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**State of Minnesota
In Supreme Court**

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**OFFICE OF
APPELLATE COURTS**

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

**AMICUS CURIAE RED LAKE BAND OF CHIPPEWA INDIANS' BRIEF IN
SUPPORT OF PLAINTIFFS-APPELLANTS**

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STATEMENT OF *AMICUS CURIAE*¹

The Red Lake Band of Chippewa Indians (“Red Lake”) is a federally recognized Indian tribe with a reservation located within the boundaries of the State of Minnesota. 86 Fed. Reg. 7554, 7556 (Jan. 29, 2021). Red Lake has been described as “perhaps the most insular and independent sovereign tribe” in the United States. *Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 536 (8th Cir. 2020). Red Lake has a public interest in the issues before this Court because its tribal members are disenfranchised in disproportionate numbers by the statutory framework under which the State of Minnesota restores voting rights to persons convicted of felonies.

Red Lake tribal members are entitled to all the rights and privileges of other citizens, including full access to the political process. Failures rooted in damaging policies and discrimination create needless barriers to vote. Minnesota’s felony disenfranchisement scheme is one of them. Red Lake seeks to protect its members right to vote by ensuring that its members are not disenfranchised by the Minnesota statutory voting framework in an unconstitutional manner. Red Lake supports the position of Plaintiffs-Appellants in this case.

¹ Pursuant to Minn. R. Civ. App. P. 129.03, undersigned counsel hereby certifies that no counsel for a party authored this brief in whole or in part; and no person or entity, specifically no party’s counsel, other than *amicus curiae*, its members, and its counsel, contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

Red Lake tribal members live both on and off the Red Lake Reservation, including in rural and metropolitan areas throughout Minnesota. They are state citizens and contributing members of society who have a strong interest in participating in the political process and exercising their fundamental right to vote. Red Lake tribal members' interest in participating in the political process is evidenced by the more than 5,500 members reported to have registered to vote before the 2020 election.²

Due to the unique status of Indian tribes in the United States, access to voting is critically important for Native people. “While Native American issues are complex and vary by region, tribe, community, and culture, there are key points many Native voters agree on – supporting tribal sovereignty and self-determination is the foundation of any tribal policy platform. Tribal nations are governments and want to operate as the sovereign nations they are and always have been. They want the federal government to hold up their end of the bargain on treaties[.]”³

In Minnesota, Red Lake tribal members continue to face barriers to participate in the political process that prevent them from voting and stripping them of their political

² Michael Meuers, *Successful Voter Registration Drive at Red Lake*, Red Lake Nation News (Oct. 26, 2020), <https://www.redlakenationnews.com/story/2020/10/26/opinion/successful-voter-registration-drive-at-red-lake/93281.html>.

³ Maria Givens, *The 5 million Americans that 2020 candidates refuse to talk about*, Vox (Mar. 13, 2020), <https://www.vox.com/first-person/2020/3/13/21176957/native-american-vote-2020>.

power to elect candidates who support tribal sovereignty and tribal self-determination policies. Minnesota’s felony disenfranchisement system denies the right to vote at disproportionate rates compared to other races and ethnicities. The current felony disenfranchisement system perpetuates the barriers that have historically been placed on the exercise of Native Americans’ right to vote in Minnesota. Minnesota’s felony disenfranchisement system “definitely dilutes the votes of communities of color.”⁴

Under “well established” law, the “exercise of the political franchise is a ‘fundamental right.’” *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978). Because Minnesota’s disenfranchisement system under which the state restores voting rights to persons convicted of felonies unconstitutionally burdens the fundamental right to vote, the Court should reverse the Court of Appeals decision below.

ARGUMENT

I. Minnesota’s Felony Disenfranchisement System Unconstitutionally Burdens Native Americans’ Right to Vote.

Indian tribes are “separate sovereigns pre-existing the Constitution[.]” *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citation omitted) and “distinct, independent political communities, retaining their original natural rights in matters of local self-government.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). Tribes have functioning and operative

⁴ Liz Sawyer, *Why are felons in Minnesota stripped of their voting rights?*, Star Tribune (Jan. 10, 2020), <https://www.startribune.com/why-are-felons-stripped-of-voting-rights-and-what-other-rights-do-they-lose/565227122/>.

governments that provide for their members and territories. *See Williams v. Lee*, 358 U.S. 217, 220 (1959) (stating that tribes and their members have the right “to make their own laws and be ruled by them”). Tribes maintain a unique government-to-government relationship with the United States, including a “duty of protection” the United States owes to tribes. *Worcester*, 31 U.S. at 556.

