person's civil rights should be restored. 1911 Minn. Laws ch. 298, § 8, at 415. The governor still retained discretion to restore rights. *Id.*; *see also* Minn. Stat. § 243.06-.07 (1961). The law later expanded to direct the relevant authority with jurisdiction over a person—i.e., a court, board, or officer—to certify a recommendation to the governor upon the termination of correctional supervision. 1919 Minn. Laws ch. 290, § 1, at 299; Minn. Stat. §§ 243.06-.07 (1961). These laws all survived until 1963. 1963 Minn. Laws ch. 753, art. 2, §§ 3, 17, art. 3, § 1; *see also*

1965 Minn. Laws ch. 45, §§ 15-16 (repealing remaining law superseded by 1963 legislation). In other words, other than under the narrow circumstances identified in the 1867 law, at no point before 1963 did the law provide for automatic restoration of rights before completion of sentence.

In 1963, as part of a larger overhaul of the criminal code, the legislature significantly reformed the restoration process by enacting section 609.165 to automatically restore civil rights when discharged from a felony sentence. 1963 Minn. Laws ch. 753, art. 1, at 1198. Unlike its statutory predecessors, section 609.165 requires neither good behavior nor gubernatorial or court action to restore rights. Minn. Stat. § 609.165, subd. 1. Discharge can be either "(1) by order of the court following stay of sentence or stay of execution of sentence; or (2) upon expiration of sentence." *Id.* § 609.165, subd. 2.

This change in law followed the recommendation of an advisory committee that studied the reform of chapter 609. The committee recommended simplifying the restoration process to promote rehabilitation:

> The recommended sections also revise the rather extensive present provisions relating to the restoration of civil rights. This may be discretionary with the Governor, but in practice it appears that the restoration of civil rights has been granted almost as a matter of course. Under the recommended provisions, these rights will be automatically restored when the defendant is discharged following satisfactory service of sentence, probation or parole. This is deemed desirable to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen.

(Add. 57.) The committee added: "It is believed that where a sentence has either been served to completion or where the defendant has been discharged after parole or probation

his rehabilitation will be promoted by removing the stigma and disqualification to active community participation resulting from the denial of his civil rights." (*Id.* at 58-59.)

Minnesota is one of sixteen states that automatically restores voting rights upon completion of sentence. *See* Nat'l Conference of State Legislatures, *Felon Voting Rights* (June 28, 2021), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx. Twenty-one states permit voting while on probation, parole, or supervised release. *Id.* In two states, a felony conviction does not result in any loss of voting rights. *Id.* But eleven states either disenfranchise indefinitely or require an additional time or action after completion of the sentence before rights are restored. *Id.* Most states therefore have either the same or a more restrictive law than Minnesota.[3]

In recent years, many states have expanded voting rights in the felony-disenfranchisement context through legislative and executive action. *See, e.g.*, Amici D.C. et al. Br. 2-3, 6; Amicus Am. Probation & Parole Ass'n Br. 6-7. Over the years, Minnesota legislators have similarly introduced bills to amend section 609.165 to restore voting rights earlier. In the past decade, legislators have introduced these bills in almost every regular legislative session. *See, e.g.*, H.F. 9, 92d Leg. (Minn. 2021); H.F. 876, 92d Leg. (Minn. 2021); S.F. 422, 92d Leg. (Minn. 2021); S.F. 1010, 92d Leg. (Minn. 2021); H.F. 40, 91st Leg. (Minn. 2019); S.F. 856, 91st Leg. (Minn. 2019); S.F. 3736, 90th Leg. (Minn. 2018);

[3] Unlike some other states, Minnesota does not require payment of outstanding fines or restitution from a criminal case to regain the right to vote after completion of supervised release or probation. *E.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1070, 1078-81 (9th Cir. 2010) (describing, and affirming dismissal of challenges to, Arizona law that required completing sentence and paying outstanding fines and restitution).

H.F. 951, 90th Leg. (Minn. 2017); H.F. 342, 89th Leg. (Minn. 2015); S.F. 355, 89th Leg. (Minn. 2015); H.F. 491, 88th Leg. (Minn. 2013); S.F. 107, 88th Leg. (Minn. 2013); H.F. 881, 86th Leg. (Minn. 2009); S.F. 564, 86th Leg. (Minn. 2009). To date, these efforts to secure a policy change have been unsuccessful.

Procedural History

In 2019, Appellants Jennifer Schroeder and Elizer Darris sued the Secretary, in his official capacity, alleging that the process for restoring voting rights is unconstitutional. [4] (Compl., Doc. No. 2.) Because they are still serving their sentences on probation or supervised release, they have not been restored to civil rights under section 609.165 and cannot vote. Probation is supervision imposed by a court as an alternative to imprisonment, but a court may revoke probation and execute the prison sentence for violating any probation conditions. Minn. Stat. §§ 609.135, subd. 1, .14 (2020). Supervised release is akin to parole. After serving a term of imprisonment, the remainder of the sentence is served in the community on supervised release, subject to conditions and to revocation of release for violating conditions. Minn. Stat. §§ 244.101, 244.05, subds. 1b, 3 (2020).

Appellants alleged that section 609.165 violates their voting rights and rights to equal protection and substantive due process under the Minnesota Constitution. (Compl. ¶¶ 58-80.) They sought judicial recognition of a constitutional right that restores voting rights whenever not incarcerated for a felony conviction. (*Id.* ¶¶ a-c.) On cross-

[4] Because original plaintiffs Tierre Caldwell and Christopher Jecevicus-Varner did not appeal the holding that the restoration of their voting rights mooted their claims, they are no longer parties to the case. (Appellants' Br. 6. n.1.)

motions for summary judgment, the district court granted the Secretary's motion and dismissed the lawsuit. (Add. 28-41.)

