A20-1264

STATE OF MINNESOTA

IN SUPREME COURT

Jennifer Schroeder, et al.,

Appellants,

v.

Minnesota Secretary of State Steve Simon,

Respondent.

BRIEF OF AMICUS CURIAE RAMSEY COUNTY ATTORNEY'S OFFICE

Craig S. Coleman
Jeffrey P. Justman
Thomas K. Pryor
Kirsten L. Elfstrand
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 766-7000

Julie Ebenstein
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500

ATTORNEYS FOR APPELLANTS

Teresa J. Nelson
David P. McKinney
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
2828 University Avenue Southeast, Suite 160
Minneapolis, MN 55414
Telephone: (651) 645-4097

Keith Ellison
Minnesota Attorney General

Angela Behrens
Jason Marisam
OFFICE OF THE ATTORNEY GENERAL
445 Minnesota Street, Suite 1100
Saint Paul, MN 55101
Telephone: (651) 757-1275

ATTORNEYS FOR RESPONDENT

JOHN J. CHOI
Ramsey County Attorney

JEFFREY A. WALD
Assistant Ramsey County Attorney
License No. 0396344

345 Wabasha Street N., Suite 120
St. Paul, Minnesota 55102
Telephone: (651) 266-2755

ATTORNEYS FOR AMICUS CURIAE RAMSEY COUNTY ATTORNEY'S OFFICE

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INTRODUCTION

The mission of the Ramsey County Attorney's Office ("RCAO") is to serve the residents of Ramsey County by pursuing justice and public safety, protecting the vulnerable, delivering quality legal services, and providing leadership to achieve positive outcomes for our community.[1] Among other roles, the RCAO represents the State in prosecuting all felonies alleged to have been committed in Ramsey County.

This case presents an important question of statewide significance: whether Minnesota Statutes section 609.165, subdivision 1 (Minnesota's statutory disenfranchisement scheme) violates the Minnesota Constitution's Equal Protection Clause. This issue is of particular interest to the RCAO because: 1) Minnesota's current disenfranchisement scheme impacts the RCAO's ability to be a minister of justice; and 2) one of the named appellants – Jennifer Schroeder – is a Ramsey County resident.

The RCAO agrees with appellants' two primary arguments regarding why the statutory disenfranchisement scheme violates Minnesota's Equal Protection Clause and should be struck down: 1) it denies appellants' fundamental right to vote and cannot survive strict scrutiny; and alternatively 2) the scheme cannot survive Minnesota's heightened rational-basis review because no actual or stated legislative purpose justifies appellants' disenfranchisement. The RCAO is in a unique position to support these arguments from the standpoint of a prosecuting agency. Notably, although disenfranchisement is triggered in Minnesota by a felony criminal conviction, the RCAO nonetheless has no discretion

[1] The RCAO solely authored this brief; no other entity made a monetary contribution to the preparation or submission of this brief.

when it comes to deciding *whether* a convicted felon will become disenfranchised, or *when* a convicted felon will have voting rights restored. The current disenfranchisement statute thus operates as an automatic collateral consequence for all convicted felons in Minnesota, both for those serving prison sentences, *and* for those living in the community on probation, parole, or supervised release. Such automatic disenfranchisement of people serving sentences in the community is not reasonably related to any legitimate government interest, and is contrary to the RCAO's own policy regarding the impact of collateral consequences.

On January 31, 2019, Ramsey County Attorney John Choi issued a new policy regarding how the RCAO would consider collateral consequences in negotiating just outcomes in felony cases. *See Prosecution Policy Regarding the Consideration of Collateral Consequences in Plea Negotiation and Sentencings*. RCAO Addendum 1-5. The Policy provides in pertinent part:

> Not only do collateral consequences impact individual people in our community, but they restrain their families and our community, as well. Because people of color and those who are underresourced are disproportionately involved in the justice system, these impacts unjustly burden those segments of our population. It stands to reason that our community is best served when people can leave confinement and transition to a productive life in which they can pursue their educational goals, attain meaningful work and find a safe place to live. *Inhibiting people's progress through unnecessary constraints prevents them from reaching their full potential, increases the likelihood of recidivism, and does a disservice to them and to our entire community.*

Addendum 2 (emphasis added). Disenfranchising Ramsey County residents who are otherwise living in the community – paying taxes, working or going to school, and involved in civic or faith organizations – does a disservice both to the disenfranchised resident and

the entire community. For the reasons that follow, the RCAO joins appellants' request for reversal of the district court order granting summary judgment to respondent.

