STATE OF MINNESOTA

IN SUPREME COURT

A20-1264

Court of Appeals

Thissen, J.
Concurring, Anderson, J., Gildea, C.J.
Dissenting, Hudson, J.

Jennifer Schroeder, et al.,

Appellants,

vs.

Filed: February 15, 2023
Office of Appellate Courts

Minnesota Secretary of State Steve Simon,

Respondent.

Craig S. Coleman, Jeffrey P. Justman, Kirsten L. Elfstrand, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota;

Teresa J. Nelson, David P. McKinney, American Civil Liberties Union of Minnesota, Minneapolis, Minnesota; and

Julie Ebenstein, American Civil Liberties Union, New York, New York, for appellants.

Keith Ellison, Attorney General, Angela Behrens, Jason Marisam, Assistant Attorneys General, Saint Paul, Minnesota, for respondent.

Jenna K. Johnson, Ballard Spahr LLP, Minneapolis, Minnesota; and

Louis Petrich, Ballard Spahr LLP, Los Angeles, California, for amicus curiae American Probation and Parole Association.

Lyndsey M. Olson, Saint Paul City Attorney, Anthony G. Edwards, Megan D. Hafner, Assistant City Attorneys, Saint Paul, Minnesota; and

Kristyn Anderson, Minneapolis City Attorney, Minneapolis, Minnesota, for amici curiae City of Saint Paul and City of Minneapolis.

Katherine M. Swenson, Amran A. Farah, Greene Espel PLLP, Minneapolis, Minnesota, for amici curiae District of Columbia, et al.

Anthony B. Sanders, Institute for Justice, Minneapolis, Minnesota; and

Adam Shelton, Anya Bidwell, Institute for Justice, Arlington, Virginia, for amicus curiae Institute for Justice.

Tara Kalar, ISAIAH, Saint Paul, Minnesota, for amicus curiae ISAIAH.

Marc A. Al, Andrew J. Pieper, Riley A. Conlin, Emily C. Atmore, Stoel Rives LLP, Minneapolis, Minnesota, for amici curiae League of Women Voters Minnesota, Common Cause Minnesota, and Minnesota Second Chance Coalition.

Bradford Colbert, Legal Assistance to Minnesota Prisoners and Reentry Clinic, Saint Paul, Minnesota; and

Joshua Esmay, Legal Rights Center, Minneapolis, Minnesota; and

Emily Hunt Turner, All Square, Minneapolis, Minnesota, for amici curiae Legal Assistance to Minnesota Prisoners and Reentry Clinic, Legal Rights Center, and All Square.

Mark R. Bradford, Maria P. Brekke, Bassford Remele, P.A., Minneapolis, Minnesota, for amicus curiae Minnesota Association of Black Lawyers.

John J. Choi, Ramsey County Attorney, Jeffrey A. Wald, Assistant County Attorney, Saint Paul, Minnesota, for amicus curiae Ramsey County Attorney's Office.

Joseph Plumer, Plumer Law Office, Bemidji, Minnesota; and

Riley Plumer, Hobbs, Straus, Dean & Walker, LLP, Washington, D.C., for amicus curiae Red Lake Band of Chippewa Indians.

Henry Allen Blair, Volunteers of America Minnesota and Wisconsin, Saint Paul, Minnesota, for amicus curiae Volunteers of America Minnesota and Wisconsin.

Tara Kalar, World Without Genocide, Saint Paul, Minnesota, for amicus curiae World Without Genocide.

S Y L L A B U S

1. Under Article VII, Section 1, of the Minnesota Constitution, a person convicted of a felony cannot vote in Minnesota unless the person's right to vote is restored by some affirmative act of the government including a law passed by the Legislature. Article VII, Section 1, does not provide that a person deprived of the right to vote due to a felony conviction is automatically restored to that right upon release from incarceration.

2. Minn. Stat. § 609.165 (2022) does not violate the fundamental right to vote.

3. Plaintiffs have not offered sufficient evidence to prove that Minn. Stat. § 609.165 violates the equal protection principle contained in the Minnesota Constitution.

Affirmed.

O P I N I O N

THISSEN, Justice.

Article VII, Section 1, of the Minnesota Constitution provides that "a person who has been convicted of treason or felony" shall not be entitled or permitted to vote in any election in this state "unless restored to civil rights . . . ." Minnesota Statutes section 609.165 (2022) provides a statutory mechanism to restore civil rights of persons convicted of a felony. Under the statute, the civil rights of a person convicted of a felony, including the right to vote, are restored upon "discharge" of the felony sentence. *Id.*, subd. 1.

Appellants—each of whom was convicted of a felony but is now living in the community while on probation or supervised release—filed an action for declaratory relief and injunctive relief against respondent Steve Simon in his official capacity as Minnesota Secretary of State. Appellants sought a declaration "that individuals are restored to civil

rights and possess the fundamental right to vote guaranteed by Article VII of the Minnesota Constitution by virtue of being released or excused from incarceration following a felony." Appellants also claimed that section 609.165 violates the fundamental right to vote and the guarantee of equal protection embedded in the Minnesota Constitution. The district court granted the Secretary of State's motion for summary judgment and dismissed the lawsuit. The court of appeals affirmed. *Schroeder v. Simon*, 962 N.W.2d 471, 487 (Minn. App. 2021).

We granted review to determine whether Article VII, Section 1, requires that persons convicted of a felony be restored to the right to vote upon being released or excused from incarceration and whether section 609.165 is contrary to the fundamental right to vote or the equal protection principle embodied in the Minnesota Constitution. We conclude as follows: First, under Article VII, Section 1, of the Minnesota Constitution, a person convicted of a felony cannot vote in Minnesota unless the person's right to vote is restored in accordance with an affirmative act or mechanism of the government restoring the person's right to vote, such as an absolute pardon or a legislative act that generally restores the right to vote upon the occurrence of certain events. We disagree with appellants that the constitution provides that the right to vote is automatically restored upon release from incarceration. Second, because Article VII, Section 1, of the Minnesota Constitution, defines the scope of the right to vote in Minnesota and appellants do not challenge the validity of Article VII, Section 1, Minnesota Statutes section 609.165 does not violate the fundamental right to vote. Third, appellants have not offered sufficient evidence to prove

that section 609.165 violates the equal protection principle contained in the Minnesota Constitution. Therefore, we affirm.

FACTS

Appellants Jennifer Schroeder and Elizer Eugene Darris were each convicted of a felony but are now living in the community while on probation or supervised release.[1] Schroeder was convicted of first-degree sale of a controlled substance, Minn. Stat. § 152.021, subd. 1(1) (2022). The district court stayed execution of a presumptive 98-month prison term and placed her on probation for 40 years. Schroeder chose not to appeal her sentence. She will remain on probation until 2053 unless the district court issues an order discharging her from probation before that date or she receives a pardon or other executive clemency. During her probation, Schroeder earned a degree in addiction counseling and is now an addiction counselor. She also volunteers in her community, pays taxes, and is active in her church. But because she remains on probation, she cannot vote.

Darris was convicted of second-degree intentional murder, Minn. Stat. § 609.19, subd. 1(1) (2022). The district court sentenced Darris to 306 months in prison. In 2016,

[1] The court of appeals dismissed the claims of co-plaintiffs Christopher James Jecevicus-Varner and Tierre Davon Caldwell as moot because they regained the right to vote when their felony sentences expired. *Schroeder*, 962 N.W.2d at 478 n.2. Schroeder and Darris attested to their conviction and sentence in affidavits filed at summary judgment. We also take judicial notice of the public court record of their conviction and sentence. *See In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp.*, 954 N.W.2d 572, 581 n.8 (Minn. 2021).

the Department of Corrections placed Darris on supervised release.[2] His supervised release is scheduled to expire in 2025. While on supervised release, Darris has worked at the American Civil Liberties Union of Minnesota as an organizer among other jobs. He also volunteers as a mentor, reentry coach, and campaign staffer. But because he remains on supervised release, he cannot vote.

In 2019, appellants filed an action for declaratory and injunctive relief. Appellants sought three declarations. First, they sought a declaration "that individuals are restored to civil rights and possess the fundamental right to vote guaranteed by Article VII of the Minnesota Constitution by virtue of being released or excused from incarceration following a felony." Second, they sought a declaration that the denial of the right to vote "to individuals who live in the community while subject to parole, probation, or another form of supervised release" violates the fundamental right to vote in Article VII, Section 1, and the equal protection principle embodied in the Minnesota Constitution.[3] Third, appellants sought a declaration that the restoration statute, Minn. Stat. § 609.165, "shall not be read

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[2] "Supervised release is the current term for the release practice formally known as parole." *State v. Schwartz*, 628 N.W.2d 134, 139 (Minn. 2001). "Generally, a prison sentence in Minnesota consists of two terms. The 'term of imprisonment' is typically the first two-thirds of the sentence, with a supervised-release term comprising the remaining one-third of the sentence." *State ex rel. Ford v. Schnell*, 933 N.W.2d 393, 396–97 (Minn. 2019); *see also* Minn. Stat. § 244.05, subd. 1 (2022) ("every inmate shall serve a supervised release term upon completion of the inmate's term of imprisonment").