A unanimous court of appeals affirmed. *Schroeder v. Simon*, 962 N.W.2d 471 (Minn. Ct. App. 2021). The court held that those convicted of a felony do not have a fundamental right to vote under the Minnesota Constitution because the text expressly negates any right and because the framers understood that voting rights would be restored only through executive or legislative action. (Add. 12, 21-22.) The court held that Appellant's equal-protection claim failed for two independent reasons: they are not similarly situated to those who have had voting rights restored and the legislature made a rational policy choice in deciding when and how to restore voting rights to those convicted of a felony. (*Id.* at 19-20, 23-25.) The court similarly rejected Appellants' substantive-due-process claim because the legislature sought to simplify the restoration process and reasonably chose to restore rights at expiration of a criminal sentence. (*Id.* at 26.)

ARGUMENT

This Court reviews a grant of summary judgment de novo. *Kratzer v. Welsh Cos., LLC*, 771 N.W.2d 14, 18 (Minn. 2009). The Court affirms the judgment when no material-fact dispute exists and the lower court properly applied the law. *Id.* Because statutes are presumed constitutional, this Court exercises its power to declare statutes unconstitutional "with extreme caution and only when absolutely necessary." *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 9 (Minn. 2020). The party challenging a statute bears the burden of proof. *Sheridan v. Comm'r of Revenue*, 963 N.W.2d 712, 716 (Minn. 2021).

Appellants challenge the constitutionality of section 609.165, which automatically restores voting rights on completion of a felony sentence. Minn. Stat. § 609.165, subd. 1. Appellants focus almost exclusively on standards of review rather than the elements of their claims. The courts below appropriately focused on the substance of their claims. This Court should do the same and affirm the statute's constitutionality for three reasons. First, the statute does not implicate a fundamental right. Article VII expressly mandates felony disenfranchisement and leaves it to the legislature to decide when to restore voting rights. Appellants cannot prove an independent violation of their right to vote.

Second, section 609.165 does not violate the right to equal protection. Appellants are not similarly situated to those with voting rights and the statute is not subject to heightened rational-basis review because it does not cause any racial disparities. And the law survives any form of rational-basis review because the legislature furthered its valid interest in rehabilitation by expanding the law to automatically restore voting rights. That hypothetical alternative statutes could also promote rehabilitation is not of constitutional import. Finally, Appellants waived their substantive-due-process claim by not raising it in their petition for review or adequately briefing it. But even if the Court considers the claim, it should affirm because the law is not arbitrary and capricious.

I. SECTION 609.165 IS NOT SUBJECT TO STRICT SCRUTINY BECAUSE IT DOES NOT IMPLICATE A FUNDAMENTAL RIGHT TO VOTE.

Unless a law burdens a fundamental right or draws lines based on membership in a suspect class, the law is subject to rational-basis review. *Fletcher*, 947 N.W.2d at 20. A law that affects a fundamental right is typically subject to strict scrutiny. *State v. Holloway*,

916 N.W.2d 338, 347 (Minn. 2018). Appellants do not claim that section 609.165 facially discriminates based on a suspect class, but instead broadly invoke the fundamental right to vote as a basis for applying strict scrutiny to their alleged infringement on that right.

Fundamental rights are created by express constitutional protections or longstanding tradition. While the right to vote is of paramount importance, the district court and court of appeals properly held that Appellants' claims do not implicate a fundamental right and that strict scrutiny does not apply. This case is not about an infringement on an existing right to vote; it is about the right to vote while serving a sentence for a felony conviction, and that is not a fundamental right under the Minnesota Constitution. Minn. Const. art. VII, § 1. Appellants' reading of Article VII ignores the constitution's plain text, longstanding legislative practices, and judicial interpretations. Appellants' arguments about how the criminal justice system has changed since the state's founding and since the enactment of section 609.165 do not change the meaning of the constitution.

A. Appellants Do Not Have a Fundamental Right to Vote While Serving a Felony Sentence in the Community.

Fundamental rights are those that are either express or implied in the constitution. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993). Fundamental rights are "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). A party claiming a fundamental right must describe the claimed right with specificity and avoid overgeneralization. *Id.* at 721-23; *State v. Hill*, 871 N.W.2d 900, 907 (Minn. 2015). Section 609.165 does not implicate a

fundamental right because the right to vote for people still serving felony sentences finds no protection in the Minnesota Constitution or longstanding tradition.

1. The Minnesota Constitution does not create a fundamental right to vote while serving a felony sentence.

The goal of constitutional interpretation is to give effect to the constitution's plain language. *See Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005). A right is not fundamental if the constitution does not mandate protections but instead leaves it to legislative discretion.[5] *E.g.*, *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (holding no fundamental right to parole exists); *United States v. Kras*, 409 U.S. 434, 446-47 (1973) (holding that no fundamental right to exists to "legislatively created benefit" of bankruptcy). And even when a constitution provides a general right to vote, it does not create a right to vote for those convicted of a felony when, as with Minnesota's constitution, the constitution also contains a felony-disenfranchisement provision. *See Richardson v. Ramirez*, 418 U.S. 24, 54-56 (1974) (holding that federal constitution's textual authorization for disenfranchisement negates any fundamental right).

This Court has at least implicitly recognized the lack of a constitutional right to vote after a felony conviction. *See Minn. Voters Alliance v. Simon*, 885 N.W.2d 660, 662 (Minn.

[5] Appellants repeatedly imply that the Secretary conceded that the constitution mandates restoration of rights. (*E.g.*, Appellants' Br. 10, 41-42, 54.) The Secretary acknowledged that the framers left open the possibility for the legislature to restore rights. (Pryor Aff. Ex. 12 at 2-3, Doc. 60.) Recognizing the existence of legislative discretion is not a concession that the constitution creates a fundamental right to a particular outcome as to how the legislature might use that discretion. *See, e.g.*, *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) ("A constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and expressly discretionary state privilege has been granted generally in the past.").

