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STATE OF MINNESOTA
IN SUPREME COURT

JENNIFER SCHROEDER, ELIZER EUGENE DARRIS, CHRISTOPHER JAMES JECEVICUS-VARNER, AND TIERRE DAVON CALDWELL,

Plaintiffs-Appellants,

vs.

MINNESOTA SECRETARY OF STATE SIMON, IN HIS OFFICIAL CAPACITY,

Defendant--Appellee.

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VOLUNTEERS OF AMERICA MINNESOTA AND WISCONSIN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

Statement of the Legal Issues 6

Statement of the *amicus Curiae*'s Identity.....6

Statement of the Case and Facts 7

Introduction.....7

Argument 10

I. Minnesota's disenfranchisement scheme is undemocratic and radically out of step with mature democracies around the world. 10

II. Minnesota's disenfranchisement scheme contravenes the United States' international civil and human rights obligations. 15

A. Minnesota's disenfranchisement scheme runs counter to both the ICCPR and CERD. 16

B. This Court should interpret Minnesota law in a manner that upholds the United States' international obligations. 20

III. Minnesota's disenfranchisement scheme stigmatizes returning citizens and impedes their ability to fit back into their communities. 23

IV. Minnesota's disenfranchisement scheme muffles communities of color and exacerbates racial inequities in our criminal system. 28

CONCLUSION.....30

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Charming Betsy, 6 U.S. (2 Cranch) 64 ..... 13, 21
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Harper v. Va. Bd. of Elections, 383 U.S. 663, 667, 670 (1966) 11
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STATEMENT OF THE LEGAL ISSUES

Volunteers of America Minnesota and Wisconsin ("VOA") accepts and adopts the statement of the legal issues offered by Plaintiffs-Appellants.

STATEMENT OF THE *AMICUS CURIAE*'S IDENTITY[1]

VOA is a health and human services nonprofit committed to supporting people in need, strengthening families, and building communities. It is a faith-based organization that answers God's call to uplift communities through a ministry of service. VOA has provided essential assistance and opportunities to people of all faiths and backgrounds for more than a century. Operating a comprehensive range of innovative programs and fostering diverse coalitions of community members, VOA challenges past and present injustices to those who are disadvantaged and marginalized socially, politically, and economically. The organization's work impacts the lives of 25,000 people annually in 110 communities across Minnesota and Wisconsin.

For fifty years, a critical pillar of VOA's commitment to restorative justice has been helping individuals successfully re-join their communities following prison sentences as engaged and whole citizens. To accomplish this goal, VOA provides transitional housing and supervision in residential re-

[1] VOA certifies under Rule 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity, has made a monetary contribution to its preparation or submission.

entry centers and work-release programs. Additionally, VOA has one of Minnesota's longest standing and most successful mentoring programs and offers a continuum of evidence-based and trauma-informed support and education for individuals pre-release and leaving incarceration. This program benefits over 2,000 Minnesotans every year. Among other things, it provides tailormade assistance to meet the specific challenges that result from an encounter with the criminal legal system. This help includes one-on-one mentoring to secure employment and housing, transportation services, referrals to meet mental and physical health needs, access to computers, and other related aid that reduces recidivism, reunites families, and helps build safe, strong, and healthy communities.

STATEMENT OF THE CASE AND FACTS

VOA accepts and adopts the statement of the case and facts offered by Plaintiffs-Appellants.

INTRODUCTION

The 2020 national election was heralded by many as the most important in a generation. One correspondent for Foreign Policy magazine put it this way: "[a]n extraordinary consensus exists among historians, political scientists, diplomats, national security officials, and other experts that the stakes of the U.S. presidential election . . . this November rise to . . .

portentous historical standards."[2] The issues at stake were significant to every single person in the United States, including the health and economic consequences of a global pandemic, the racially fraught relationships between citizens and police who are sworn to serve and protect them, and the environment, to name only a few. Unsurprisingly, more people voted, despite extraordinary practical challenges, than ever before.[3] In fact, in Minnesota, an estimated 81% of the voting age population cast their ballot this past November.[4]