[3] As we observed in *Fletcher Properties, Inc. v. City of Minneapolis*, 947 N.W.2d 1, 20 n.13 (Minn. 2020), "[t]he Minnesota equal protection guarantee is found in the Rights and Privileges Clause in Article 1, Section 2 of the Minnesota Constitution. We have also applied the principle under the Uniformity Clause found in Article 10, Section 1, and the Special Legislation clauses now found in Article 12 of the Minnesota Constitution." (citations omitted).

to preclude restoration of voting rights prior to discharge."[4] Accordingly, appellants requested an order requiring the Secretary of State "to immediately and permanently take steps to ensure that all individuals who have been convicted of a felony but live in the community shall have their right to vote restored."

To support their claim, appellants submitted statistical data that show that at the beginning of 2018, roughly 1 percent of white Minnesotans, 6 percent of Black Minnesotans and 9 percent of Native American Minnesotans who are old enough to vote in Minnesota could not do so because they had been convicted of a felony but not discharged from their sentence. *See Minn. Just. Rsch. Ctr.*, *Felon Disenfranchisement in Minnesota* 1 (Feb. 21, 2019) (hereinafter Felon Disenfranchisement in Minnesota), https://e038407e-8024-4a7f-8f8c-ce70d24cbc8c.filesusr.com/ugd/d2a74f_d6009880598a476ab2e596337f500731.pdf (last visited Feb. 13, 2023) [opinion attachment]. And the evidence suggests that if the right to vote were restored by virtue of being released or excused from incarceration, those percentages would drop to 0.1 percent, 1.5 percent, and 2 percent, respectively. *Id.* at 2.

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[4] Appellants relatedly challenge the constitutionality of Minn. Stat. §§ 201.014 and .145 (2022). Appellants argue that these statutes unconstitutionally revoke their right to vote. But section 201.014 merely repeats the language of Minn. Const. art. VII, § 1, by denying the fundamental right to vote to individuals "convicted of treason or any felony whose civil rights have not been restored . . . ." Minn. Stat. § 201.014, subd. 2(1). The statute then creates a felony offense for individuals who know they are ineligible to vote but vote anyway. *Id.*, subd. 3. Section 201.145, subdivision 3, requires state officials to track individuals who are not eligible to vote due to felony convictions. In other words, these statutes are the mechanisms for enforcing the disenfranchisement provision of Article VII, Section 1, of the Minnesota Constitution. Because the statutes simply enforce the disenfranchisement provision of the Minnesota Constitution, appellants' contention that they are unconstitutional is unsound.

Both appellants and the Secretary of State sought summary judgment. The district court granted the Secretary of State's motion for summary judgment and denied appellants' motion for summary judgment. The court of appeals affirmed the district court's order. *Schroeder*, 962 N.W.2d 487. We granted review.

ANALYSIS

"We review a grant of summary judgment de novo." *City of Waconia v. Dock*, 961 N.W.2d 220, 229 (Minn. 2021). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. In evaluating a grant of summary judgment, we must view the evidence "in the light most favorable to the nonmoving party." *Justice v. Marvel, LLC*, 979 N.W.2d 894, 898 (Minn. 2022).

I.

We start with appellant's argument that Article VII, Section 1, of the Minnesota Constitution provides that a person convicted of a felony is restored to the right to vote when released or excused from incarceration. This assertion requires us to interpret the language of Article VII, Section 1.

Issues of constitutional interpretation are questions of law, which we review de novo. *Shefa v. Ellison*, 968 N.W.2d 818, 825 (Minn. 2022). " 'The rules applicable to the construction of statutes are equally applicable' to the construction of the Minnesota Constitution." *Id.* (quoting *Clark v. Ritchie*, 787 N.W.2d 142, 146 (Minn. 2010)). When interpreting our constitution, we start with the text itself. *Schowalter v. State*, 822 N.W.2d 292, 300 (Minn. 2012).

When the text of the constitution is clear, we go no further and "there is no room for the application of rules of construction." *Kernan v. Holm*, 34 N.W.2d 327, 329 (Minn. 1948); *see also Shefa*, 968 N.W.2d at 825 (explaining that "[w]hen we determine that the language of a constitutional provision is unambiguous, the language is 'effective as written and we do not apply any other rules of construction' " (quoting *Kahn v. Griffin*, 701 N.W.2d 815, 825 (Minn. 2005))); *State v. Brooks*, 604 N.W.2d 345, 348 (Minn. 2000) (explaining that we may consider "other indicia of intent" only when the language of the constitution is ambiguous). But when the text of the constitution is ambiguous, meaning that it is susceptible to more than one reasonable interpretation, we try to resolve the ambiguity by "look[ing] to 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.

A.

Article VII, Section 1, defines who can vote in Minnesota elections. It states as follows:

> Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. *The following persons shall not be entitled or permitted to vote at any election in this state*: A person not meeting the above requirements; *a person who has been*

> *convicted of treason or felony, unless restored to civil rights*; a person under guardianship, or a person who is insane or not mentally competent.[5]

(Emphasis added.) The constitutional language is straightforward. It means that a person convicted of a felony (just like a person younger than 18 years of age or a non-citizen) is excluded from the set of persons who have a right to—who are "entitled to"—vote. Under this provision, a person convicted of a felony could be permanently prohibited from ever being allowed to vote. In fact, such a person is permanently prohibited from voting "unless restored to civil rights."

There may be many compelling reasons why society should not permanently prohibit—or perhaps prohibit at all—persons convicted of a felony from voting. But the people of Minnesota made the choice to establish a constitutional baseline that persons convicted of a felony are not entitled or permitted to vote, and the people of Minnesota have not seen fit to amend the constitution to excise the felon voting prohibition. *See* Minn. Const. art. IX (providing for amendment to the Minnesota Constitution).[6] And appellants

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[5] The original text of the Minnesota Constitution provided that "no person who has been convicted of treason or any felony, unless restored to civil rights, . . . shall be entitled or permitted to vote at any election in this State." Minn. Const. of 1857, art. VII, § 2. The text was revised as part of general revisions in 1974 to reform the Minnesota Constitution's structure, style, and form. We focus in the first instance upon the current language of the constitution.

[6] One solution that would address appellants' concerns would be an amendment eliminating the felon voting prohibition from the constitution. The people of Minnesota have used the constitutional amendment process many times to eliminate constitutional provisions that excluded groups of people—such as non-white men, women, and Native Americans—from voting. *See* Act of Mar. 6, 1868, ch. 106, 1868 Minn. Laws 149, 149–51 (codified at Minn. Const. of 1857, art. VII, § 1 (1868)) (expanding the franchise to non-white males otherwise authorized to vote); Act of Mar. 4, 1875, ch. 2, 1875 Minn.

do not argue that the constitutional provision on felon voting is itself unconstitutional because it conflicts with other values—like equal protection—embedded in the Minnesota Constitution. That question is left for another day.[7]

The real dispute about the constitutional language centers on the meaning and effect of the phrase "unless restored to civil rights." On this point, the parties' most basic

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Laws 18, 18–19 (codified at Minn. Const. of 1857, art. VII, § 8 (1875)) (authorizing women to vote in school affairs); Act of Apr. 21, 1897, ch. 175, 1897 Minn. Laws 331, 331–32 (approved by voters in 1898 and codified at Minn. Const. of 1857, art. VII, § 8 (1898)) (authorizing women to vote for and serve on library boards); Act of Apr. 24, 1959, ch. 696, 1959 Minn. Laws 1359, 1359–60 (approved by voters in 1960 and codified at Minn. Const. of 1857, art. VII, § 1 (1960)) (eliminating obsolete provisions on voting rights of "persons of Indian blood"); Act of June 6, 1969, ch. 996, 1969 Minn. Laws 2000, 2000 (adopted by voters in 1970 and codified at Minn. Const. of 1857, art. VII, § 1 (1970)) (reducing the voting age requirement from age 21 to age 19, which was later reduced to 18 by operation of the Twenty-Sixth Amendment to the United States Constitution ratified in 1971). Between 1942 and 1944, the official published versions of the Minnesota Constitution removed the word "male" from Article VII, § 1, in recognition of the Nineteenth Amendment to the United States Constitution.

The people of Minnesota have also approved constitutional amendments that constrict the right to vote. For instance, the original constitution allowed non-citizen immigrants to vote under certain circumstances: "White persons of foreign birth, who shall have declared their intention to become citizens, conformably to the laws of the United States upon the subject of naturalization." Minn. Const. of 1857, art. VII, § 1. That provision was eliminated from the constitution in 1896. *See* Act of Mar. 2, 1895, ch. 3, 1895 Minn. Laws 7, 7–8. Minnesota's constitution currently prohibits from voting persons who are not United States citizens and persons who have been United States citizens for less than 3 months. Minn. Const. art. VII, § 1.