2016) ("[T]he Legislature has identified the circumstances under which the voting rights of felons and wards are restored."); *State ex rel. Arpagaus v. Todd*, 29 N.W.2d 810, 811, 816 (Minn. 1947) (analyzing only whether federal conviction involved conduct that would be felony under Minnesota law and result in losing voting rights under Article VII). These prior comments were correct. The plain language of the Minnesota Constitution is unambiguous and negates any claim to a fundamental right: A felony conviction results in disfranchisement unless and until rights are restored. The constitution provides no right to have voting rights restored before completion of sentence or at any other particular time. As the court of appeals held, the constitution affirmatively provides that "a person who has been convicted of a felony does *not* have a right to vote." (Add. 21-22.) Regardless of the wisdom of their decision, the framers consciously chose not to protect this right and to let the legislature decide whether and how people with felony convictions should regain the right to vote.

To the extent that Appellants claim "restored to civil rights" has a different meaning, for nearly two centuries courts have interpreted the phrase to require a government action to restore those rights – namely, a pardon or legislative act. *See, e.g.*, *Caron v. United States*, 524 U.S. 308, 313-14 (1998) (holding that a person can have "civil rights restored" under federal statute either by pardon or by "operation of [state] law"); *Minn. Voters Alliance*, 885 N.W.2d at 662 (stating legislature determined when to restore voting rights after felony conviction); *State v. Stern*, 297 N.W. 321, 323 (Minn. 1941) (a "pardon . . . restore[s] the defendant to his civil rights"); *Poage v. State*, 3 Ohio St. 229, 236 (1854) (after a "general pardon" "said convict shall be restored to all his civil rights");

Perkins v. Stevens, 41 Mass. 277, 280 (1834) ("It is only a full pardon of the offence which can wipe away the infamy of the conviction, and restore the convict to his civil rights."). Modern legal treatises similarly acknowledge that "the mere release on parole does not restore all the civil rights that have been suspended by reason of the original conviction." 18C Am. Jur. Pl. & Pr. Forms Pardon and Parole § 21.

The plain language of the constitution is clear and that should end the Court's analysis. But even if the Court concludes that some ambiguity exists, the Court should still affirm. When constitutional text is ambiguous, the Court resolves the ambiguity "to give effect to the intent of the constitution as indicated by the framers and the people who ratified it." *Kahn*, 701 N.W.2d at 825; *see also Sheridan*, 963 N.W.2d at 719. This requires reviewing "the history and circumstances of the times and the state of things existing when the constitutional provisions were framed and ratified in order to ascertain the mischief addressed and the remedy sought by the particular provision." *Kahn*, 701 N.W.2d at 825. The Court also gives great consideration to a "practical construction of the constitution, which has been adopted and followed in good faith by the legislature and people for many years." *Clark v. Pawlenty*, 755 N.W.2d 293, 306 (Minn. 2008); *see also Eldred v. Ashcroft*, 537 U.S. 186, 213 (2003) (noting that "a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given [to constitutional] provisions").

The history and circumstances of the times underscore that the plain language of the constitution means what it says. The constitutional-convention debates reflect that the

framers understood that re-enfranchisement would occur through either a pardon or the legislature. The framers specifically discussed that the restoration clause referred to "the power of the Legislature to restore civil rights" and the governor's power to restore rights through a pardon. (*Id.* at 73.) Although the debate was brief, no delegate suggested restoration of rights would be automatic or before completion of sentence.

Early Minnesota lawmakers also understood that restoration of voting rights required a pardon or legislated process. By 1867, the legislature had restored rights to those leaving prison, but only if the person had no disciplinary infractions while incarcerated. 1867 Minn. Laws ch. 14. Those who completed prison sentences but had a disciplinary record returned to the community without voting rights. Even Appellants' expert agreed no Minnesota history supported their claimed right to automatic re-enfranchisement whenever not incarcerated: "The only formalized rights restoration process . . . during Minnesota's first few years as a state was the executive pardon." (Add. 45.)

In addition to the various statutes from the late nineteenth and early twentieth centuries that provided restoration mechanisms, the 1962 advisory committee that proposed section 609.165 expressly acknowledged that, under existing law, restoration was not automatic and required gubernatorial action. *See* Minn. Stat. Ann. ch. 609, advisory comm. cmt. Similarly, the constitutional study in early 1970s reflected the understanding that the constitution did not then mandate restoration of rights at any particular time. In more recent years, the numerous unsuccessful legislative bills to establish an earlier restoration of rights further underscores the longstanding understanding that restoring rights earlier is a policy choice for the legislature and not an existing right in Article VII.

This understanding that the constitution requires a legislated process or pardon to restore voting rights has persisted throughout Minnesota's history for more than 160 years. Such a longstanding, practical construction of the constitution is entitled to great weight. This Court has rejected constitutional challenges with significantly shorter histories of legislative implementation. *See Clark*, 755 N.W.2d at 306 (citing 59-year legislative understanding of constitutional provision).

Appellants now assert that the restoration of civil rights has a completely different meaning than what the framers discussed and what Minnesota legislators and courts have acted on since statehood. Their claim that "unless restored to civil rights" in Article VII actually means "unless residing in the community" lacks a legal and factual basis. The court of appeals correctly rejected it, because the framers "understood that the restoration of a felon's civil rights would occur in ways specified by the executive or legislative branches" and "there is no reason to believe that the framers of the constitution understood the phrase 'unless restored to civil rights' to mean that a felon automatically would be restored to civil rights upon being released from jail or prison." (Add. 12.)

2. No longstanding tradition supports Appellants' claimed fundamental right.

History and tradition, nationally and in Minnesota, further undermine any claim to a fundamental right. Felony disenfranchisement is a longstanding practice, and it continues in some form in nearly every state today. *Richardson*, 418 U.S. 24; *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010); *see also Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (citing previous criminal record as "obvious example" of factor that

states can consider in determining voters' qualifications); *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958) (recognizing that felony disenfranchisement laws reflect states' "nonpenal exercise of the power to regulate the franchise"). In Minnesota, the practice pre-dates statehood. Minn. Terr. Stat. ch. 5, § 2 (1851). For nearly a decade after statehood, Minnesota had no law restoring voting rights after a felony conviction, meaning that, absent a pardon, disenfranchisement was permanent. For most of Minnesota's history, re-enfranchisement for people with felony convictions was harder to secure, more procedurally onerous, and less certain than it is today: past laws required good behavior, witnesses, court involvement, and administrative recommendations, and the final restoration decision was generally discretionary. This long history runs counter to Appellants' attempt to claim a fundamental right to re-enfranchisement for people with felony convictions.