Yet, despite the momentous stakes and often razor thin margins of this election, more than 5.17 million United States citizens—including 64,700 Minnesota citizens—were denied the opportunity to vote.[5] These citizens were boxed out of exercising their most fundamental democratic right because of criminal convictions. The State, in the District Court and at the Court of Appeals, has not offered a single, solitary justification, rational or

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[2] Michael Hirsh*, The Most Important Election. Ever.,* FP (Foreign Policy), Sept. 25, 2020, https://foreignpolicy.com/2020/09/25/2020-election-donald-trump-joe-biden/.
[3] *See* Rachael Dottle & Demetrios Pogkas, *Voter Turnout Hits Historic Levels With States Still Counting Votes*, Bloomburg, Nov. 4, 2020, *https://www.bloomberg.com/graphics/2020-us-election-voter-turnout/*.
[4] *See id.*
[5] *See* Chris Uggen, et. al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, The Sentencing Project, Oct. 20, 2020, https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/.

otherwise, for preventing citizens returning to civil society after their incarceration from having their voices heard and their votes counted about issues of universal importance—issues that will impact them, their communities, and their families for years to come. In fact, no such justification exists.

VOA works with thousands of incarcerated and returning citizens every year, helping to restore and strengthen the bonds between them and their communities. In its work, it sees daily the stigma and harm perpetuated by Minnesota's disenfranchisement scheme. But the negative consequences of disenfranchisement are felt not only by returning citizens who are trying to rebuild their lives and contribute to society. Instead, Minnesota's disenfranchisement scheme runs contrary to international human rights law and norms, degrades the democratic process for all of us, and muffles the voices of communities of color.

ARGUMENT

I. Minnesota's disenfranchisement scheme is undemocratic and radically out of step with mature democracies around the world.

Voting constitutes the backbone of democratic structures. It is not simply *a* fundamental right. It is *the* most fundamental right.[6] When a group of citizens votes, it affirms the notion that we govern ourselves by free choice.

The Court of Appeals mistakenly denied the application of strict scrutiny in this case by relying on faulty logic. It incorrectly bifurcated the right to vote into two categories: a right that citizens have and a right that citizens convicted of a felony have. According to the Court of Appeals, persons convicted of a felony have a lesser "right" to vote that is somehow not fundamental.[7]

That logic runs afoul not only of U.S. law, practice, and history, but of the nearly uniform understanding of constitutional courts around the world. There is a single right to vote, and it is a fundamental attribute of citizenship. Citizens convicted of a felony may, temporarily, have that fundamental right

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[6] *See, e.g.,* THE DECLARATION OF INDEPENDENCE, para 2 (U.S. 1776) (governments derive "their just powers from the consent of the governed"); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52 (C.B. Machperson ed., 1980) (1960) (same).

[7] *See* ADD-20-21.

suspended, but such a suspension does not devalue or change the characteristic of the right.

The United States Supreme Court has long declared that voting is "fundamental,"[8] the "essence of a democratic society,"[9] and "preservative of all rights."[10] In fact, as the Court once explained:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[11]

Other democracies around the world also recognize the essential character of voting. Accordingly, a clear "trajectory has emerged towards the expansion of felon suffrage."[12] In fact, in 2006, the ACLU noted that all non-U.S. constitutional courts that have evaluated disenfranchisement laws have "found the automatic, blanket disqualification of prisoners to violate basic democratic principles."[13]

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[8] *See, e.g.*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667, 670 (1966).
[9] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).
[10] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
[11] *Reynolds*, 377 U.S. at 554.
[12] Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 210 (2011).
[13] *Dimming the Beacon of Freedom: U.S. Violations of the International Covenant on Civil & Political Rights*, ACLU (June 2006), https://www.aclu.org/files/pdfs/iccprreport20060620.pdf.