ARGUMENT

I. Appellants' Equal-Protection Challenge To The Disenfranchisement Statutory Scheme Must Be Analyzed Under Strict Scrutiny; Under Strict Scrutiny, Respondent Cannot Satisfy Its "Heavy Burden" To Justify The Statutory Classification.

There is no dispute that the right to vote is, ordinarily, a fundamental right, *see Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978), and that any statutory abridgement of that right therefore must meet strict scrutiny to pass constitutional muster, *see Kahn v. Griffin*, 701 N.W.2d 815, 831 (Minn. 2005). Nevertheless, the lower courts both concluded that rational-basis review applied, reasoning that Minnesotans convicted of a felony *do not* have a fundamental right to vote. Appellants' Addendum ("AA.") at 1-41. Both courts erred in holding that rational-basis review applies.

It is true that an individual convicted of a crime does not have a fundamental right to vote under the United States Constitution. *See Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974). But appellants' claim was not brought under the U.S. Constitution; it was brought under Article I, Section 2 of the Minnesota Constitution. This Court has often interpreted the Minnesota Constitution as providing greater protection than the U.S. Constitution. *See Kahn*, 701 N.W.2d at 827–28 (citing cases). In *Kahn*, this Court held that the Minnesota Constitution did not provide greater protection to the right to vote than the U.S. Constitution such that a city's failure to hold prompt elections following a decennial redistricting violated the Minnesota Constitution. *Id.* at 833-34. But this Court specifically

noted that it was not foreclosing the "possibility that under other facts and circumstances, a successful argument may be made that greater protection for the right to vote exists under the Minnesota Constitution." *Id.* at 834. This is such a case.

The justification for interpreting the Minnesota Constitution as providing greater protection for the right to vote than the protection provided by the U.S. Constitution in this case is twofold: first, because of the differences in the text of the Minnesota Constitution and the U.S. Constitution; and second, because federal precedent does not adequately protect Minnesota citizens' basic rights and liberties. *Kahn*, 701 N.W.2d at 834-35 (listing justifications for finding that the Minnesota Constitution provides greater protection than the U.S. Constitution).

The constitutional text that justified the U.S. Supreme Court's decision in *Richardson* is Section 2 of the 14th Amendment, which provides that a State's apportionment shall be reduced by the number of eligible voters who are denied the right to vote by that State, except when the right to vote is denied "for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. Notably, this constitutional provision does not disenfranchise any eligible voters; instead, it simply implicitly permits a State to disenfranchise an otherwise eligible voter, without suffering a reduction in apportionment, when that voter participated in "rebellion, or other crime." The phrase "other crime" is comprehensive, covering both common law felonies as well as lower-level offenses. *Richardson*, 418 U.S. at 76 n. 24 (Marshall, J., dissenting) ("Even a jaywalking or traffic conviction could conceivably lead to disenfranchisement, since [section] 2 does not differentiate between felonies and misdemeanors.").

In contrast, Article VII, Section 1, of the Minnesota Constitution expressly disenfranchises otherwise eligible voters who have been convicted of "treason or felony, unless restored to civil rights." Whereas the potential disenfranchisement authorized by the U.S. Constitution is broad ("rebellion, or other crime"), the actual disenfranchisement chosen by Minnesota is narrow ("treason or felony"). This distinction in the texts of the two constitutions provides a basis for this Court to interpret the Minnesota Constitution as providing greater protection to the right to vote than the U.S. Constitution provides. The drafters of the Minnesota Constitution clearly wanted to limit disenfranchisement to serious offenses, indicating a desire to provide a robust right to vote in Minnesota.

Since ratification of the Minnesota Constitution, however, disenfranchisement in Minnesota has greatly expanded. At the time of ratification, there were only 75 felony crimes in Minnesota; today there are over 375 felony crimes. *See* AA.57 n. 31 (citing Mark Haase, Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota, 99 Minn. L. Rev. 1913 (2015)). The tremendous growth in felony crimes in Minnesota has caused a significant increase in the number of Minnesotans currently disenfranchised. *See* AA.56-60 (discussing the huge increase in the number of Minnesotans disenfranchised due to a felony conviction from the time of ratification to today). Because there are now so many Minnesotans disenfranchised due to a felony conviction – 61,727 in 2018, *see* AA.32-33 – it can fairly be said that federal precedent, which denies that a person convicted of a felony offense has a fundamental right to vote, "does not adequately protect [Minnesota] citizens' basic rights and liberties." *Kahn*, 701 N.W.2d at 828. Accordingly, this Court should conclude that the Minnesota Constitution provides greater

protection for the right to vote than exists under the U.S. Constitution, and that the strict-scrutiny standard of review therefore applies.