[7] In *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), the United States Supreme Court held that restrictions on the right of persons convicted of a felony to vote do not violate the Fourteenth Amendment to the United States Constitution. Of course, that decision does not bind us in any way in our assessment of whether a restriction on the voting rights of persons convicted of a felony violates the equal protection principle of the Minnesota Constitution—particularly if Minnesota's unique heightened rational basis review applies. *See State v. Russell*, 477 N.W.2d 886, 889–90 (Minn. 1991) (recognizing heightened rational basis review).

disagreement is over the functional meaning of those words: What is required to restore a person convicted of a felony to civil rights? The Secretary of State understands that language to mean that a person is barred from voting absent some affirmative act of the government expressly stating that the person convicted of a felony now has the right to vote (as the Legislature did when it enacted section 609.165) or that the felony conviction underlying the constitutional deprivation of the right is nullified (as in an absolute pardon, *see* Minn. Const. art. V, § 7 (establishing the Board of Pardons)); Minn. Stat. § 638.02, subd. 1 (2022) (authorizing the Board of Pardons to "grant an absolute or a conditional pardon, but every conditional pardon shall state the terms and conditions on which it was granted"). In contrast, appellants read the language "unless restored to civil rights" to mean that the right to vote is automatically restored when a person convicted of a felony is "restored to life in the community"—i.e., when the person is released or excused from incarceration in prison.

We first observe that the language of Article VII, Section 1, does not use the words "restored to life in the community" or "restored upon release from prison" as one might reasonably expect if the constitutional convention delegates and the voters who approved the constitution intended restoration to occur upon one of those events. That certainly raises textual doubt about the reasonableness of appellants' interpretation. *See Buzzell v. Walz*, 974 N.W.2d 256, 265 (Minn. 2022) (rejecting a statutory interpretation argument on the basis that, had the Legislature intended a particular meaning, it would have chosen a more direct textual path).

Moreover, the Secretary of State's reading is reasonable. The words "unless restored to civil rights" are compatible with the notion that rights are restored only in accordance with a mechanism established by the government (as opposed to the occurrence of an event not identified in the constitution or in any other law).

Further, the Secretary's position is consistent with the broader text and structure of Article VII, Section 1. The constitutional provision is structured to first define broadly who is eligible to vote ("[e]very person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election"). Next, it creates exceptions to the general rule that prohibits certain persons from voting (including "a person who has been convicted of treason or felony" as well as persons under guardianship or persons who are "insane or not mentally competent") even if those persons otherwise fall within the class of eligible voters.

The particular exception at issue here starts out with a clear statement of who is excepted from entitlement and permission to vote—"a person who has been convicted of treason or felony"— due to an act of the government (prosecution for and conviction of a felony) and then, in a subordinate clause, provides an exception to the exception—"unless restored to civil rights." The felon voting prohibition turns on an act of government. It is also the only exception that allows for restoration of civil rights. A reasonable conclusion to draw from these textual features is that an affirmative act of government is required to restore what the government has taken away by its affirmative decision to prosecute and convict a person of a felony.

To be sure, the language of Article VII, Section 1, does not explicitly say that civil rights are restored only in accordance with a mechanism established by the government. But this omission only gets appellants so far. The specific conclusion that appellants ask us to reach—that persons convicted of a felony are automatically restored to civil rights upon a quite specific and particular event (release from prison)—does not follow from the absence of explicit language requiring restoration by some affirmative act of a public official. Indeed, appellants do not cite any authority that expressly states that "restored to civil rights" means "restored to life in the community."

B.

Appellants turn to the history of the adoption of Article VII, Section 1, to support their position. They note that the delegates to the 1857 constitutional convention ultimately had before them two language choices related to restoring the right to vote to persons convicted of a felony: the language that ultimately made it into the constitution—"unless restored to civil rights" and language expressly providing that the Governor and Legislature may restore a person convicted of a felony to civil rights.[8] From that fact, appellants infer that the delegates to the constitutional convention did not intend to limit restoration of the right to vote to affirmative acts by the Governor or Legislature. We do not agree. Even if we were to find the language of Article VII, Section 1, ambiguous, the history generally supports the Secretary's construction, rather than that of appellants.

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[8] Split over policy concerns, the Democratic and Republican parties of the time separately produced draft constitutions. *See* Fred L. Morrison, *An Introduction to the Minnesota Constitution*, 20 Wm. Mitchell L. Rev. 287, 295–99 (1994) (laying out the history of the Minnesota Constitution).

The Democratic delegates spent no time debating the language prohibiting persons convicted of a felony from voting. They passed a draft constitution that included the phrase "unless restored to civil rights." Francis H. Smith, rep., *The Debates and Proceedings of the Minnesota Constitutional Convention* 422–37 (Earl S. Goodrich, printer, 1857) (hereinafter Democratic Debates).

The Republican delegates took up the report on the Elective Franchise on August 21, 1857, and debated the following felon voting provision:

> No person shall be qualified to vote at any election who shall be convicted of treason—or any felony—or of voting, or attempting to vote, more than once in any election—or of procuring or inducing any person to vote illegally at any election; *Provided*, That the Governor or the Legislature may restore any such person to civil rights.

T. F. Andrews, rep., *Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota* 540 (George W. Moore, printer, 1858) (hereinafter Republican Debates). The Republican delegates first considered a motion by David Morgan to delete the provision altogether on the ground that it was "sweeping," "difficult of application," and "would work great hardship." *Id.* Morgan argued that it would be better to address the parameters of felon disenfranchisement through the legislative process rather than enshrining the prohibition in the constitution. *Id.* The motion was rejected without further discussion. *Id.* This rejection at least shows that the delegates accepted some limits on the ability of persons convicted of a felony to vote.

Later, St. Andre Durand Balcombe moved to strike out everything after the word "felony" so that the provision would read: "No person shall be qualified to vote at any election who shall be convicted of treason—or any felony." *Id.* Nathan Pierce Colburn

opposed the amendment "for the reason that it would cut off the power of the Legislature to restore civil rights . . . ." *Id.* And in response to the assertion that "[a] pardon always restores a person to his legal civil rights," Colburn stated:

> That is usually the case under the laws of the various States; but where there is a Constitutional provision, that no person shall vote at any election who shall have been convicted of a particular offense, it is not in the power of the Legislature or Governor to restore him.

Id. at 540–41. In response to Colburn's argument, the amendment was amended to leave in the restoration proviso so that the provision read: "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 541. The Republican convention adopted that language. *Id.*

This exchange conveys important information about whether a person convicted of a felony was automatically restored to civil rights upon release. First, the common and uncontested understanding was that a gubernatorial pardon was an affirmative act that would restore civil rights, and the delegates understood that is how civil rights were restored. More importantly, the delegates understood that without the restoration proviso, there would be *no mechanism* to restore a person's right to vote. In other words, at the very least, the Republican delegates understood the first portion of the provision—that no person convicted of any felony shall be qualified to vote—as a permanent bar. There was no discussion at all to suggest that anyone believed that persons convicted of a felony would be restored automatically to the right to vote upon release from incarceration.

The draft constitutions were combined by a conference committee that adopted the more passive phrasing proposed by the Democratic delegates: "unless restored to civil rights." *See* Democratic Debates at 423, 614–15; Republican Debates at 583. There is no record of how or why the Democratic language was chosen over the Republican proposal. *See* William Anderson & Albert J. Lobb, *A History of the Constitution of Minnesota* 115–16, 123–24 (1921). Thus, we have no information about why the Democratic language was adopted. More to the point, nothing in the historical record suggests that it was because the delegates to the convention believed that persons who lost the right to vote due to a felony conviction would be restored to the right to vote upon release from incarceration.

Perhaps the only thing we know is that the language ultimately adopted into the constitution mirrors Minnesota's territorial statutes that, since 1851, had prohibited persons convicted of a felony from voting "unless restored to civil rights." Minn. Rev. Stat. (Terr.) ch. 5, § 2 (1851). And those same territorial statutes also authorized the restoration of civil rights through the affirmative act of a gubernatorial pardon. The 1851 territorial statutes provided that "[i]n all cases in which the governor is authorized to grant pardons, he may upon the petition of the person convicted, grant a pardon, upon such conditions, and with such restrictions, and under such limitations, as he may think proper . . . ." Minn. Rev. Stat. (Terr.) ch. 131, § 233 (1851); *see also* Organic Act of Minnesota § 2 (1849) (granting the Governor of the Territory of Minnesota the power to "grant pardons for offenses against the law of [the] Territory").

The delegates to the 1857 constitutional convention understood that the pardon power could be used to restore civil rights. For instance, during the convention, delegates

debated a constitutional provision that deprived a person who fought a duel with deadly weapons from holding any office of profit or trust. Republican Debates at 109. David Morgan objected and asserted:

> A man may be guilty of manslaughter, or highway robbery, and be in State prison as a punishment for the offense, yet if he is pardoned out one day before the expiration of his sentence, he is restored to all his civil rights; but a man who has been connected in any way with a duel, cannot, if this section is adopted, be restored to his civil rights without a change of the Constitution.