The European Court of Human Rights, for instance, has said that the provision for "free elections" within the Convention on Human Rights is "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law."[14] In declaring the United Kingdom's blanket disenfranchisement of persons convicted of felonies violative of the Convention, the court noted that there was no place under "the Convention system, where tolerance and broadmindedness were the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion."[15] Indeed, contracting States to the Convention are obligated to take "positive measures" to provide free elections "as opposed to merely refraining from interference."[16] "[T]he right to vote is not a privilege . . . . Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates."[17] Instead, "the presumption in a democratic State must be in favour of inclusion."[18]

The Canadian Supreme Court, too, has highlighted the foundational nature of voting when striking down a felon disenfranchisement scheme:

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[14] *Hirst v. United Kingdom (No. 2)*, 42 Eur. Ct. H.R. 41, ¶ 58 (2005).
[15] *Id.* ¶ 70.
[16] *Id.* ¶ 57.
[17] *Id.* ¶¶ 59, 62.
[18] *Id.* ¶ 59.

> All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom.[19]

Perhaps the most apt international comparator to the United States when it comes to disenfranchisement for citizens convicted of felonies is South Africa. Like the United States, South Africa has a long history of governmentally sanctioned segregation and racial strife.[20] In 1991, apartheid officially ended.[21] In 1999, The Constitutional Court expounded upon the essential character of voting for democracy when it invalidated a felon disenfranchisement law:

> Universal adult suffrage on a common voters' roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single

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[19] *Haig v. Canada*, [1993] 2 S.C.R. 995 (Can.) (Cory, J., concurring); *see also Sauvé v. Canada* (Attorney General), [1993] 2 S.C.R. 438 (Can.) ("The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power.").

[20] *See generally Apartheid,* HISTORY, March 3, 2020, http://www.history.com/topics/apartheid (stating segregation in South Africa started long before Apartheid).

[21] *Id.*

> interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.[22]

Importantly, the South African court noted that "[i]n light of our history where the denial of the vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected."[23] The same is true in the United States, where felony disenfranchisement laws trace their roots to widespread efforts to stop Black citizens from voting.

The bottom-line reality is that countries around the globe are recognizing that disenfranchising significant swaths of the population is undemocratic. Accordingly, more and more modern democracies have restored voting rights to incarcerated and returning citizens.[24] At least

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[22] *August v. Electoral Comm'n* 1999 (4) BCLR 363 (CC) at para. 17 (S. Afr.); *see also Minister of Home Affairs v. Nat'l Inst. for Crime Prevention & the Re-integration of Offenders* 2004 (5) BCLR 445 (CC) at para. 47 (S. Afr.) ("[T]he right to vote is foundational to democracy which is a core value of our Constitution. In the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected.").

[23] *Id.*

[24] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 28 (2008).

twenty-one countries impose no restriction on voting from prison,[25] and fourteen more countries allow at least some prisoners to vote.[26]

Even among the few mature democracies that continue to permit limited disenfranchisement of citizens convicted of felonies, however, Minnesota's particular disenfranchisement scheme stands out as anachronistic and undemocratic. Virtually no other countries disenfranchise citizens after they return to civil society.[27] Indeed, preventing such returning citizens from voting runs counter to the United States' obligations under international human rights law.

II. Minnesota's disenfranchisement scheme contravenes the United States' international civil and human rights obligations.

Minnesota's disenfranchisement scheme contravenes the United States' obligations under two international treaties: the International Covenant on Civil and Political Rights ("ICCPR"),[28] ratified by the United States in 1992, and the International Convention on the Elimination of All

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[25] These countries include Austria, Canada, Croatia, Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Israel, Latvia, Lithuania, Macedonia, Norway, Serbia, Slovenia, Spain, South Africa, Sweden, Switzerland, and the Ukraine. *International Comparison of Felon Voting Laws,* Britannica ProCon.org, Apr. 11, 2018, https://felonvoting.procon.org/international-comparison-of-felon-voting-laws/.
[26] These countries include Australia, Belgium, Bosnia, France, Greece, Iceland, Italy, Luxembourg, Malta, Poland, Portugal, and Romania. *Id.*
[27] Laleh Ispahani, American Civil Liberties Union, *Out of Step with the World: An Analysis of Felony Disenfranchisement in the US. and Other Democracies* 4 (2006), http:// www.aclu.org/pdfs/votingrights/ outofstep_20060525.pdf.
[28] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