For the reasons articulated in appellants' brief, the current statutory disenfranchisement scheme does not survive strict scrutiny. *See* Appellants' Brief ("AB.") at 39-51. The lower courts correctly observed that it is the Minnesota Constitution, *not* Minnesota Statutes section 609.165, subdivision 1, that is the initial cause of appellants' disenfranchisement. *See* AA.15. But this analysis misses the mark regarding *why* section 609.165, subdivision 1 – which automatically restores civil rights to persons convicted of a crime once their sentence has been discharged – violates equal protection. If the legislature had remained silent, there would be no constitutional violation; to the extent appellants remain disenfranchised while living in the community, that disenfranchisement would be caused solely by operation of Article VII, Section 1, of the Minnesota Constitution.[2] And common sense dictates that the Minnesota Constitution cannot violate the Minnesota Constitution. The problem is the legislature did not remain silent. It opted to enact section 609.165, subdivision 1, and make a distinction between Minnesotans

[2] Of course, if this Court accepts appellants' argument – which the RCAO supports – that "the best reading of Article VII is that Appellants' right to vote are restored when they return to the community" because "given the absence of any criminal justice system supervising persons living in the community, the phrase 'restored to civil rights' is best understood as freedom from incarceration," (*see* AB.12, 43) then appellants are not disenfranchised at all, either by the Minnesota Constitution or by statute. But to the extent appellants remain disenfranchised in the community, that disenfranchisement is now a result of the constitutional text *and* the legislature's subsequent unconstitutional classification of appellants as being similarly situated to Minnesotans convicted of a felony who are incarcerated, instead of being similarly situated to Minnesotans convicted of a felony who live in the community and whose felony sentences have been discharged.

convicted of a felony offense who live in the community on probation, parole, or supervised release, and those Minnesotans convicted of a felony offense who live in the community and whose felony sentences have been discharged.[3] It is this classification between these two groups of similarly situated people that cannot survive strict scrutiny. *See Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000) (stating that the Minnesota's Equal Protection Clause requires that "all similarly situated individuals shall be treated alike").[4]

Respondent cannot satisfy its burden of showing that the current statutory disenfranchisement scheme is "narrowly tailored to serve a compelling government interest." *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn. 2014). Simply put, the rationale for restoring voting rights to Minnesotans whose felony sentences have been

[3] The RCAO does not dispute that the legislature has the authority to pass laws regulating re-enfranchisement. *See Saari v. Gleason*, 126 Minn. 378, 382, 148 N.W. 293, 295 (1914). But that authority is not unfettered. For instance, suppose the legislature passed a law only re-enfranchising those convicted of a felony who are over 6 feet tall. Even though their disenfranchisement is a result of the Constitution, and not the statute, would anyone seriously dispute that felons under 6 feet tall would have a viable equal-protection claim? The fact that the Minnesota Constitution initially disenfranchised appellants is beside the point; the question is, does the legislature's statutory classification survive judicial scrutiny?

[4] The RCAO acknowledges that appellants are not identical in all respects to members of the class who benefit from re-enfranchisement under section 609.165, subdivision 1. Specifically, appellants are still serving active felony sentences on probation, parole, or supervised release, whereas members of the class who benefit from re-enfranchisement have been discharged from supervision. But appellants need not be similar in *all* respects to state an equal-protection claim, just "in all *relevant* respects." *State v. Cox*, 798 N.W.2d 517, 522 (Minn. 2011) (emphasis added). Appellants and the class that benefits from the statutory classification are similar in all *relevant* respects: both groups have been convicted of felony offenses; both groups are living freely in Minnesota communities, not incarcerated; and the stated goal of the re-enfranchisement statute – removal of the stigma of "civil death" and rehabilitation – applies equally to both groups.

discharged under section 609.165, subdivision 1 – to remove "the stigma and disqualification to active community participation resulting from the denial of [] civil rights," and to "promote the rehabilitation of the defendant and his return to his community as an effective participating citizen" (*see* AA.24)[5] – is at least as strong for those who are living in the community on felony probation, parole, or supervised release. In fact, the justification might be even higher for this group, because restoring voting rights to those on probation, parole, or supervised release fosters their re-engagement with society and the community, thereby increasing their likelihood of success under supervision. *See* Amy Heath, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote after Serving Their Sentences*, 25 Am. U. J. Gender Soc. Pol'y & L. 327, 356 (2017) ("Research has shown that felons in states who are given back their right to vote after being released from prison within a reasonable time frame are far less likely to become repeat offenders.").