“Indians have faced intense, deep-seated resistance and racism from the majority community while attempting to participate in the democratic process has a unique and complete history which mirrors their long, cyclic relationship with the federal government.” Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 167 (1991). In Minnesota, undue and unnecessary barriers have been historically placed on Native Americans’ exercise of their right to vote.

When ratified in 1858, the Minnesota Constitution included a provision in which Indians could become citizens entitled to vote in state elections only if they adopted the “language, customs, and habits of civilization in order to vote.” Minn. Const., art. VII, § 1(4) (1858). To meet these requirements, each potential Indian voter was required to go before a district court and take an examination. *Id.* At this time, no other ethnic or racial group was forced to give up its culture in order to exercise their right to vote.

In 1917, this Court determined that Indians could not vote in a state election on the grounds that they did not pay the same taxes as white persons. *Opsahl v. Johnson*, 163 N.W. 988, 989 (Minn. 1917). The Court reasoned that Indians “still cling to some of the customs and habits of their race, and are governed in their relation with each other by

their peculiar tribal rules and practices, subject, in a certain sense, to the advice and supervision of the federal authorities.” *Id.* The Court further added: “No doubt the right of suffrage was by this state held out as an inducement to the Indians to sever their tribal relations and adopt in all respects the habits and customs of civilization[.]” *Id.* at 991. According to the Court, an Indian could have been eligible to vote “by taking up [their] abode outside the reservation and there pursuing the customs and habits of civilization.” *Id.* The requirement that an Indian abandon his or her tribal ties severely restricted Indians from participating in state and local elections and voting on matters touching aspects of their everyday lives.

Presently, Minnesota’s felony disenfranchisement scheme at issue in this case perpetuates the past denial of Native Americans’ voting rights. Native Americans continue to be drastically and disproportionately impacted by Minnesota’s disenfranchisement system under which the state restores voting rights to persons convicted of felonies. Data shows that while Native Americans comprise less than 1 percent of Minnesota’s voting population, the state’s felony disenfranchisement scheme currently denies the right to vote to approximately 9 percent of Native Americans who are being supervised in the community—the highest percentage among any racial or ethnic group of people. Plaintiffs-Appellants’ ADD-36 to ADD-37. This includes Native Americans who live productive lives in their community while on probation and/or supervised release.

Unsurprisingly, Minnesota’s arrest, charge, and conviction rates are significantly higher for minorities. Native Americans are imprisoned at nearly 14 times the rate of

white adults while accounting for only 1 percent of the state adult population.⁵ From 2008 to 2018, the Native American prison population grew by 34 percent, while the white prison population decreased by 2 percent.⁶ At the start of 2020, Native Americans made up approximately 8.7 percent of the 9,381 inmates housed in the state prison system, despite the fact that only about 1.4 percent of Minnesota’s total population is Native American.⁷ In addition, Native Americans in Minnesota are arrested at a rate five times higher than the white population. Plaintiffs-Appellants’ ADD-23.

In Beltrami County, which encompasses the majority of the land within the Red Lake Reservation, there continues to be racial injustice where the largest minority group is Native Americans. In 2020, community leaders in Beltrami County “pushed for the police department to have a citizen advisory commission, questioning why the majority of jail detainees are Native American.”⁸ The “long-standing mistrust” between the Native American community and law enforcement has resulted in “obvious disparities in the Beltrami County Jail” where Native Americans, including Red Lake tribal members, are

⁵ American Civil Liberties Union of Minnesota, *ALCU-MN Releases Study to Sharply Reduce Mass Incarceration* (Nov. 7, 2019), <https://www.aclu-mn.org/en/press-releases/aclu-mn-releases-study-sharply-reduce-mass-incarceration>.

⁶ American Civil Liberties Union, *Blueprint for Smart Justice Minnesota*, at 10, <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-MN.pdf>.

⁷ Matthew Guerry, *Minnesota prisons begin tracking tribal affiliations of Native American inmates*, Twin Cities Pioneer Press (Feb. 26, 2020), <https://www.twincities.com/2020/02/26/minnesota-prisons-begin-tracking-tribal-affiliations-of-native-american-inmates/>.

⁸ Maya Rao, *Trump rally highlights tensions over race in Beltrami County*, Star Tribune (Sept. 25, 2020), <https://www.startribune.com/trump-rally-highlights-tensions-over-race-in-beltrami-county/572520771/>.

disproportionately represented while the white population comprise approximately 75 percent of the County’s population.⁹ The racial disparities persist within the criminal justice system explain why Native Americans are disproportionately disenfranchised in comparison to the white population. See Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 707, 717 (2019) (“Native people are disproportionately prosecuted and convicted of felonies as compared to their white counterparts, and as a consequence are disproportionately harmed by felon disenfranchisement laws.”).