Forms of Racial Discrimination ("CERD"),[29] ratified by the United States in 1994. Both treaties—widely embraced by the international community with more than 170 state parties—prohibit far-reaching disenfranchisement schemes, like Minnesota's. While both treaties are non-self-executing, this Court should not construe Minnesota's laws "to violate the law of nations if any other possible construction remains."[30] In light of these international obligations, Article VII of the Minnesota Constitution should be interpreted by the Court to mean that a citizen convicted of a felony has her civil rights restored whenever her incarceration ends.

A. Minnesota's disenfranchisement scheme runs counter to both the ICCPR and CERD.

Article 25 of the ICCPR declares that every citizen has the right to vote through "universal and equal suffrage" and "without unreasonable restrictions." Though the treaty was ratified by the United States as non-self-executing, the United States included the following declaration:

> [I]t is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights

[29] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195

[30] *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also, e.g.,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); RESTATEMENT (FORTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 309 (same).

> recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.[31]

The ICCPR also prohibits laws that further discrimination in voting rights. Article 25 provides that every citizen has the right to vote without Article 2 distinctions—"without distinction of any kind, such as race [or] colour."[32] This aligns with the requirements of the CERD, which mandates in Article 5 that states ensure "[p]olitical rights, in particular the right to participate in elections—to vote[—] . . . on the basis of universal and equal suffrage" without racial distinctions.[33] CERD prohibits racial distinctions having the purpose or effect of nullifying or impairing the equal exercise of various human and political rights, including the right to vote. As a U.N. Committee noted, "the right of everyone to vote on a non-discriminatory basis is a right contained in article 5 of the Convention."[34] The Committee went on to urge the United States to remember its "obligations under the Convention . . . to undertake to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect."[35]

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[31] 138 CONG. REC. 8,071 (1992).
[32] ICCPR arts. 2, 25.
[33] CERD art. 5.
[34] *See* CERD arts 1 and 5; *see also, e.g.,* Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/56/18, at 66 (2001).
[35] *Id.*

Minnesota's disenfranchisement scheme runs counter to both treaties. As the United Nations Human Rights Committee, which monitors compliance with the ICCPR,[36] observed fourteen years ago, "general deprivation of the right vote for persons who have received a felony conviction, **and in particular those who are no longer deprived of liberty**, do not meet the requirements of [the ICCPR]" and do not serve rehabilitation goals.[37] Since then, the Committee has continued to express "concern about the persistence of state-level felon disenfranchisement laws," highlighting their "disproportionate impact on minorities."[38]

The U.N. Committee on the Elimination of Racial Discrimination, which monitors CERD's implementation, has also criticized broad disenfranchisement schemes like Minnesota's. For instance, in its 2014 concluding observations to the United States' period report, the Committee wrote that it was "concerned at the obstacles faced by individuals belonging to racial and ethnic minorities and indigenous peoples to effectively exercise their right to vote due, inter alia, to . . . state-level felon disenfranchisement

[36] Human Rights Committee, UNITED NATIONS OFF. HIGH COMMISSIONER FOR HUM. RTS., https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx.
[37] Concluding Remarks of the U.N. Hum. Rts. Comm., CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), ¶ 35, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement (emphasis added).
[38] Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, at 11 (Apr. 23, 2014).

laws."[39] The Committee went on to suggest that compliance with the CERD obligations would require that voting rights be restored to those convicted of felonies who are no longer incarcerated, individuals be provided with information about registering to vote, and states "review automatic denial of the right to vote to imprisoned felons, regardless of the nature of the offense."[40]

Minnesota's legislative scheme, in fact, relies on and perpetuates deep racial imbalances in the criminal legal system, converting them into ongoing political marginalization and structural political inequality. As detailed in the Appellants' briefs, literally thousands of voters of color are denied the right to vote under Minnesota's disenfranchisement scheme: "About 4.5% of voting-age Black Minnesotans and 8.3% of American Indian Minnesotans are disenfranchised due to voting restrictions for persons on community supervision, relative to less than 1% of . . . White Minnesotans."[41] Unquestionably, racial distinctions are having the effect, in Minnesota, of nullifying returning citizens' human and political rights in contravention of the CERD and the ICCPR.