Against this backdrop, the court of appeals correctly held that this case does not implicate a fundamental right. (Add. 21-22.)

3. Developments in the criminal justice system did not change the meaning of Article VII.

Appellant also cite historical changes to the criminal justice system to suggest Article VII has a different meaning. The changes that they cite do not establish a constitutional right and instead reflect policy disagreements. (Appellants' Br. 13-18.) Although probation and supervised release did not exist at statehood, Article VII is unambiguous in its application to people on community supervision. Its plain language provides that a person convicted of a felony cannot vote unless restored to civil rights.

Disenfranchisement follows any felony; it is tied to the conviction, not the sentence; and it lasts until the individual is restored to civil rights. The creation of community supervision does not change that Article VII requires some legislative or executive act to restore voting rights to people with felony convictions.

Appellants note the expansion of what constitutes a felony and highlight that many felony offenses today did not exist in the 1850s. (*Id.*) Because the constitution does not define felony, the Minnesota Legislature retains discretion to define crimes, classify the offense level, and prescribe the punishment for committing a crime. *Baker v. State*, 590 N.W.2d 636, 638 (Minn. 1999); *see also State v. Osterloh*, 275 N.W.2d 578, 580 (Minn. 1978) (addressing separation of powers in criminal justice system). The only relevant inquiry for purposes of Article VII is whether a person's conviction was for an offense that constitutes a felony under Minnesota law. *See Arpagaus*, 29 N.W.2d at 811, 816. It is the role of the legislature to respond to ongoing societal changes and determine what should be a crime and what the offense level should be. The legislature classified Appellants' crimes as felonies, and Appellants do not argue that this classification is unconstitutional.[6]

[6] Amici League of Women Voters and others argue that "felony" as used in Article VII is limited to the felonies that existed in 1858. (Amici League of Women Voters et al. Br. 5-6.) This Court does not address issues raised by amici curiae that are not otherwise part of the case. *In re Northmet Project Permit to Mine Application*, 959 N.W.2d 731, 755 (Minn. 2021). The Secretary notes, however, that this argument does not account for the 1974 update to the constitution, by which time many more felonies existed. Nor would this argument aid Darris because murder was a felony in 1858. Minn. Stat. ch. 89, § 1 (1858); *see also Harvey*, 605 F.3d at 1075 (rejecting common-law-felony argument). Similarly, other amici raise legal issues that are not properly before the Court, including whether (Footnote Continued on Next Page.)

Appellants also note Minnesota's high rate of community supervision relative to its incarceration rate. The disparity is perhaps expected and unremarkable when the state made a concerted and express effort to use community supervision rather than incarceration whenever possible. Minn. Sentencing Guidelines 1.A.5. That policy choice is therefore reflected by courts' sentencing decisions and does not provide a basis for the Court to create a new fundamental right.

B. Appellants' Article VII Claim Also Fails Because the Statute Expands, Not Restricts, Voting Rights.

Appellants have not identified any law or facts that could overcome the plain language or history of Article VII and establish a fundamental right to vote before discharge from a felony sentence. Without a fundamental right, their claim that section 609.165 independently violates their right to vote under the Minnesota Constitution necessarily fails. The cases they rely on, like *Kahn*, involved alleged infringements on an existing, undisputed fundamental right to vote. (Appellants' Br. 48-49.) The district court and court of appeals properly rejected their claim.

Appellants fail to grapple with the fact that Article VII strips the right to vote for people with felony convictions until they are restored to civil rights through a pardon or legislated process. Accordingly, section 609.165 does not add a burden to voting rights for people with convictions. To the contrary, it eases the constitutional burden by automatically restoring rights on completion of sentence, rather than making them seek a

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incarcerated persons have a right to vote, whether Minnesota law complies with international treaties, and whether the Court should abrogate its equal-protection jurisprudence.

pardon or jump through other procedural hoops. Invalidating section 609.165 would not remove a burden on voting right and would instead mean that people with felony convictions could regain the right to vote only by pardon. Obviously, this would be far more restrictive of voting rights than the status quo. As the court of appeals put it: "It appears that appellants are asking this court to reconsider the wisdom of article VII, section 1, itself. That we may not do." (Add. 13-14.)

Because section 609.165 does not burden voting rights protected by Article VII, the Court should affirm the dismissal of the claim.

II. SECTION 609.165 DOES NOT VIOLATE APPELLANTS' RIGHT TO EQUAL PROTECTION.

Because Appellants' claims do not implicate a fundamental right and they did not allege that the law creates a classification based on a suspect class, their equal-protection claim is subject only to rational-basis review. *Fletcher*, 947 N.W.2d at 20. A threshold requirement for an equal-protection claim is that the plaintiffs must be similarly situated in all relevant respects to the class to which they compare themselves. *Id.* at 22. Even if a plaintiff is similarly situated, a law survives rational-basis review when the law is rationally related to a legitimate government purpose. *Id.* at 19. In narrow circumstances, this Court has held that, under the Minnesota Constitution, a heightened—but still deferential—form of rational basis applies when a law causes a disparate racial impact. *Id.* at 19 & n.12, 25; *State v. Russell*, 477 N.W.2d 886, 890 (Minn. 1991); *but see Fletcher*, 947 N.W.2d at 31 (Anderson, J., concurring) (stating that court's discussion of *Russell* was dicta and that *Russell* no longer controls).

The court of appeals properly affirmed summary judgment on Appellants' equal-protection claim. The claim fails as a threshold matter because they are not similarly situated to community members who are not serving a felony sentence. And, even if similarly situated, their claims are subject only to traditional rational-basis review, rather than any heightened standard under *Russell*. Finally, under either form of rational-basis review, section 609.165 is constitutional.