Id. at 110. This discussion reflects a general understanding that the pardon power could be used to restore civil rights, and that understanding is in tension with a conclusion that voting rights were automatically restored upon release from incarceration.

The territorial statutory scheme—a provision that prohibited persons convicted of a felony from voting "unless restored to civil rights" and a provision granting the Governor the power to restore civil rights through the pardon power—carried over into the first set of Minnesota state statutes enacted in 1858, which included legislation governing the pardon power. Minn. Gen. Stat. ch. 117, § 233 (1858) (stating that "[i]n all cases in which the governor is authorized to grant pardons, he may upon the petition of the person convicted, grant a pardon, upon such conditions, and with such restrictions, and under such limitations, as he may think proper"). Until 1867—9 years after the constitutional provision was adopted—the Legislature enacted no other statutory provisions to restore civil rights or voting rights to persons convicted of felonies. This indicates that the constitutional delegates understood restoration of civil rights to include an affirmative act by a public official, such as a pardon by the Governor.

Appellants also rely on an 1867 statute that automatically restored the civil rights of *some* convicted felons following release from prison. *See* Act of Feb. 19, 1867, ch. 14, § 82, 1867 Minn. Laws 18, 19 (codified at Minn. Gen. Stat. ch. 120, § 85 (1878)). The 1867 statute provided that:

> [I]f any convict shall so pass the whole term of his service, or the remainder of his sentence after the passage of this act, (provided he shall have the term of one year yet to serve,) [without any recorded prison rules infractions], he shall be entitled to a certificate thereof from the warden, and, upon the presentation thereof to the governor, he shall be entitled to a restoration of the rights of citizenship, which may have been forfeited by his conviction.

Id. In other words, if a person completed his sentence and was released from incarceration (returned to the community) *and the person did not have any record of infractions of prison rules*, the person would be entitled to automatic restoration of his "rights of citizenship" (including the right to vote). If the language "until restored to civil rights" means, as appellants assert, that the right to vote is automatically restored when a person is released and returned to the community without any additional affirmative act, then the 1867 statute, which was enacted less than a decade after the constitution was adopted, makes no sense. Stated another way, if civil rights were restored immediately upon release, there would be no need for the warden to certify the lack of rules infractions or for the Governor to act to restore the person being released to rights of citizenship. Because felons who received disciplinary infractions remained ineligible to vote on release, the 1867 statute undermines rather than supports appellants' argument that the phrase "unless restored to civil rights" means "unless released from incarceration."

Later legislatures also understood that persons convicted of felonies were not automatically restored to civil rights upon return to the community. While these later enactments, further removed in time from the adoption of the constitution, may be less persuasive, they nonetheless show a consistent understanding over time of the meaning of the felon voting limitation in Article VII, Section 1. In 1887, the Legislature passed a law establishing a reformatory in St. Cloud. Act of Mar. 2, 1887, ch. 208, 1887 Minn. Laws 329, 329–35. The law directed that courts sentencing a person convicted of a felony to the reformatory impose "a general sentence to imprisonment" and that courts "shall not fix the limit or duration [of the sentence]." *Id.* at § 11, 331. Section 16 of the law provided:

> When it appears to [the reformatory's board of] managers that there is a strong or reasonable probability that any prisoner will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society, [the board] shall issue to such prisoner an absolute release from imprisonment, provided that the minimum term prescribed by law has expired, and shall certify the fact of such release and the grounds thereof to the governor. The governor *may* thereupon *in his discretion* restore such person to citizenship.

Id. at § 16, 334. Once again, if the constitution means that civil rights are restored automatically upon a person's release from incarceration and return to the community, then there would be no reason to authorize the Governor to act to restore the person to citizenship upon release, and there would be no basis to leave the question of restoring that right to the Governor's discretion. Put another way, if the constitution is read to mean "[t]he following persons shall not be entitled or permitted to vote in any election in this state: . . . a person who has been convicted of treason or felony, unless returned to the

community/unless released from prison," then the Governor would have no constitutional discretion to withhold civil rights from the person upon release from incarceration.[9]

In 1907, the Legislature passed a law establishing a different judicial process for restoring full rights and citizenship to all persons convicted of a felony and sentenced to jail or to pay a fine who had completed their sentence. Act of Mar. 12, 1907, ch. 34, 1907 Minn. Laws 40, 40–41. The provision states:

> All persons . . . who have heretofore been convicted of a felony and sentenced by a court of this state to pay a fine for such offense or to be confined in a county jail, for such offense, and who have paid and satisfied such fine or served such sentence shall be restored to all their civil rights and to full citizenship with full right to vote and hold office, the same as if such conviction and sentence had not taken place, in the manner hereinafter provided. Before such restoration to civil rights shall take effect such person or persons shall at the end of one year from the date of the judgment thereof or at any time thereafter first apply to the district court where such person or persons may reside and produce before such judge three[10] witnesses to testify to his or her good character during the time since such conviction, and if said judge shall be satisfied of such good character he shall issue an order

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[9] This same approach for restoring civil rights was adopted in 1911 when Minnesota passed a general indeterminate sentencing law and created a parole board with authority to determine when persons convicted of felonies should be released on parole or released absolutely. Act of Apr. 20, 1911, ch. 298, 1911 Minn. Laws 412, 412–17. The law provided that "[w]henever said [parole] board shall grant an absolute release it shall certify the fact and the grounds therefore to the governor, who may in his discretion restore the prisoner released to citizenship." *Id.* at § 7, 415. Importantly, the statute authorized the parole board to release a person into the community on parole, but the power to restore a person to civil rights was limited to prisoners granted absolute release. *Id.* at, §§ 6–7, 414–15.

[10] The requirement that three witnesses testify to good character was reduced to two witnesses in 1913. Act of Apr. 7, 1913, ch. 187, § 1, 1913 Minn. Laws 238, 238.

> restoring such party to all civil rights, which order shall be filed with the clerk of said court; thereupon said restoration to civil rights shall take effect and be in full force.

Id. at § 1, 40.

This 1907 provision tells us several things. First, like the statutes discussed above, if the constitution means that civil rights are restored automatically upon a person's release from incarceration and return to the community, then there would be no reason for this law. Second, the statute plainly contemplates that some individuals living in the community were not yet restored to civil rights. Under this provision, even if a person convicted of a felony were never jailed or incarcerated but solely ordered to pay a fine, that person could not seek to be restored to civil rights for at least 1 year. And third, the statute clarifies that in 1907, the Legislature equated the restoration of civil rights with the right to vote and hold office.

In 1919, the Legislature enacted a law providing for restoration of civil rights of persons convicted of a felony and sentenced to the state reformatory or state prison. Act of Apr. 17, 1919, ch. 290, 1919 Minn. Laws 299, 299–300. As with the provisions discussed above, the statute left it to the Governor "in his discretion" to restore civil rights. *Id.* at § 1, 299.

In summary, each of these legislative enactments require an affirmative act of the Governor (or a judge in the case of persons convicted of a felony who are sentenced to pay a fine or serve time in county jail) to restore the person's civil rights upon completion of a sentence and release from incarceration. In each case, the Governor or a judge has discretion to refuse to restore civil rights to the person. If appellants are correct that the

constitution means that voting and other civil rights are automatically restored upon release from prison, these statutes, which were passed over the course of several decades, make no sense and are unconstitutional to the extent they leave restoration of civil rights to the discretion of the Governor or a judge. Once again, all of these later legislative understandings are not dispositive as to the meaning of Article VII, Section 1, of the Minnesota Constitution when enacted. But they are more compelling clues than the historical arguments offered by appellants, which seem based on conjecture and speculation alone.

C.

Appellants also offer another line of reasoning to support their position that the passive language "restored to civil rights" means that those rights are restored when a person convicted of a felony is not incarcerated. They argue that Article VII, Section 1, does not envision that persons convicted of a felony be permanently barred from voting because the constitutional language offers the possibility of restoration. From that observation, appellants claim that release from incarceration is the time that possibility becomes manifest, particularly because concepts like probation and conditional release did not exist when the constitution was adopted. At that time, a person convicted of a felony would go to prison, and a sentence was completed when the person was released from incarceration. Consequently, appellants argue, we should equate release from incarceration with restoration of civil rights. We disagree.

First, as discussed above, appellants' argument is inconsistent with the historical record. In 1858—just 1 year after the constitutional convention—persons convicted of a

felony were not automatically restored to civil rights upon release from prison; some act of the Governor affirmatively restoring civil rights was required. *See* Minn. Gen. Stat. ch. 117, § 233 (1858). And even in 1867, after the first restoration statute was enacted, it only restored the right to vote upon release from prison to some, but not all, persons who committed a felony. Act of Feb. 19, 1867, ch. 14, § 82, 1867 Minn. Laws 18, 19 (codified at Minn. Gen. Stat. ch. 120, § 85 (1878)).