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[39] Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, U.N. Doc. CERD/C/USA/CO/7-9, at 5 (Sept. 25, 2014).
[40] *Id.*
[41] ADD-51.

Minnesota's scheme, in short, leads to precisely the disproportionate impact that resulted in the U.N. Human Rights Committee lambasting the racially skewed consequences of U.S. felony disenfranchisement laws generally and recommending that the U.S. "ensure that all states reinstate voting rights to felons who have fully served their sentences; . . . remove or streamline lengthy and cumbersome voting restoration procedures; as well as review automatic denial of the vote to any imprisoned felon, regardless of the nature of the offence."[42]

B. This Court should interpret Minnesota law in a manner that upholds the United States' international obligations.

All treaties duly ratified by the United States are part of U.S. domestic law.[43] "Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law."[44] When a treaty provision gets invoked as a rule of decision in a judicial proceeding, the self-execution inquiry addresses whether the provision should be directly enforced by the court.[45] Regardless of whether a treaty is self-executing or

[42] Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, at 11 (Apr. 23, 2014).
[43] U.S. Constitution, art. VI, cl. 2.
[44] RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 310.
[45] *See Medellín v. Texas*, 552 U.S. 491, 498 (2008) (examining whether treaties concerning an International Court of Justice judgment were self-executing so that the judgment would be "directly enforceable as domestic law in a state court").

not, however, courts "ought never" construe domestic law "to violate the law of nations if any other possible construction remains."[46]

First articulated by Justice Marshall, the *Charming Betsy* cannon of construction "encourages judges to select an interpretation . . . that accords with the United States' international obligations, including those expressed in non-self-executing treaties."[47] Importantly, the *Charming Betsy* cannon now constitutes a critical "component of the legal regime defining the U.S. relationship with international law."[48] The cannon strives to harmonize U.S. domestic law with treaty obligations in order to avoid serious infractions of international law.

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[46] *Charming Betsy*, 6 U.S. (2 Cranch) at 118; *see also, e.g., See, e.g.,* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 310, cmt. b.

[47] Rebecca Crootof, Note, *Judicious Influence: Non-self-executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1783-84 (2011); *see also, e.g., Garcia v. Sessions,* 856 F.3d 27, 42 (1st Cir. 2017) ("[W]e do not see why the non- self-executing status of the Refugee Protocol bears on the Charming Betsy canon's potential application."); *id.* at 53 n.28 (Stahl, J., dissenting) ("The government's cursory argument, that the Refugee Protocol is not a self- executing treaty and thus it is inappropriate to apply the Charming Betsy canon, is a clear misfire . . . . The question of whether a treaty is self- executing speaks to whether the international agreement in question can be enforced as domestic law in the courts of the United States without implementing legislation, not whether the treaty is an international obligation on the part of the country as a whole."); *Khan v. Holder,* 584 F.3d 773, 783 (9th Cir. 2009) (using the Charming Betsy canon to interpret the Immigration and Nationality Act so as to avoid conflict with the 1967 United Nations Protocol Relating to the Status of Refugees, which is a non-self-executing treaty ratified by the United States).

[48] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO L.J. 479, 482 (1997).