A. Appellants Are Not Similarly Situated to People Who Have Either Regained or Never Lost Their Right to Vote.

Equal protection does not require the State to treat persons who are differently situated as though they are the same. *Fletcher*, 947 N.W.2d at 22; *Holloway*, 916 N.W.2d at 347. A plaintiff claiming differential treatment must be similarly situated to those treated differently in all relevant respects. *Fletcher*, 947 N.W.2d at 22. This inquiry is not contextless, and courts need not defer to plaintiffs' characterization of their class. *Id.* at 22-23.

In general, those with different criminal histories or legal statuses relative to the criminal justice system are not similarly situated. *E.g.*, *Moreland v. United States*, 968 F.2d 655, 660 (8th Cir. 1992) (stating that "presentence defendants and postsentence defendants are legally distinct" and not similarly situated); *State v. Frazier*, 649 N.W.2d 828, 837-38 (Minn. 2002) (rejecting equal-protection claim because a person convicted "based on the commission of one criminal offense[] is not similarly situated to an individual convicted . . . based on his participation in at least three criminal acts").

Here, section 609.165 applies equally to all convicted of a felony and restores voting rights at the same point: completion of sentence. To the extent the statute creates a classification, it distinguishes people who have completed their felony sentences and those who have not. These two groups are not similarly situated. Those still serving a sentence are subject to a host of legal restrictions that do not apply to those who have completed their sentences. Notably, those serving a sentence in the community remain subject to conditions of release and to incarceration for violating those conditions. Minn. Stat. §§ 244.05, subd. 3, 609.135, .14. A person who has completed his or her sentence is not subject to these same legal restrictions.

Based on this reasoning, the court of appeals correctly held that Appellants cannot survive the similarly-situated inquiry, which is an independent and sufficient basis to affirm the dismissal of their equal-protection claim. (Add. 17-20.)

B. Section 609.165 Survives Rational-Basis Review.

Even if the Court holds that Appellants are similarly situated to those who are not serving felony sentences, the court of appeals and district court correctly held that their claims fail as a matter of law because section 609.165 survives rational-basis review. Appellants argue that the statute is subject to a heightened form of rational-basis review because it allegedly has a disparate impact on communities of color.[7] The lower courts

[7] To the extent that Appellants now suggest that, by automating the restoration process to expand voting rights in 1963, the legislature somehow acted with a discriminatory motive, that argument is waived because they raise it for the first time in this Court. (Appellants' Br. 36.) Further, they cite no evidence to support the allegation.

properly rejected this argument. But regardless of which standard this Court applies, Appellants' claims fail.

1. Heightened Rational-Basis Review Does Not Apply Because Section 609.165 Does Not Cause Racial Disparities.

Appellants claim that section 609.165 is subject to heightened rational-basis review under *State v. Russell*, 477 N.W.2d 886. When a statutory classification "demonstrably and adversely affects one race differently than other races," courts have applied a heightened form of rational basis to equal-protection claims under the Minnesota Constitution. *Fletcher*, 947 N.W.2d at 19. Heightened rational basis does not apply in this case. *Russell* is easily distinguishable because it involved a statute that directly caused racial disparities in the criminal justice system. Because section 609.165 does not cause racial disparities, and Appellants instead cite disparities caused by many other factors related to the *dis*enfranchisement imposed by the constitution, their equal-protection claim does not fall under the heightened review articulated in *Russell*.

In *Russell*, this Court struck down statutory differences in the penalties for possessing crack versus powder cocaine. *Russell*, 477 N.W.2d 886. The Court cited racial disparities in the law's impact and concluded it violated the state constitution's guarantee of equal protection. *Id.* at 889. The Court emphasized that, in proscribing criminal consequences, the legislature made arbitrary distinctions, relied on anecdotal evidence about the scientific differences between various forms of cocaine, and made assumptions about individuals dealing or using drugs based on their possession. *Id.* at 889-91. These

distinctions produced starkly different criminal consequences for similar offenses. *Id.* at 887.

Significantly, in *Russell*, the statutory differences directly caused racial disparities in the criminal justice system: "the predominantly black possessors of three grams of crack cocaine face a long term of imprisonment with presumptive execution of sentence while the predominantly white possessors of three grams of powder cocaine face a lesser term of imprisonment with presumptive probation and stay of sentence." *Id.* at 888 n.2. A decade later, the Court confirmed the need to evaluate a disparate-impact claim based on a direct connection between the challenged statute and the alleged racial disparity. *Frazier*, 649 N.W.2d at 834-37 (assessing racial disparities resulting from sentencing for crimes committed for benefit of gang). *Russell* represents a narrow exception to the traditional rational-basis test and it remains the sole time this Court has struck down a statute using it. *Fletcher*, 947 N.W.2d at 25. Differences *within* groups created by a classification "are not of constitutional import under rational basis review." *Id.* at 27.

In this case, section 609.165 does not cause any racial disparities. Section 609.165 automatically restores voting rights to all people with felony convictions when they complete their sentences, regardless of race. It also does not have a disparate impact based on race. The law creates no disparities in the re-enfranchisement process, and it eliminates discretion that could create disparities. That people of color make up a disproportionate share of people with felony convictions in Minnesota is a serious concern, but not one traceable to section 609.165.

Appellants' arguments highlight this disconnect. They cite disparities in arrests, charging decisions, convictions, and sentences. (*See, e.g.*, Appellants' Br. 18-21.) Any disparities in today's criminal justice system are not traceable to the enactment of section 609.165. Section 609.165 made re-enfranchisement automatic and easier for all people completing their felony sentences. It did not result in more convictions or racial disparities in who is convicted of a felony, and it did not create disparities in the re-enfranchisement process. Appellants focus on disparities in *dis*enfranchisement; they produced no evidence that the *re*-enfranchisement process causes or exacerbates any disparate impact in who is restored to civil rights.