There is no legitimate reason for the disenfranchisement of Native Americans living in the community on probation and/or supervised release. Nothing suggests that the framers of the Minnesota Constitution intended for persons convicted of a felony and living in their community on prohibition and/or supervised release from being denied the right to vote. Notably, community supervision did not exist when the Minnesota Constitution was ratified, and parole, probation, and supervised release of persons living in the community evolved only in the 20th century. In the absence of any specific indication that the phrase “restored to civil rights” was intended to result in the disenfranchisement of persons living in their community following felony convictions, the Court should not construe the Minnesota Constitution in a manner that denies the right to vote to this category of persons.

⁹ John Enger, *Bemidji residents answer chief’s question of police oversight with a ‘yes’*, MPR News (Aug. 11, 2020), <https://www.mprnews.org/story/2020/08/11/bemidji-residents-answer-chiefs-question-of-police-oversight-with-a-yes>.

II. Equal Access to Voting for Native Americans is Critically Important to Advance Tribal Sovereignty.

Native Americans have been deemed a “small but powerful voice within the American electorate.” Jennifer L. Robinson & Stephen L. Nelson, *The Small But Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians*, 70 BAYLOR L. REV. 91, 94 (2018); see also Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 267 (2015) (“The Native American vote, although small in overall population numbers, is a powerful vote in local and state elections.”). When equal access to voting occurs, “Native voters are empowered to not only have their voices heard, but to ‘protect our sovereignty rights.’”¹⁰ Current Minnesota Lieutenant Governor Peggy Flanagan, a member of the White Earth Band of Ojibwe who in 2018 became the first Native woman elected to statewide office, stated: “Native folks have more at stake, in my opinion, than any other community—our lives are touched more by government than anyone else’s.”¹¹

Equal access to voting for Native Americans is critically important in light of the impact of legislative policy affecting all aspects of the Indian tribes within the United States. The fact that Congress has plenary and exclusive authority to legislative in all

¹⁰ Native American Rights Fund, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, at 125, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

¹¹ Brooks Johnson, *Native Groups Working to Get Out Indigenous Voters in Charged Election*, Star Tribune (Oct. 30, 2020), <https://www.startribune.com/native-groups-working-to-get-out-indigenous-voters-in-charged-election/572918931/>.

aspects of Indian affairs indicates the significance of the democratic process on tribes and their members. *See, e.g., Bay Mills*, 572 U.S. at 800 (“The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress.”); *Swenson v. Nickaboine*, 793 N.W.2d 738, 739 (Minn. 2011) (“Congress has broad powers, described as plenary and exclusive, to regulate tribal affairs under the Indian Commerce Clause.”).

Native American voters have used their influence to impact election results. In the 2020 election, a record-breaking six Native American candidates were elected to the serve in the U.S. House of Representatives.¹² The election of these candidates into office “inspire[s] other Native Americans to run for office at every level of government and create change in their communities.”¹³

CONCLUSION

The disenfranchisement of Native Americans who are leading productive lives simply because they have previously been convicted of a felony level offense cannot be justified. Disenfranchisement of Native Americans continues the undertones of extermination that began in 1492, in a more indirect way, but which results nevertheless in greatly limiting the potential of individuals who are subject to this limitation. When the

¹² Carlie Porterfield, *More Native Americans Were Elected to Congress Tuesday Than Ever Before*, Forbes (Nov. 4, 2020), <https://www.forbes.com/sites/carlieporterfield/2020/11/04/more-native-americans-were-elected-to-congress-tuesday-than-ever-before/?sh=5680eddd2881>.

¹³ Native American Rights Fund, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, at 126, https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

incarceration levels of Native Americans in Beltrami County, for example, regularly reach 90% of the persons incarcerated; and no one in the judicial or criminal justice systems in Beltrami County can see that this is a problem, we have a problem.

It is time to change course from the blatant racism against Native Americans that was explicitly spelled out in the original Minnesota Constitution, which has been perpetuated through decisions of Minnesota courts; and which continues to disenfranchise Native Americans at vastly disproportionate rates compared to other races and ethnicities. Because Native Americans hold a unique position in the American political system; and because participation in the American political system is crucial to Native Americans in the exercise of tribal self-determination, it is essential that Native Americans not be unnecessarily disenfranchised.

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

Dated: September 16, 2021

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CERTIFICATION OF DOCUMENT LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01. The length of this brief is 2,357 words (including headings, footnotes, and quotations) according to the word count feature on Microsoft Word 2016, the word processing software system used to prepare this brief.

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/s/ Joseph Plumer