While the cannon has most frequently been applied to federal statutes, as was the case in the *Charming Betsy,* the underlying policy rationale has arguably even more application to states.[49] While the federal government has the power to override a treaty as a matter of U.S. domestic law, federal courts have long used the cannon to presume that Congress does not lightly intend to do so.[50] The benefits of the cannon's application in the context of state law are amplified, as it would implicate serious federalism concerns for individual state law to be interpreted in a manner that violates the commitments made by the national government. "Violating international-law norms and breaching international obligations may trigger serious consequences, such as subjecting the United States to sanctions, undermining U.S. standing in the world community, or encouraging retaliation against U.S. personnel abroad."[51]

Contrary to the Court of Appeals, then, there are sound reasons rooted in adherence to international law and norms to interpret Article VII, Section 1 of the Minnesota Constitution as Appellants propose. Not only does doing

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[49] *See* Rebecca Crootof, Note, Judicious Influence: Non-self-executing Treaties and the Charming Betsy Canon, 120 Yale L.J. 1784, 1818 (2011) ("While the extend to which . . . non-self-executing treaty commitments should affect state statutory interpretation is still undetermined" there are many arguments that "favor its application").

[50] *See, e.g.,* RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 309, cmt. b.

[51] *Al-Bihani v. Obama*, 619 F.3d 1, 11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

so uphold the constitutional rights of Appellants and similarly situated returning citizens, but it avoids Minnesota contributing to the U.S.'s ongoing violations of international human rights laws.

III. Minnesota's disenfranchisement scheme stigmatizes returning citizens and impedes their ability to fit back into their communities.

International humanitarian law and norms recognizes that real citizens prize the right to vote for exceptionally personal reasons.

On Tuesday, January 2019, Robert Eckford found his way to the local election supervisor's office in Orlando, Florida. The former Marine, incarcerated for seven years following a drug conviction, openly wept after registering to vote. He was one of the first wave of Floridians with felony records to do so on the day the state's newly minted Amendment 4 took effect. "I'll be a human being again," he said. "I'll be an American citizen again."[52]

Joe Loya, a California ex-inmate and writer, explained in a congressional hearing just how it felt to be disenfranchised: "Without a vote, a voice, I am a ghost inhabiting a citizen's space." He went on to add, "I want to walk calmly into a polling place with other citizens to carry my placid ballot

[52] Joshua Replogle, *Registering to Vote Brings Out Emotions Among Florida Felons*, PBS NEWS HOUR (Jan. 8, 2019), https://www.pbs.org/newshour/natio n/registering-to-vote-brings-out-emotions-among-florida-felons.

into the booth, check off my choices, then drop my conscience in the common box."[53]

Mr. Eckford's and Mr. Loya's experiences are not unique. Charmaine Daniels, a prisoner who has been disenfranchised since 2015, put it this way:

> The vote is important because without it, one must simply accept anything that happens because you do not have the ability to fight peacefully for the change needed to address the inequality in the system, how the laws are bent and manipulated by those with hidden agendas against those that they systematically silence. Until [I am able to vote], I am relegated to the ranks of the three-fifths society.[54]

In contrast, Tony Lewis, Sr., an incarcerated citizen in Washington D.C., was able to vote in the 2020 election.[55] Speaking about the prospect of voting, he said,

> You know, [it's] just a great feeling . . . still being a citizen of our community and our city of Washington DC and to know that I have a say, that's just gonna be such an amazing feeling. . . . I have two beautiful granddaughters . . . and I want only the best for them.[56]

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[53] *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States,* 12 HARV. HUMAN RIGHTS J. 399, 400 (1999).
[54] New Jersey Institute for Social Justice, *Value to the Soul*: *People with Convictions on the Power of the Vote* (Oct. 2, 2019), at 2, https://d3n8a8pro7vhmx.cloudfront.net/njisj/pages/1360/attachments/original/1570569487/Value_to_the_Soul_10-08-19_FIN_WEB.pdf?1570569487.
[55] Kira Lerer, *What It's Like to Vote From Prison,* Slate, Oct. 28, 2020, https://slate.com/news-and-politics/2020/10/dc-prisoners-voting-first-time-felony-disenfranchisement.html.
[56] The Sentencing Project, *Free the Vote*, YOUTUBE (Oct. 14, 2020), https://www.youtube.com/watch?v=qCeNFeMuoAM&feature=emb_logo.