Second, the very fact that probation and conditional release did not exist in 1858 means that release from incarceration was the completion of a sentence. Accordingly, even if we were to accept appellants' argument that the constitutional possibility of restoration means that restoration is constitutionally mandated, one way to interpret the framers' understanding of the phrase "unless restored to civil rights" is that restoration occurs upon completion of the sentence. And that is precisely what section 609.165 provides: restoration upon completion of sentence.

Third and more fundamentally, while it is true under any reading that Article VII, Section 1, of the Minnesota Constitution envisions that a person convicted of a felony *could* be restored to the right to vote, the provision does not mean that a person convicted of a felony *must* be restored to the right to vote. The constitution provides that a person convicted of a felony "shall not be entitled or permitted to vote . . . *unless* restored to civil rights;" it does not say "*until* restored to civil rights." In other words, the fact that the constitution states that restoration of the right to vote to persons convicted of a felony is a possibility does not mean that it is an obligation or mandate. Indeed, under Article VII, Section 1, the Legislature could choose to never enact any statute restoring to a person

convicted of a felony the right to vote. Accordingly, the language of the constitution does not support appellants' interpretation that all persons convicted of a felony who are living in the community are entitled and permitted to vote.

Appellants also assert that persons released from prison have broader rights than persons in prison. Consequently, they argue, if a person is automatically restored to *some* greater freedom that incarcerated persons do not have—automatically restored to some civil rights like the right to move about the community, speak freely, and politically associate—by virtue of release from imprisonment, then individuals released from prison must be restored to *all* "civil rights," including the right to vote.

Appellants' argument proves too much. Even if we assume that the words "civil rights" as used in Article VII, Section 1, were intended to broadly include any right that a person has, it does not follow from the fact that *some* of those rights may be restored upon release from incarceration that *all* civil rights must be restored. Different rights may be restored at different times (and may be limited in different ways at different times). Indeed, the premise of appellants' argument is flawed because the constitutional rights of parolees and probationers may be limited in ways that the rights of persons who have completed their sentences may not be.[11]

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[11] Federal courts have upheld numerous conditions impinging on a probationer's constitutional rights, including conditions that limit a probationer's freedom of speech, *United States v. Turner*, 44 F.3d 900, 903 (10th Cir. 1995) (restricting protest in front of family planning facilities); freedom of association, *United States v. Pabon*, 819 F.3d 26, 30–33 (1st Cir. 2016) (restricting association with minors after sex crime); *United States v. Schiff*, 876 F.2d 272, 276–77 (2d Cir. 1989) (restricting association with advocates of tax evasion); *United States v. Schave*, 186 F.3d 839, 843–44 (7th Cir. 1999) (restricting

For the reasons stated above, we conclude that the rule under Article VII, Section 1, of the Minnesota Constitution is as follows: a person convicted of a felony cannot vote in Minnesota unless the person's right to vote is restored by some affirmative act of, or mechanism established by, the government. For instance, that affirmative act could be an absolute pardon that nullifies the felony conviction upon which the constitutional deprivation of the right to vote is based or a legislative act that generally restores the right to vote upon the occurrence of certain events. The constitution does not provide that the right to vote is automatically restored upon release from prison.

II.

With this background in mind, we turn to the appellants' argument that the civil rights restoration statute, Minn. Stat. § 609.165, subd. 1, violates their constitutional rights. We first briefly discuss in this part the fundamental right to vote and then turn to the equal protection principle in the Minnesota Constitution in part III. We review the question of whether a statute is unconstitutional de novo. *State v. Casillas*, 952 N.W.2d 629, 635 (Minn. 2020).

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association with white supremacists); *see also* James M. Binnall, *Divided We Fall: Parole Supervision Conditions Prohibiting "Inter-Offender" Associations*, 22 U. Pa. J.L. & Soc. Change 25, 41–43 (2019); freedom of religion, *United States v. Ofchinick*, 937 F.2d 892, 898 (3d Cir. 1991) (affirming a restitution payment plan despite hardship to pay monthly church donation); and freedom from warrantless searches, *United States v. Knights*, 534 U.S. 112, 122 (2001) (holding that a warrantless search, "supported by reasonable suspicion and authorized by a condition of probation," did not violate a probationer's Fourth Amendment rights). We do not mean to forecast how *we* may address any specific limitations on the rights of parolees or probationers in the future, but only observe that the interests in deterrence and public protection may play out differently for persons on parole or probation than for persons who have completed their sentences. *See United States v. Crandon*, 173 F.3d 122, 127–28 (3d Cir. 1999).

There is no doubt that the right to vote is fundamental. *See, e.g.*, *Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 730 (Minn. 2003); *Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978). That is one principle that every member of this court signs onto today.

But the people of Minnesota have the power to define in the constitution who can and cannot vote—who has the right to vote. And in the Minnesota Constitution, the people established who can participate in the civic life of this state through the power of the franchise and restricted the right to vote in several ways: by age, by residence, by mental competency, and by status as someone convicted of treason or felony. As long as those limitations do not violate the United States Constitution (e.g., the Fifteenth, Nineteenth, and Twenty-Sixth Amendments to the United States Constitution, which respectively prohibit denying or abridging the right to vote on account of race, sex, or age for those older than 18) or the Minnesota Constitution (e.g., art. 1, § 1, or the equal protection principle set forth in the Minnesota Constitution)—and there is no allegation that Article VII, Section 1's limitations do—we do not understand how a statute denying persons convicted of a felony the entitlement or permission to vote can violate the fundamental right to vote.

Appellants do not contend that Article VII, Section 1, of the Minnesota Constitution is itself unconstitutional. Accordingly, we conclude that section 609.165 does not deny appellants' fundamental right to vote.

III.

We turn, then, to the question of whether the mechanism chosen by the Legislature to restore the civil rights of those otherwise constitutionally prohibited from voting due to a felony conviction violates the equal protection principle in the Minnesota Constitution.[12] In answering this question, we first analyze in greater detail the statutory mechanism for restoring voting rights in section 609.165, before then summarizing the equal protection principle under the Minnesota Constitution. We then apply the equal protection analysis, first addressing whether appellants have satisfied the threshold similarly situated test, before then addressing which standard of review applies, and then, finally, applying it to section 609.165.

The statutory mechanism for restoring voting rights (aside from a gubernatorial pardon) is set forth in Minn. Stat. § 609.165, subd. 1. That section provides:

> When a person has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.

Accordingly, the mechanism that the Legislature has chosen for restoring the right to vote to persons convicted of a felony is "discharge" from the conviction. Minn. Stat. § 609.165,

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[12] In *Kahn v. Griffin*, 701 N.W.2d 815, 829 n.13 (Minn. 2005), a redistricting case, we explained that Article I, Section 2, of the Minnesota Constitution, which reads in relevant part that "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers," is similar to the Equal Protection Clause of Section 1 of the Fourteenth Amendment. We further noted that Article VII, Section 1, of the Minnesota Constitution—the constitutional provision at issue here—"establishes the criteria that citizens must fulfill in order to be eligible to vote in Minnesota." *Id.*

subd. 1. "Discharge" is defined in the statute. For those persons whose sentences for a felony conviction were executed, discharge occurs upon "expiration of sentence." Minn. Stat. § 609.165, subd. 2(2). This means that the person has completed the sentence, including any period of supervised release following release from prison. For persons who received stays of imposition or execution of their sentence, discharge occurs upon "order of the court following stay of sentence or stay of execution of sentence." Minn. Stat. § 609.165, subd. 2(1).

By its plain terms and against the background of Article VII, Section 1, which permanently prohibits a person convicted of a felony from voting in the absence of some affirmative act of the government restoring the person's right to vote, section 609.165 expands the voting rights of those convicted of a felony. Indeed, as enacted in 1963, section 609.165 was the most expansive restoration of voting rights for persons who have committed a felony that Minnesota had adopted up to its time.[13]

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[13] The 1963 version of section 609.165 was broader than the current version of the statute. *Compare* Minn. Stat. § 609.165 (1965), *with* Minn. Stat. § 609.165 (2022). As part of the same legislation that created section 609.165, the Legislature changed the process for paroling or releasing persons committed to prison under indeterminate sentences. Minn. Stat. § 609.12, subd. 1 (1965). Among other things, the statute allowed the adult corrections commission to fully release from sentence or to release on parole persons convicted of a felony. *Id.* The adult corrections commission also had authority to impose in its judgment conditions on paroled individuals with an eye to what "would be most conducive to [the incarcerated person's] rehabilitation and would be in the public interest." *Id.* In accordance with this authority, section 609.165 included in its definition of discharge an "order of the adult corrections commission . . . prior to expiration of sentence." Minn. Stat. § 609.165, subd. 2(2) (1965). Thus, under the 1963 version of the civil rights restoration statute, the adult corrections commission could restore civil rights to persons on parole *but before* expiration of their sentence. The Legislature repealed this provision in the 1978 overhaul of the Minnesota sentencing statutes that eliminated

Immediately before the enactment of section 609.165 in 1963, restoration occurred as follows: (1) the civil rights of a person convicted of a felony and sentenced to the state reformatory or the state prison were restored only upon completion of a sentence[14] and upon the act of the governor, who had full discretion to grant or deny the restoration of civil rights, Minn. Stat. §§ 610.41–.43 (1961); (2) if a person convicted of a felony and sentenced to prison completed his term of incarceration without violating prison rules, the governor was required to restore his civil rights, Minn. Stat. § 243.18 (1961); and (3) the district court restored the civil rights of a person convicted of a felony but sentenced only to county jail or to pay a fine upon payment of the fine or completion of the jail term if the court was satisfied of the person's "good character." Minn. Stat. §§ 610.45–46 (1961).