Nor does section 609.165 implicate the other concerns addressed in *Russell*. In enacting the law at issue in *Russell*, the legislature relied on abstract or perceived differences in forms of cocaine. By contrast, in enacting section 609.165, the legislature selected an objective and indisputable point for restoring the right lost upon conviction: completion of sentence. Those who have completed their sentences have indisputably fulfilled the prescribed sanction for their offense and are free from further correctional supervision. A straightforward connection exists for the legislature to select that as the time for restoring the civil rights that the person lost upon conviction of the same offense.

Appellants' emphasis on historical changes to the criminal justice system and their impact does not change the constitutional inquiry. Their real challenge is to the modern criminal justice system, not to the purpose or impact of section 609.165. While racial disparities within the criminal justice system are critically important issues in our society today, they should be addressed within the criminal justice system and the processes that

produce them. Put another way, striking down section 609.165 would do nothing to address the racial disparities in the criminal justice system that Appellants cite. And striking down the statute would leave Appellants and others convicted of a felony in a *worse* position by eliminating the automatic path to restoration. Without section 609.165, a pardon would be the only restoration option remaining intact.

Similarly, Appellants' policy concerns about over-criminalization of certain conduct and about the expanded use of probation should be addressed to the legislature and to prosecutors and judges.[8] And in recent years reforms have been implemented to address many of the issues raised by Appellants. In 2016, the legislature enacted the Drug Sentencing Reform Act, 2016 Minn. Laws ch. 160. Since this litigation started, the Minnesota Sentencing Guidelines Commission approved a presumptive cap of five years' probation for felony sentences. Minn. Sentencing Guidelines 3.A.2.a; *see also* H.F. 689, 91st Leg. (Minn. 2019) (proposing to cap probation terms.) And as part of an effort to reduce racial disparities, amicus curiae Ramsey County Attorney's Office recently announced changes to how his office will exercise prosecutorial discretion. (Amicus Ramsey Cnty. Att'y's Off. Add. 6-12.)

[8] Appellants highlight the length of Schroeder's probation sentence. (Appellants' Br. 51.) The record established that her sentence was an extreme outlier and unrepresentative of typical sentences. (Pryor Aff. Ex. 2 at 5 (reflecting historical average term of 5.5 years and noting lower average in 2018), Doc. No. 60.) Minnesota also allows early termination of probation for good conduct. (*See, e.g.*, *id.* Ex. 26 at 2). For example, while original plaintiff Jecevicus-Varner received a 20-year probation sentence, he was discharged from probation after 6 years. (Appellants' Br. 6.) The record is silent on whether Schroeder has ever requested an early discharge.

For these reasons, the court of appeals correctly rejected Appellants' arguments for a heightened rational-basis review. As the court of appeals observed, the statute does not affect one race differently than others: "There is no evidence in this case that the statute's racially neutral criterion has been applied differently based on race. In every racial category, all persons who are discharged are re-enfranchised upon discharge by operation of section 609.165, subdivision 2." (Add. 23.) Because Appellants failed to establish a disparate impact, traditional rational-basis review applies.

2. Section 609.165 Survives Traditional Rational-Basis Review.

Because section 609.165 rationally advances a valid government purpose, the Court should affirm the court of appeals' conclusion that the law survives rational-basis review. Under rational-basis review, a court will not substitute its judgment for the legislature's and it will uphold a statute if it is rationally related to achieving a legitimate government purpose. *Skeen*, 505 N.W.2d at 312. Legislation need not be perfect, and courts give the legislature substantial deference. *Fletcher*, 947 N.W.2d at 29-30. The role of a court is not to second-guess the wisdom or accuracy of the legislature's decision. *Id.* at 19, 29. "The calculus of effects, the manner in which a particular law reverberates in society, is a legislative and not a judicial responsibility." *Id.* at 29 (quotation omitted).

Appellants attempt to focus the Court's attention on their *dis*enfranchisement, asking that the Court assess whether the legislature had a rational basis for not expanding voting rights further to encompass those on some form of community supervision. But the Minnesota Constitution expressly disenfranchises people with felony convictions and leaves the legislature with broad discretion to decide whether, when, and how to restore

voting rights. The question for this Court is whether the legislature had a rational basis for automatically restoring rights at the completion of a felony sentence. The legislature chose a rational point: completion of sentence. At that time, debts to society have been satisfied and there is no further criminal sanction for the conviction. The person is no longer under correctional supervision and the state has a clear interest in fully rehabilitating the person into the community.

Restoring voting rights at the completion of the sentence is a rational choice that many other states have also made. Courts have repeatedly upheld, as rational and lawful, statutes that restore the right to vote to people with felony convictions when they complete their sentences but not sooner. *See, e.g.*, *Harvey*, 605 F.3d at 1079; *Hayden v. Paterson*, 594 F.3d 150, 171 (2d Cir. 2010); *Madison v. State*, 163 P.3d 757, 772 (Wash. 2007). For example, when the State of New York defended its law that restores rights upon expiration of sentence, the state's justification was the "rehabilitation of the offender . . . once the offender has served his sentence or been discharged from parole, [and] is presumed to be capable of rejoining society." *Hayden*, 594 F.3d at 171. The Second Circuit affirmed the law's constitutionality, holding that the law "clearly bears a rational relationship to the government's stated legitimate interest" in rehabilitation. *Id.*; *see also Madison*, 163 P.3d at 772 (holding that Washington law conditioning right to vote on completing sentence was rational).

Because section 609.165 has a rational basis, Appellants' claims fail as a matter of law. As evidenced by the multiple bills attempting to amend section 609.165 through the legislature, whether to restore civil rights earlier than current law allows is a policy matter

for the legislature, not the courts. It is not the role of the courts to referee policy debates. *State v. Empie*, 204 N.W. 572, 573-74 (Minn. 1925) ("The statute may embody bad policy or good policy. Courts do not determine public policy when the Legislature speaks."). As the Supreme Court noted when rejecting a challenge to felony disenfranchisement under the federal constitution:

> [I]t not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State . . . will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument.

Richardson, 418 U.S. at 55.