The feelings expressed by these individuals align with the limited existing empirical evidence we have about the perspectives of ex-felons on disenfranchisement schemes, like the one in Minnesota. One very recent unpublished study, relying on interviews with fifteen ex-felons, concluded that all interviewees "expressed in one way or another feelings of rejection in relation to disenfranchisement."[57] Many said things such as, "I feel like nothing, government doesn't care about me, felons are frowned upon."[58] One interviewee said that "I feel like a freak in my own country. One of the rights is in this country is to vote. A person born in America has such rights attached to them. Don't call me a citizen, because you want me to abide by everything else but don't want me to vote."[59]

The sentiments expressed in this study are not news to VOA. VOA hears its clients wrestle with this sort of alienation, grief, and resentment every day. Over and over again, VOA hears from incarcerated and returning citizens that voting has more than instrumental value. The vote of each and every citizen constitutes a symbol of dignity and of personhood. Voting represents a vital part of participatory citizenship, and the ability of returning citizens to vote is no less important than safe and affordable housing, a livable

[57] Jeanetta Lindo, *Ex-Felon: The Un-Spoken and Un-Counted*, Thesis, Concordia University, St. Paul (2021), https://digitalcommons.csp.edu/criminal-justice_masters16.
[58] *Id.* at 69.
[59] *Id.* at 70

wage, education, access to health care, family, and friends. These are all universal in their necessity and key to any successful transition. Returning citizens already face steep challenges when rejoining their communities, not the least of which is feeling as though they belong, as though they count. Voting helps to reconnect returning citizens to their communities, it gives them a way to demonstrate that they are engaged with and accountable to society, and it provides them with meaningful opportunities to influence the policies that matter to their lives and the lives of those that they love.

Accordingly, as one court explained,

> [d]isenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box the disenfranchised, the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly; rather, only when the circumstances and the law clearly direct.[60]

Here, neither the State of Minnesota nor the lower courts have offered any justification, let alone a compelling one, for relegating individuals who are returning to their communities to this voiceless and "shadowy form of citizenship." While the district court found that the Minnesota legislature intended "to promote the rehabilitation" of formerly incarcerated individuals

[60] *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

and assure their return to their communities as "effective participating citizen[s],"[61] it did not identify any compelling or even rational basis for denying the restoration of civil rights to citizens once they are no longer imprisoned. Instead, the district court effectively conflated a goal with the means of achieving that goal. In so doing, the district court failed to evaluate whether the means Minnesota has chosen actually promote the ends it has identified, regardless of the standard of review that should apply.

In fact, there is no plausible way of understanding Minnesota's disenfranchisement scheme as assisting those who have been convicted of crimes in resuming the responsibilities and rights of citizenship. Instead, Minnesota's disenfranchisement scheme functions like other ideologically driven exclusionary rules, making the right to vote conditional on some measure of worthiness. Rather than validating disenfranchised citizens' continued place in our political community, the Minnesota scheme sends a clear message to those previously convicted that their views, concerns, and interests do not matter to the politicians who are supposed to be representing them—they are not worthy of political interest or participation. They remain unworthy even though they have ostensibly been returned to society. This message reinforces the social and political isolation that returning citizens

[61] ADD—10.

feel, fostering distrust and resentment. Restricting the right to vote, in short, leads to a cyclical pattern of alienation, which is diametrically opposed to the rehabilitative goals of supervised release, probation, and parole.

IV. Minnesota's disenfranchisement scheme muffles communities of color and exacerbates racial inequities in our criminal system.

Felony disenfranchisement laws in the United States are deeply rooted in the history of American racism.[62] That fact is beyond cavil and aptly demonstrated by the Appellants' expert reports in this case. The intent of disenfranchisement laws is fundamentally antidemocratic, driven by exclusionary discrimination.

Even assuming, implausibly, for the sake of argument, that there was no racial animus behind Minnesota's particular disenfranchisement scheme, the continuing disproportionate impact of the law on minority communities cannot be disputed. Minnesota's disenfranchisement scheme not only strips the voice of a returning citizen, however, but it strips the collective voice of that citizen's community and limits the community's efficacy.[63]

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[62] ADD--29.