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indeterminate sentencing, largely eliminated the power of the Department of Corrections to parole and release prisoners, and created the Sentencing Guidelines Commission. Act of Apr. 5, 1978, ch. 723, §§ 8, 9, 13, 15, 1978 Minn. Laws 761, 765–70.

[14] In 1961, Minnesota continued the indeterminate sentencing system under which judges would sentence offenders to an indefinite sentence up to a maximum length and the adult corrections commission had authority to release the individual on parole or to final discharge. Minn. Stat. §§ 243.01, 243.05 (1961). As part of the 1963 reforms, a new, albeit similar, system was put in place. The indeterminate sentencing system allowed courts to sentence persons convicted of a felony (other than those sentenced to life in prison) to a maximum sentence or indeterminate sentence in prison or to impose a fine without imprisonment, but courts could not impose a minimum sentence in prison. Minn. Stat. §§ 609.10–.11 (1965). Judges also had authority (except in cases where a life sentence was mandatory) to stay imposition or execution of a sentence imposed on a person convicted of a felony with the discretion to subject the person to supervision. Minn. Stat. § 609.135 (1965). The adult corrections commission retained the authority in its judgment to parole or discharge most persons convicted of a felony and sentenced to prison. Minn. Stat. § 609.12, subd. 1 (1965); *see also* Minn. Stat. § 243.05 (1965). The Adult Corrections Commission's exercise of judgment was focused on whether "parole or discharge would be most conducive to [the incarcerated person's] rehabilitation and would be in the public interest." Minn. Stat. § 609.12, subd. 1 (1965). The adult corrections commission also had authority to impose conditions on paroled individuals. *Id.*

These provisions were repealed in 1963 at the same time section 609.165 was enacted. The purpose of the new law was summarized in an Advisory Committee Comment:

> 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. The present practice it is understood is for the Governor to restore civil rights almost automatically.

Minn. Stat. § 609.165 (Advisory Committee Comment 1963). The new law made restoration of the right to vote automatic for all felons upon discharge, where previously, such restoration required an affirmative act by the governor or a district court. Thus, against the plain terms and background of both Article VII, Section 1, as well as the predecessor restoration laws, section 609.165 expands the voting rights of those convicted of a felony.

We understand the appellants' and dissent's perspective that because the Legislature chose a method of restoring the right to vote to *some* persons convicted of a felony while precluding other persons convicted of a felony from voting for a period of time (until expiration of the sentence, rather than release from incarceration), section 609.165 in some sense limits the right to vote. But Article VII, Section 1 of the Minnesota Constitution (which no party in this case contests is invalid), and *not the statute*, drives the deprivation of the right of persons convicted of a felony.[15] The dissent's framing of section 609.165

[15] To frame this point in a different way: Imagine that Article VII, Section 1, did not include a provision that disenfranchised persons convicted of a felony. Imagine further

ignores the fact discussed more fully above that the Legislature could choose, in accordance with Article VII, Section 1, to never enact a mechanism to restore the right to vote to persons convicted of a felony. And, as discussed below, the appellants' and dissent's position also disregards that the mechanism for restoration of the vote that *they* propose (restoration at release from incarceration) does not eliminate the disproportionate adverse impact caused by the felon disenfranchisement enshrined in the constitution. For instance, the appellants' data suggests that continuing to prohibit persons who are incarcerated from voting has a disproportionate racial impact.

In any event, as stated above, our difference with appellants and the dissent on this point does not prevent us from engaging in an equal protection analysis. The equal protection question is whether, in exercising its constitutional prerogative to restore the civil rights of persons convicted of a felony, the Legislature did so in a manner that is consistent with the equal protection principle in the Minnesota Constitution. If the statute is not consistent with that principle, the statute is constitutionally infirm. We now turn to that analysis.

The equal protection principle does not forbid the Legislature from treating similarly situated persons differently; it merely places limits on the circumstances and extent to

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that the Legislature passed a statute that provided "a person who has been convicted of treason or felony shall not be entitled or permitted to vote in any election in this state" or "a person who has been convicted of treason or felony shall not be entitled or permitted to vote in any election in this state until discharged." In that circumstance, we would be facing an entirely different case. The statute would be the direct cause of the disproportionate adverse impact on the voting rights of Black and Native American Minnesotans caused by tying voting rights to an individual's status as a person convicted of a felony.

which the Legislature can do so. *Fletcher Props. Inc. v. City of Minneapolis*, 947 N.W.2d 1, 20 (Minn. 2020). And the limits on the Legislature's power turn on the level of scrutiny we apply in reviewing the statute.

Generally, if a statutory classification on its face "impacts fundamental rights or creates a suspect class, the scope of action of the legislative body is significantly constrained and its decision is subject to less deference and heightened scrutiny by the courts." *Id.* (citing *In re Welfare of Child of R.D.L.*, 853 N.W.2d 127, 133 (Minn. 2014) (stating the test for strict scrutiny), and *State ex rel. Forslund v. Bronson*, 305 N.W.2d 748, 750 (Minn. 1981) (applying intermediate scrutiny to gender-based classifications)).

If a law does not impact a fundamental right or a suspect class, the law is generally subject to rational basis review. We have stated:

> [A] law subject to rational basis review does not violate the equal protection principle of the Minnesota Constitution when it is a rational means of achieving a legislative body's legitimate policy goal. . . . [and], in the absence of overwhelming evidence to the contrary, we will not second-guess the accuracy of a legislative determination of facts.

Fletcher Props., 947 N.W.2d at 19.

Finally, under the equal protection principle in the Minnesota Constitution, even if the lawmakers' purpose in enacting a law was not to affect any suspect class differently, "we hold lawmakers to a higher standard of evidence when a statutory classification demonstrably and adversely affects one race differently than other races." *Id.* In those circumstances, we apply a so-called heightened (also known as active) rational basis review test and "require actual (and not just conceivable or theoretical) proof that a statutory classification serves the legislative purpose." *Id.*

In applying these principles here, we address three issues. First, we address the threshold issue of whether appellants are similarly situated to persons convicted of a felony whose rights have been restored. We conclude appellants cleared the threshold inquiry because they are similarly situated to persons convicted of a felony who have had their right to vote restored. Accordingly, our analysis moves on to the next step in the equal protection analysis: What standard of review applies? We conclude that strict scrutiny does not apply. We also conclude that appellants have not provided sufficient evidence that we should apply heightened rational basis review. Finally, we conclude that section 609.165 survives traditional rational basis review.[16]

A.

We typically start our equal protection analysis by assessing whether "the claimant is similarly situated in all relevant respects to others whom the claimant contends are being treated differently." *State v. Lee*, 976 N.W.2d 120, 125–26 (Minn. 2022). The dissent argues that under *State v. Frazier*, 649 N.W.2d 828 (Minn. 2002), the threshold similarly situated inquiry does not apply in heightened rational basis scrutiny cases. We need not

[16] The concurrence and dissent both suggest that our analysis reaches issues not raised by the parties. We disagree. The parties specifically debate the threshold similarly situated issue in their briefs, and the district court and court of appeals directly addressed the issue. It is an essential part of the equal protection analysis. And as part of our analysis in concluding that appellants cleared the threshold inquiry, we explain why the Secretary of State's position on that issue is not in accordance with our well-established precedent on the subject. Our analysis then moves on to the question of what standard of review applies, and then applies section 609.165 against the standard of review. At each step, we explain our rationale for why we reach our conclusion as one would expect. It is unclear to us which of these steps the concurrence and dissent would have us skip over. Indeed, the dissent also criticizes us for not reaching enough issues.

resolve that issue here because we conclude that appellants satisfy the threshold similarly situated test. We also address the threshold similarly situated analysis because appellants assert that section 609.165 violates the equal protection principle under the strict scrutiny and rational basis tests.

To determine whether appellants are similarly situated in all relevant respects to others whom the claimant contends are being treated differently, we must assess "whether the law creates distinct classes within a broader group of similarly situated persons or whether those treated differently by the law are sufficiently dissimilar from others such that the law does not create different classes within a group of similarly situated persons." *Lee*, 976 N.W.2d at 126 (quoting *Fletcher Props.*, 947 N.W.2d at 22) (internal quotation marks omitted).

With this background in mind, we turn to the statutory language and its broad purposes. Section 609.165, subdivision 1, concerns the restoration of voting rights to the group of persons who have been deprived of their voting rights by reason of a felony conviction. Minn. Stat. § 609.165, subd. 1. The statute itself tells us what it is about and what is relevant: What are the circumstances under which persons who lost the entitlement and permission to vote under Article VII, Section 1, because they were convicted of a felony, will have their civil rights restored?