In sum, because the Minnesota Constitution should be interpreted as providing greater protection to the right to vote than the U.S. Constitution, the strict-scrutiny standard applies, under which respondent cannot satisfy its "heavy burden" to prove that the disenfranchisement statutory scheme passes constitutional muster. *See In re Welfare of Child of R.D.L.*, 853 N.W.2d at 133. Accordingly, the district court's order granting summary judgement to respondent should be reversed.

[5] *See also* Advisory Comm. on Revision of the Criminal Law, Proposed Minnesota Criminal Code 42 (1962), https://www.leg.state.mn.us/docs/nonmnpub/oclc15743657.pdf at 42, 60.

II. The Disenfranchisement Statutory Scheme Operates As An Automatic Collateral Consequence That Cannot Survive Minnesota's Heightened Rational-Basis Review.

Even if this Court determines that the strict-scrutiny standard of review does not apply, reversal is still warranted. This is so because – for the reasons articulated in appellants' principal brief (*see* AB.24-39) – the disenfranchisement statutory scheme cannot survive Minnesota's heightened rational-basis review, which applies because of the demonstrably disproportionate impact the law has on persons of color, including Black and American Indian Minnesotans. *See* AA.27-28.[6]

When a law has a demonstrable and adverse effect on one race differently than other races, this Court must searchingly scrutinize the actual, as opposed to theoretical, justifications for the statutory classification:

> [U]nder the equal protection guarantee of the Minnesota Constitution, we 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. *See State v. Russell*, 477 N.W.2d 886, 890 (Minn. 1991). In those circumstances, we require actual (and not just conceivable or theoretical) proof that a statutory classification serves the legislative purpose.

Fletcher Properties, Inc. v. City of Minneapolis, 947 N.W.2d 1, 19 (Minn. 2020); *see also Russell*, 477 N.W.2d at 889-91 (invalidating criminal statute that classified crack cocaine

[6] The RCAO takes seriously its obligation as a minister of justice to work to eliminate racial disparities in the criminal justice system, and to end the disparate impact some laws (or enforcement of laws) have on certain racial minorities. To that end, the RCAO recently released a new Charging Policy Regarding Non-Public-Safety Traffic Stops. *See* RCAO Addendum 6-12. The Policy recognizes that pretextual stops "disproportionately impact people of color and those in under-resourced communities," and aims to "maintain the public's trust and confidence" by "declin[ing] to prosecute charges arising from non-public-safety stops or searches of vehicles based solely on consent." *Id.* at 6, 12.

differently than powder cocaine, which disparately impacted Black Minnesotans, because the State could not provide *actual* as opposed to *theoretical* proof that the classification served a legitimate legislative purpose).

Here, the theoretical justification for the statutory disenfranchisement statutory scheme – and the one relied on by the lower courts in upholding the classification – is to "promote the rehabilitation of the defendant and his return to his community as an effective participating citizen." AA.24. The problem with this rationale is that it does nothing to explain why the legislature is treating the people in appellants' shoes – Minnesotans convicted of a felony living in the community on probation, parole, or supervised release – differently from those who have had their felony sentences discharged. The legislature did not claim, and respondent did not argue at the district court, that re-enfranchising appellants and those in their shoes *would not* promote their rehabilitation and return to the community; it is uncontested that re-enfranchising appellants and those in their shoes *would promote their rehabilitation*. Thus, in terms of the only stated rationale for the statute, the two groups are similarly situated, and the legislature has provided no grounds for treating the groups differently. Paradoxically, therefore, the legislature's rationale *supports* appellants' position. *See Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring) ("[Disenfranchisement] constitutes the very antithesis of rehabilitation, for

instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally, an outcast.").[7]

Because the *claimed* rationale for the statutory distinction between Minnesotans convicted of a felony living in the community on probation, parole, or supervised release on the one hand, and those who have had their felony sentences discharged on the other, cannot survive this Court's "searching scrutiny," *see Fletcher Properties, Inc.*, 947 N.W.2d at 27, the statutory scheme must be invalidated. In fact, as opposed to hypothesis, disenfranchisement of Minnesotans living in the community is not a means to rehabilitation but an automatic and crippling collateral consequence. The RCAO is well aware of the many collateral consequences that may stem from a felony conviction. For example, persons convicted of a crime of violence are prohibited from possessing a firearm. Minn. Stat. § 624.713, subd. 1(2). And persons convicted of enumerated felony crimes involving a victim must register for a period of time with a corrections agent or law enforcement authority. Minn. Stat. § 243.166, subd. 1b. But other collateral consequences typically have a useful public-safety function; they are not merely punitive. *See Kaiser v. State*, 641 N.W.2d 900, 905 (Minn. 2002) (stating that collateral consequences "are not punishment

[7] This "excommunication" of the disenfranchised was originally designed as an aspect of "civil death," which, simply put,

> sunders completely every bond between society and the man who has incurred it; he has ceased to be a citizen, but cannot be looked upon as an alien, as he is without a country; he does not exist save as a human being, and this, by a sort of commiseration which has no source in the law.