[63] *See, e.g.,* Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. IN BRIEF 41, 41 (2007) ("[C}ontemporary scholarship begins with the premise that the right to vote is meaningful in large part because it affords groups of persons the opportunity to join their voices to exert force on the political process.").

Appellants' briefs demonstrate that Black and American Indian Minnesotans are arrested at a rate five times higher than white Minnesotans and thus disenfranchised disproportionately.[64] In addition to its direct effects on community representation detailed by Appellants, Minnesota's disenfranchisement of returning citizens also has pernicious spillover consequences.

First, at least one study has suggested that people living in neighborhoods with more disenfranchised citizens are significantly less likely to vote, even when are not themselves disenfranchised.[65] Not only are they less likely to vote, but they are also less likely to engage in other forms of political participation, to be registered voters, and to participate in broader civic engagement.[66]

Second, disenfranchisement of returning citizens has a generational impact. Studies suggest that voting is a learned behavior.[67] Children whose parents engage in civic activity and talk about politics are more likely to value participation in the democratic process. "If you've had the behavior modeled

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[64] *See* Appellant's Brief Court of Appeals at 17-18.
[65] Traci R. Burch, *Effects of Imprisonment and Community Supervision on Neighborhood Political Participation in North Carolina*, The Annals of the American Academy of Political and Social Science , January 2014, Vol. 651, Detaining Democracy? Criminal Justice and American Civic Life (January 2014), pp. 184-201.
[66] *Id.*
[67] *See, e.g.,* MARK N. FRANKLIN, VOTER TURNOUT AND THE DYNAMICS OF ELECTORAL COMPETITION IN ESTABLISHED DEMOCRACIES SINCE 1945 10 (2004)

in your home by your parents consistently voting, by political discussion, sometimes by participation, you start a habit formation, and then when you become a little older you'll feel it's your duty and responsibility to register and vote."[68] When parents are not able to vote, however, children often have no model for civic engagement. This suggests that when parents are disenfranchised, their children are effectively disenfranchised as well.

In short, Minnesota's incursion on the right to vote impacts not only individual experiences of political participation, but also community-wide political engagement. The harms of disenfranchisement ripple outward from returning citizens through their communities. As a result, Minnesota's disenfranchisement scheme muffles not only persons convicted of felonies, who are disproportionately people of color, but also their families, friends, and neighbors.

CONCLUSION

The right to vote has been hard won. Lofty sentiments about the importance of voting for our democracy rang hollow for nearly two centuries during a long and often bloody struggle to enfranchise Black, indigenous peoples, other minorities, and women. Minnesota's disenfranchisement

[68] Perri Klass, M.d., *What Really Makes Us Vote? It May Be Our Parents,* The New York Times, Nov. 7, 2016, https://www.nytimes.com/2016/11/07/well/family/what-really-makes-us-vote-it-may-be-our-parents.html (referencing various studies).

scheme perpetuates, in practice, an antiquated and undemocratic resistance to voting rights that millions of citizens in our country have fought for generations to overcome. That scheme denies individuals an equitable opportunity to participate, to have a voice regarding matters of universal concern. It stands in grave contrast to the overwhelming and growing consensus of other mature democracies around the world, which restore voting rights to at least citizens returning from incarceration to civil society, and it violates the United States' international humanitarian law obligations. The unquestioned global consensus sees voting as a fundamental right that is inherent to—essential for—a functioning democracy. Voting represents an expression of democratic will and self-governance and denying voting rights to returning citizens will stymie rehabilitation and restoration efforts as well as silence communities of color.

VOA joins with Plaintiffs-Appellants and respectfully requests that this Court issue an order restoring their right to vote and declaring the practice of disenfranchising persons living in the community on probation, parole, or supervised release to be unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the brief contains 5082 words, exclusive of the cover page, Table of Contents, and Table of Authorities.

/s/ Henry Allen Blair
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