3. Section 609.165 Survives Heightened Rational-Basis Review.

Even if subject to heightened rational-basis review, the statute still survives because the legislature articulated an actual, as opposed to theoretical, interest that is indisputably advanced by the statute. Heightened rational-basis review differs from the usual standard in only one respect: it requires "actual (and not just conceivable or theoretical) proof that a statutory classification serves the legislative purpose." *Fletcher*, 947 N.W.2d at 19. Even if this Court applies heightened review, section 609.165 survives because the legislature provided an actual justification that advances the legitimate legislative purpose: the statute indisputably promotes rehabilitation by making the restoration of voting rights automatic, rather than discretionary, upon completion of sentence.

When ascertaining the legislative intent of provisions in chapter 609, Minnesota courts look to comments by the advisory committee, whose recommendations in 1962 led to the overhaul of the criminal code as codified in that chapter. *See State v. Stewart*,

624 N.W.2d 585, 589–90 (Minn. 2001); *State v. Johnson*, 141 N.W.2d 517, 520 (Minn. 1966). The advisory committee that recommended the change explained that the law promotes rehabilitation and expands voting rights by making restoration automatic, instead of subject to gubernatorial discretion:

> The recommended sections also revise the rather extensive present provisions relating to the restoration of civil rights. This may be discretionary with the Governor, but in practice it appears that the restoration of civil rights has been granted almost as a matter of course. Under the recommended provisions, these rights will be automatically restored when the defendant is discharged following satisfactory service of sentence, probation or parole. This is deemed desirable to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen.

Minn. Stat. Ann. ch. 609, advisory comm. cmt; *see also* Add. 42-44.[9]

Promoting rehabilitation by automatically restoring voting rights is an actual, non-hypothetical justification for the law. Appellants do not dispute that the law promotes rehabilitation; the thrust of their argument to expand the law is that restoring voting rights furthers rehabilitation. (*E.g.*, Appellants' Br. 33.) Before section 609.165 was enacted, restoration was subject to a patchwork of various procedures, ranging from a system that put the onus on someone with a conviction to obtain a pardon to other procedures that still required action by the person seeking restoration and made the restoration decision discretionary. There is no question that section 609.165 helps achieve the stated goal of

[9] Appellants repeatedly suggest that the framers did not adequately explain why Article VII disenfranchises for a felony conviction and imply the legislature had an obligation to re-justify the constitutional provision. (*E.g.*, Appellants' Br. 10-11, 32.) The constitution's disenfranchisement provision is clear and self-executing. Regardless, Appellants cite no authority that a constitutional provision requires an articulated state interest when they allege only violations of the state constitution. The Court cannot hold that a provision of the state constitution violates the state constitution.

rehabilitation. That satisfies the inquiry under heightened rational-basis review because there is an actual, undisputed justification for the law.

Appellants emphasize that the same stated goals of promoting rehabilitation and removing gubernatorial discretion could support restoring voting rights even earlier. Indeed, they could support restoring rights to all people with convictions, even when incarcerated, as some states do. But the constitutional question is not whether it would be reasonable for the legislature to restore rights at a different point; it is whether there is an actual justification for what the legislature chose to do. *See Fletcher*, 947 N.W.2d at 25 (emphasizing that court has struck laws down under equal-protection clause only when *no* rational basis could support the legislature's decision). The answer to that question is yes: the law indisputably promotes rehabilitation. Rational-basis review, even heightened review, does not require a more searching exercise than that. The court of appeals correctly concluded that the legislature made a rational policy choice. (Add. 24.)

III. SECTION 609.165 DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS BECAUSE IT HAS A RATIONAL BASIS.

It is unclear whether Appellants challenge the court of appeals' conclusions on their substantive-due-process claim; they mention the claim only in passing and do not specifically address it. (Appellants' Br. 39.) Even if the Court would not consider the issue waived by the lack of briefing, Appellants forfeited this issue by not raising it in their petition for review. They focused on equal protection; the words "due process" are nowhere in the petition. Generally, this Court does not address issues that were not raised in a

petition for review. *See Honke v. Honke*, 960 N.W.2d 261, 266 (Minn. 2021); *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005).

Regardless, even if the Court considers the issue, it should affirm because section 609.165 does not violate Appellants' substantive due process rights. Because no fundamental right is implicated, this claim is also subject to rational-basis review. *Fletcher*, 947 N.W.2d at 10 & n.5. A law subject to rational-basis review does not violate the substantive due process clause when the legislature has authority to act, it acts for a permissible purpose, and it chooses rational means that are not arbitrary and capricious. *Id.* at 10. Only the third element has been disputed. For the same reasons that their equal-protection claim fails rational-basis review, their substantive-due-process claim fails.

A legislature's selected means of achieving a legitimate purpose are reasonable if the legislature "could rationally believe that the mechanism it chose would help achieve the legislative goal or mitigate the harm the legislation seeks to address." *Id.* It need not select the best mechanism. *Id.* Because the legislature "has the widest possible latitude within the limits of the Constitution," as long as a policy decision is "at least debatable," it is not arbitrary and capricious and courts will not second-guess the decision. *Id.* at 11 (quotation omitted). Section 609.165 readily survives this standard. In seeking to simplify restoration of rights and expand the franchise following a felony conviction, the legislature made a rational and non-arbitrary decision to restore rights on completion of sentence. And, as reflected by the varying nature of felony disenfranchisement laws across the country, the point at which rights should be restored is "at least debatable."

IV. THE SOCIAL-SCIENCE RESEARCH AND SECONDARY SOURCES APPELLANTS CITE DO NOT ESTABLISH THAT SECTION 609.165 IS UNCONSTITUTIONAL.

Apart from their legal analysis, Appellants and the amici curiae supporting them rely heavily on various social-science studies and other data. (*E.g.*, Pryor Aff. Exs. 5-11, 13-18, 20-32.) These warrant comment. Appellants present strong policy reasons for changing the law. Appellants also provide troubling data that support every stakeholder in the criminal justice system taking a closer look at racial disparities within the system and identifying how to eradicate them. And nothing would prevent the legislature from either expanding rights under section 609.165 or undertaking the process to amend the state constitution to remove the disenfranchisement provision.