The statute also answers that question: the only persons who have been convicted of a felony who may vote are those persons who have been discharged—those who have completed their sentences or who have been discharged by order of the court following stay of sentence or stay of execution of sentence. *See* Minn. Stat. § 609.165, subd. 2

(defining discharge). Of course, under the statute, the voting rights of those persons who have *not* been discharged are not restored. It is that distinction that is challenged under the equal protection principle of the Minnesota Constitution.

Thus, the broader group regulated by the statute are persons who in accordance with Article VII, Section 1, lost their right to vote because they were convicted of a felony. *See Fletcher Props.*, 947 N.W.2d at 27–28 (concluding that, in an equal protection challenge to a Minneapolis ordinance that regulated the circumstances under which a residential landlord could refuse to rent because of housing voucher requirements, the relevant group for the threshold similarly situated comparison was residential landlords); *State v. Holloway*, 916 N.W.2d 338, 347–48 (Minn. 2018) (concluding that, in a statute that made a mistake-of-age defense available to defendants who were 10 or fewer years older than the minor victim of sexual assault but not available to a defendant who was more than 10 years older than the minor victim of sexual assault, the relevant group was persons charged with sexual contact with a minor because the statute focused on criminalizing such conduct).

For this reason, the appropriate broader group for the equal protection threshold analysis is not all Minnesotans of voting age who are generally qualified to vote—those 18 years and older who are citizens of the United States and have lived in Minnesota for a sufficient amount of time—regardless of whether they have been convicted of a felony. Here, for voting eligibility purposes, the Minnesota Constitution treats persons who have been convicted of a felony differently than those who have not been convicted of a felony, and appellants are not challenging the legitimacy of that provision.

We disagree with the similarly situated analysis of the court of appeals. The court of appeals accepted the Secretary of State's argument that persons who have been discharged from their sentence are not similarly situated to persons like appellants who are not incarcerated but rather living in the community on supervised release, parole, or probation. *Schroeder v. Simon*, 962 N.W.2d at 483. The court of appeals reasoned that persons who have been convicted of a felony and not yet discharged from the conviction are subject to greater restrictions on their liberty—conditions of release, the possibility of being reincarcerated—than individuals who have been convicted of a felony and have had their sentence discharged. *Id.* In so doing, the court of appeals fell into the trap we rejected most recently in *State v. Lee*, 976 N.W.2d 120 (Minn. 2022).

Lee concerned Minn. Stat. § 609.2231 (2022), which criminalized assaults on treatment facility employees. The statute imposed a mandatory 5-year conditional release period on sexually dangerous persons (SDP) convicted of assaulting a treatment facility employee, but imposed no conditional release period on persons committed as mentally ill and dangerous (MID) who assaulted a treatment facility employee. *Id.* at 125. Because the statute was about persons who committed assaults on treatment officers, we concluded that the relevant focus of the similarly situated analysis was on the conduct of committing assaults. *Id.* at 126–27. And in that "relevant respect," SDP and MID patients were similarly situated. *Id.* We rejected the State's argument that a "broader relevance inquiry" applied. *Id.* at 127–28. The State urged us to consider factors, like the different reasons that the two groups are committed, the different commitment procedures in place for the two groups, and that patients committed as SDP and patients committed as MID may reside

in different institutions subject to different programming. *Id.* We determined that those distinctions were simply not relevant to the challenged government action—imposing punishment on patients who commit assaults on treatment staff. *Id.* at 127 (noting that "the fact that the Legislature created two different statutory classifications does not determine whether the classifications pass constitutional equal protection muster"). The only relevant question was whether the conduct that led to differential treatment was the same.

So too here. While it is true that persons who have not been discharged may be subject to greater restrictions on liberty than those who have been discharged, those differences are not at issue here. The fact that persons in a broader group may be treated or classified differently for one purpose (e.g., persons convicted of a felony on conditional release or probation may be subject to greater restrictions and may face revocation of the release or probation while those convicted of a felony who have completed their sentence may not) does not mean that persons in the same broader group may be treated differently for the relevant purpose being challenged (here, restoration of voting rights). The whole point of the equal protection inquiry is to determine if the challenged classification or difference in treatment is justified. We cannot avoid that inquiry by simply saying, "Well, we treat these similarly situated persons differently for one purpose so we can treat them differently for another purpose." Once again, the conduct that leads to differential treatment under section 609.165 is being convicted of a felony.

We are not saying that greater limitations on liberty—conditions of release that restrict some constitutional rights or the possibility of being reincarcerated—are completely irrelevant to the equal protection inquiry beyond the threshold step. Indeed,

those limitations may be quite relevant to the core equal protection inquiry of whether the classification is *justified*—for instance, if a traditional rational basis test applies, whether the Legislature's choice in section 609.165 of discharge as the operative event for restoring civil rights, including the right to vote to persons convicted of a felony, is a rational means of achieving a legitimate policy goal. The lesson of *Lee*, *Fletcher*, and *Holloway* is that we must not conflate those two inquiries.[17]

Accordingly, when considering section 609.165, the threshold question of whether the individuals treated differently are similarly situated is whether persons in both classifications created by the statute (those discharged and those not discharged) engaged in the same conduct (here, conviction for a felony with the consequence of lost voting rights) that is the subject of the law (restoring the right to vote to those persons who have been convicted of a felony). The answer to that question is yes. There is no question that the appellants, who fall within the category of persons who have not been discharged, are similarly situated with the other category of persons, those who have been discharged, in the relevant respect: persons in both categories have been convicted of a felony and lost their right to vote. Accordingly, we cannot avoid conducting the distinct, substantive equal

[17] Notably, according to the Secretary of State, the Legislature's only purposes in enacting section 609.165 were to remove the stigma of a felony conviction and promote rehabilitation. The Secretary of State did not point to administrative concerns as justifications for the statute. We express no opinion on whether, how, or at what point in the period of time between felony conviction and being discharged as defined under current law such reasons would serve to justify any potential disparate racial effects in some future case.

protection analysis of appellants' claims on the ground that section 609.165 does not make a distinction among members of the same broader group.

B.

Having concluded that appellants are similarly situated to those persons whose felony conviction has been discharged, we turn to the next step in the equal protection analysis: What standard of scrutiny should we apply? Because we have concluded that section 609.165 does not implicate the fundamental right to vote, strict scrutiny does not apply. *See Ulland*, 262 N.W.2d at 415 ("Should we decide that the statute constitutes a sufficiently direct infringement on fundamental franchise rights, the 'strict scrutiny' test must be employed," otherwise, " 'rational basis' scrutiny is appropriate."). No one argues that intermediate scrutiny applies. Thus, the question becomes whether heightened rational basis review applies or whether we should assess the constitutionality of section 609.165 under the traditional rational basis standard.

Once again, we apply the more rigorous heightened rational basis standard when the "statutory classification demonstrably and adversely affects one race differently than other races." *Fletcher Props.*, 947 N.W.2d at 19; *see State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991). Accordingly, the first question we must answer is whether section 609.165, in which the Legislature chose to use "discharge"—essentially, completion of the person's

sentence—as the triggering event for restoration of civil rights, demonstrably and adversely affects Black and Native American Minnesotans convicted of a felony.[18]

Appellants' claim starts with the fact that a disproportionately higher percentage of Black and Native American Minnesotans are deprived of the right to vote due to a felony conviction than white Minnesotans; a premise that is undoubtedly correct. But that fact alone does not answer the question of whether heightened rational basis review applies here. Appellants must also demonstrate that section 609.165 is what *caused* those disproportionate effects. *See Fletcher Properties*, 947 N.W.2d at 24 (explaining that heightened rational basis review was applied in *Russell* because "[t]he record . . . demonstrated that 'the law ha[d] a discriminatory impact on black persons' " (quoting *Russell*, 477 N.W.2d at 887)).

In assessing whether we should apply heightened rational basis scrutiny to this claim, appellants correctly observe that the criminal system disproportionately affects Black and Native American Minnesotans. The simple fact that Minnesota denies the right to vote to persons who have been convicted of a felony has disproportionate racial impacts. That is a deeply disturbing reality in Minnesota. But it cannot (and does not) form the basis for appellants' argument that section 609.165 runs afoul of the equal protection principle

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[18] This case does not present the fundamentally different question of whether disparate sentence lengths that may vary due to race violate the equal protection principle. Many individualized considerations underlie the reasons for different average sentence lengths. The question here is whether the Legislature's choice to use discharge—completion of a sentence—for the entirely independent purpose of restoring voting and other civil rights (rather than punishing a person for the commission of a specific crime) violates the equal protection principle. Of course, we leave other questions for a different case.

in the Minnesota Constitution. The choice to *deny* the right to vote to persons who have been convicted of a felony, with its attendant disproportionate racial impacts, is set forth in Article VII, Section 1. The appellants do not challenge this constitutional choice.