Ludwig Von Bar, *A History of Continental Criminal Law* 272 (1916).

[and] serve a substantially different purpose than those that serve to punish, as they are civil and regulatory in nature and are imposed in the interest of public safety").

In contrast, the disenfranchisement of people on probation, parole, or supervised release provides no discernible public safety benefit. *See* Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 Minn. L. Rev. 1913, 1914 (2015) ("[Minnesota's disenfranchisement policy] provides no public safety benefit, may even reduce public safety, perpetuates racial disparities, confuses elections, and unnecessarily expends government resources.").[8] In fact, Minnesota's disenfranchisement scheme may be working to hinder public safety, as there is evidence that ex-prisoners who have had their voting rights restored have a lower recidivism rate compared to those who have not. *Id.* at 914; *see also* Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 213 (2004) (finding, after controlling for other factors, that those with a previous arrest who subsequently voted were considerably less likely to be rearrested than those who did not).[9]

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[8] Notably, re-enfranchisement of people convicted of felonies and who have completed their prison sentences "enjoys broad support." *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1107 n. 2 (11th Cir. 2020) (Pryor, J., dissenting). Judge Pryor noted in *Jones* that the American Probation and Parole Association – a nonprofit organization counting as members over 1,700 individual probation or parole officers and more than 200 probation and parole agencies – advocate for "restoration of voting rights upon completion of an offender's prison sentence," and "[p]olice officers, too have advocated for rights restoration because reintegration of formerly incarcerated people reduces recidivism." *Id.*

[9] *See also* Guy Padraic Hamilton-Smith & Matthew Vogel, *The Ballot as a Bulwark: The Impact of Felony Disenfranchisement on Recidivism* at 19 (2011) ("[I]ndividuals who are released in states that permanently disenfranchise are roughly 19% more likely to be rearrested than those released in states that restore the franchise post-release.").

The question this Court must ask is this: is there "a genuine and substantial distinction between those inside and outside the class." *Russell*, 477 N.W.2d at 889 (stating that to meet the heightened rational-basis-review standard, "the [S]tate must provide more than anecdotal support for classifying users of crack cocaine differently from users of cocaine powder"). In other words, is there a genuine and substantial distinction between Minnesotans convicted of a felony living in the community on probation, parole, or supervised release, and those who have had their felony sentences discharged? As stated previously, the legislature could have remained silent and not run afoul of the constitution; but by choosing to act, the legislature was required to provide *actual* as opposed to *theoretical* proof that the classification serves a legitimate legislative purpose. The legislature has not articulated any rationale for disenfranchising convicted felons living in the community; the unstated rationale appears to be punitive in nature. Mere punishment cannot survive constitutional muster where the right at stake is so vital to a functioning democracy. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws. . . . Other rights, even the most basic, are illusory if the right to vote is undermined.").

The RCAO believes strongly that the "primary duty of the prosecutor is to seek justice within the bounds of the law[.]" *See* ABA Standards for Criminal Justice 3-1.2(b) (4th ed. 2017). To that end, we understand our obligation to "put the rights and interests of society in a paramount position[.]" *See* National District Attorneys Association (NDAA) National Prosecution Standards 1-1.2 (3d ed. 2009). This Court has said that "the right of the elector to have his vote cast and counted" is a "high privilege of citizenship." *State v.*

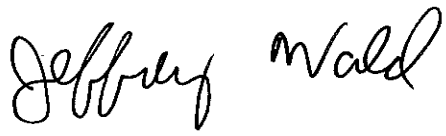
Falk, 89 Minn. 269, 275, 94 N.W. 879, 882 (1903). Because Minnesota's disenfranchisement scheme not only abridges the right to vote for tens of thousands of Minnesotans, but does so in a manner that violates Minnesota's Equal Protection Clause, the district court order granting summary judgment to respondent should be reversed.

CONCLUSION

Amicus RCAO respectfully requests that this Court reverse and remand with instructions to the district court to enter summary judgment for appellants.

Respectfully submitted,

JOHN CHOI
RAMSEY COUNTY ATTORNEY



Dated: September 16, 2021

Jeffrey A. Wald
Assistant Ramsey County Attorney
Attorney Registration No. 0396344

ATTORNEYS FOR AMICUS CURIAE