But courts do not evaluate the constitutionality of a law based on its popularity or strike down laws based on concerns detached from the relevant legal standards. The studies, expert reports, and other data Appellants presented to the district court did not provide a basis for them to prevail. This Court similarly should not be swayed. None of Appellants' submissions aided their claims because none specifically address Minnesota's felony disenfranchisement law with reference to the relevant legal standards. Some studies even note their own limitations. (*E.g.*, Pryor Aff. Ex. 11 at 18, 20-22 (noting lack of statistical significance in some modeling, acknowledging that stronger link between voting and recidivism was likely attributable to voters' educational attainment, and characterizing study as producing "largely speculative" conclusions).)

Of the few materials that mention Minnesota law, some either contain clear errors, are from those with no legal expertise, or contradict Appellants' claims by expressly

characterizing section 609.165 as a policy choice or acknowledging that restoration of rights was never automatic upon leaving prison. (*E.g.*, *id.* Ex. 1 at 1, 5, 7, 18 (reflecting professor with no legal background or expertise in election law offering overview of franchise that contains multiple inaccurate statements, including that the framers never discussed the disenfranchisement provision; that the first restoration law was passed in 1905; that, before section 609.165, no law addressed restoration of rights for those under community supervision; and that section 609.165 was enacted in 1965); Ex. 2 at 16 (acknowledging that, without enacted legislation, pardon was only way to regain rights under Article VII); Ex. 5 at 3 & n.3 (claiming framers never discussed disenfranchisement provision and discussing law only from policy perspective).) Further, to the extent that any of these materials offer legal conclusions, the Court owes them no deference. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008).

To be sure, the Secretary has never disputed the value of a robust and participatory electorate. Nor has he disputed the significance of voting rights to the individual appellants, or that some states have attempted to use disenfranchisement for illegitimate reasons. *E.g.*, *Hunter v. Underwood*, 471 U.S. 222, 231-32 (1985) (holding part of disenfranchisement provision in Alabama Constitution violated federal equal-protection clause based on clear record of race-based motives); *Cmty Success Initiative v. Moore*, No. 19-CVS-15941, 2020 WL 10540950, at *5 (N.C. Super. Ct. Sept. 4, 2020) (granting preliminary injunction as to those disenfranchised due only to inability to pay outstanding fines or restitution), *appeal filed* No. P21-340, 861 S.E.2d 885 (N.C. 2021) (staying continuation of injunction and reflecting pending appeal); *see also Cmty. Success Initiative v. Moore*, 2020 WL 10540947

(N.C. Super. Ct. Sept. 4, 2020) (dissenting and opining that all claims should have been dismissed); *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (recognizing Mississippi delegates had discriminatory intent when amending constitution's disenfranchisement provisions).

But despite repeated challenges across the country on numerous legal theories, felony disenfranchisement laws have persisted because no fundamental right to vote exists in this context and because the claims are often, as here, challenges to constitutional *dis*enfranchisement provisions presented as challenges to *re*-enfranchisement statutes.[10] *E.g.*, *Madison*, 163 P.3d at 771 ("[I]t is not Washington's *re-enfranchisement* statute that denies felons the right to vote but rather the continuing applicability of its *disenfranchisement* scheme.") This case is only about the narrow legal question of whether

[10] Felony disenfranchisement laws have been challenged on myriad grounds, including the First, Eighth, Fourteenth, Fifteenth, and Twenty-Fourth Amendments; the Voting Rights Act; and state constitutions. While not an exhaustive list, and in addition to those cited elsewhere in this brief, cases reflecting other unsuccessful challenges include: *Harrness v. Hosemann,* 988 F.3d 818, 821-22 (5th Cir. 2021), *vacated and reh'g granted*, 2 F.4th 501 (5th Cir. 2021); *Jones v. Governor of Fla.*, 975 F.3d 1016, 1028 (11th Cir. 2020); *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010); *Simmons v. Galvin*, 575 F.3d 24, 26 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 310 (2d Cir. 2006); *Johnson v. Florida*, 405 F.3d 1214, 1219 (11th Cir. 2005); *Woodruff v. Wyoming*, 49 F. App'x 199, 203 (10th Cir. 2002); *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished table decision); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983); *Shepherd v. Trevino*, 575 F.2d 1110, 1114-15 (5th Cir. 1978); *Thompson v. Merrill*, 505 F. Supp. 3d 1239, 1254-70 (M.D. Ala. 2020); *Miller v. Newsom*, No. 20-8021, 2021 WL 1087462, at *1 (N.D. Cal. Mar. 19, 2021); *Jones v. Edgar*, 3 F. Supp. 2d 979, 980-81 (C.D. Ill. 1998); *Perry v. Beamer*, 933 F. Supp. 556, 559 (E.D. Va. 1996); *Kronlund v. Honstein*, 327 F. Supp. 71, 73-74 (N.D. Ga. 1971); *Beacham v. Braterman*, 300 F. Supp. 182, 183 (S.D. Fla. 1969), *aff'd* 396 U.S. 12 (1969); *Merritt v. Jones*, 533 S.W.2d 497, 500-01 (Ark. 1976); *Emery v. Montana*, 580 P.2d 445 (Mont. 1978); *Fischer v. Governor*, 749 A.2d 321 (N.H. 2000); *NAACP v. Harvey*, 885 A.2d 445 (N.J. Super. Ct. App. Div. 2005); *Mixon v. Pennsylvania*, 759 A.2d 442, 448-50 (Pa. 2000).

section 609.165 is constitutional under the Minnesota Constitution. Applying the appropriate legal standards, the answer is yes as a matter of law and the Court should affirm. Appellants should continue to direct their arguments for changing the law to the Minnesota Legislature, not to the courts.

CONCLUSION

Because Appellants cannot establish infringement on a fundamental right or an equal-protection or substantive-due-process violation, section 609.165 is constitutional. This Court should affirm.

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Respectfully submitted,

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