Section 609.165 restores the right to vote to Minnesotans convicted of a felony once they have been discharged from their sentence. Thus, the question we must answer is whether the decision to restore the right to vote to persons upon discharge demonstrably and adversely affects one race differently from other races. It is beyond dispute that section 609.165 *reduces* the raw numbers and percentages of persons previously convicted of a felony who are deprived of the right to vote. In other words, more people can vote because of section 609.165.[19]

Appellants allege that section 609.165 nonetheless violates equal protection. To support their argument, appellants present statistics comparing the difference between two groups: (1) the percentage of white, Black and Native American Minnesotans of voting age who are disenfranchised under section 609.165 because they have not been discharged, (2) and the percentage of white, Black and Native American Minnesotans of voting age who would be disenfranchised had the Legislature chosen instead to restore voting rights at a different moment—upon release or excuse from incarceration before discharge. By definition, the first group does not include those persons who had been deprived of the right to vote due to a felony conviction but who have been restored to the right to vote

[19] Although we do not reach the core equal protection inquiry under heightened rational basis review of whether the law serves the purpose to be achieved at the appropriate level of fit, we observe that restoring the vote to persons convicted of a felony and who have been discharged does in fact serve a rehabilitative purpose for discharged persons.

because their sentence has been discharged. Accordingly, absent from the analysis are statistics showing the percentage of white, Black, and Native American Minnesotans of voting age disenfranchised by Article VII, Section 1, itself—disenfranchised based on a felony conviction alone before discharge. Ultimately, there is no information about the percentage of white, Black and Native American Minnesotans of voting age who were at one point deprived of their right to vote under the constitution because of a felony conviction nor any information about the comparative reduction in the percentage of the white, Black and Native American Minnesotans of voting age who cannot vote caused by section 609.165. Thus, we have no definitive evidence before us that restoring the right to vote upon discharge itself, as section 609.165 does, demonstrably and adversely affects Black and Native American Minnesotans compared to the status quo under Article VII, Section 1.[20]

Accordingly, appellants' evidence only tells us that had the Legislature chosen a different mechanism under Article VII, Section 1, for restoring the right to vote to those

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[20] For the same reason, we do not know how setting the mechanism for vote restoration at release or excuse from incarceration would compare to the status quo under Article VII, Section 1. This case is unique because the constitutional background rule set forth in Article VII, Section 1, results in a constitutionally imposed racial disparity (which is unchallenged in this case). Because appellants' evidence is insufficient to support their claim that it is section 609.165 itself that "demonstrably and adversely affects one race differently than other races," *see Fletcher Props.*, 947 N.W.2d at 19, we do not address the question of whether the heightened rational basis test applies to a remedial statute that generally expands rights or benefits in the same way it applies to other statutes, like the criminal statute at issue in *Russell*, 477 N.W.2d at 889. In *Russell*, we knew that in the statute imposing punishment for sale of cocaine, Black Minnesotans were far more likely to engage in the sale of a form of cocaine that resulted in a harsher punishment, and white Minnesotans were far more likely to engage in the sale of the same amount of a different form of cocaine that resulted in a lesser punishment. *Id.*

persons deprived of that right due to a felony conviction (release or excuse from incarceration) rather than the mechanism the Legislature actually chose in section 609.165 (discharge), the disproportion between the percentage of Black and Native American Minnesotans denied the right to vote due to a felony conviction, and the percentage of white Minnesotans denied the right to vote due to a felony conviction would be different.[21] In other words, the record does not include sufficient evidence to allow us to answer the necessary question of whether section 609.165 (or for that matter appellants' alternative

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[21] Appellants' data show that the percentage of white, Black and Native American Minnesotans of voting age who are disenfranchised because they committed a felony and have not been discharged is roughly 1 percent, 6 percent and 9 percent respectively. The data also shows that those disenfranchisement percentages would drop to roughly 0.1 percent for white Minnesotans, 1.5 percent for Black Minnesotans, and 2 percent for Native American Minnesotans if the right to vote were restored not upon discharge but rather when a person is released or excused from incarceration and allowed to live in the community. *See* Felon Disenfranchisement in Minnesota at 2. As noted by the court of appeals, appellants' data (depending on the proper standard of measurement) may show that, if persons convicted of a felony were prohibited from voting only while incarcerated, racial disparities would increase, not decrease, in comparison with the current rule under section 609.165 that persons convicted of a felony can vote only upon discharge. *See Schroeder*, 962 N.W.2d at 476 n.1. Based on our resolution of this case, however, we do not need to reach this issue.

Further, the mechanism chosen by appellants for restoration of the right to vote itself does not eliminate the disproportionate adverse effect on Black and Native American Minnesotans of denying the right to vote to persons convicted of a felony. Appellants' position to choose *release* from incarceration as the mechanism to restore voting rights may have a demonstrable and adverse effect on Black Minnesotans relative to *another* choice that the Legislature could have made consistent with Article VII, Section 1: to restore voting rights to all Minnesotans immediately following their felony conviction, thus allowing incarcerated Minnesotans to vote. Moreover, there is nothing in the record to inform us whether allowing incarcerated persons the right to vote would serve a rehabilitative purpose or whether other justifications may support denying the right to vote to incarcerated persons. Of course, because appellants do not challenge the disenfranchisement of persons who remain incarcerated due to a felony conviction, we express no opinion about whether and under what circumstances such disenfranchisement may violate the equal protection principle in the Minnesota Constitution.

restoration mechanism) demonstrably and adversely affects Black and Native American Minnesotans compared to the status quo established by the constitution itself in Article VII, Section 1.[22] Accordingly, because the burden of proving an adverse racial effect rests on appellants, we cannot conclude *on this record* that heightened rational basis review is warranted. *See Frazier*, 649 N.W.2d at 836 (dismissing an equal protection claim where the plaintiff did not carry his burden of showing a demonstrable and adverse effect based on race).

C.

We thus turn to the rational basis standard. Both appellants and the Secretary of State agree that the Legislature's only policy goals in enacting section 609.165 were to foster rehabilitation and remove stigma. Section 609.165 satisfies the rational basis

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[22] The court of appeals concluded that the statutory mechanism in section 609.165 on its face does not apply differently based on race precisely because discharge itself eventually restores voting rights automatically to all people with felony convictions, regardless of race. *Schroeder*, 962 N.W.2d at 485. The district court also used this reasoning to reject the application of heightened rational basis review, stating that "[a]s an automatic process, the re-enfranchisement under Minn. Stat. § 609.165 affects all persons convicted of felonies equally, restoring their civil rights at the end of their felony sentence." The Secretary of State urges us to adopt that logic.

Due to the way we resolve this case, we do not need to resolve the issue. We merely observe that we are not convinced that the question is so simple. At a high level, there is something appealing about the analysis of the court of appeals and the district court. It is certainly true that the ultimate act of discharge does not turn on race. All persons convicted of a felony (aside from the small group of persons convicted of life in prison or whose term sentences are so long that they will never be released from incarceration) ultimately will be discharged regardless of race. On the other hand, using discharge as the mechanism for restoring the right to vote may deprive Black and Native American Minnesotans of the right to vote for a longer time compared to other Minnesotans, especially if all periods of disenfranchisement—probation, parole, conditional release, and incarceration—are considered.

standard if it is one rational means (not the only means or best means) of achieving a legislative body's legitimate policy goals. *See Fletcher Props.*, 947 N.W.2d at 27–29. Moreover, the fact that the purpose of removing stigma and promoting rehabilitation might equally or similarly apply to persons convicted of a felony who are living in the community but have not been discharged is not of constitutional concern when analyzing a law under the traditional rational basis standard: "[W]e will not interfere with a law solely on the ground that it does not completely ameliorate a perceived evil." *Id.* at 27, n.19. Restoring the vote of those discharged of their crime is one rational way, albeit perhaps an incomplete way, to accomplish the Legislature's rehabilitation and removal-of-stigma purpose.[23] The statute survives rational basis review.

* * *

In conclusion, Article VII, Section 1, of the Minnesota Constitution permanently removes the entitlement and permission to vote when a person has been convicted of a felony. The basic rule under the constitution is that a person convicted of a felony cannot vote in Minnesota unless the person's right to vote is restored by some affirmative act of the government restoring the person's right to vote. That affirmative act could take

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[23] Under rational basis review, we are not limited to considering the purposes of the law expressly articulated by the Legislature when it enacted the statute. Here, one could imagine other potentially legitimate purposes for section 609.165: the challenge of what to do when a person on conditional release or probation has that status revoked and is incarcerated as a result; or the administrative challenges facing prison officials in allowing incarcerated persons to vote in that setting. The Secretary of State, however, has not asserted that any of those other unstated purposes justify the Legislature's decision to restore civil rights upon discharge. In any event, because we conclude that the statute satisfies the rational basis test regardless, we need not consider those other unstated purposes.

different forms, including an absolute pardon that nullifies the felony conviction upon which the constitutional deprivation of the right to vote is based, an express order by the Governor or some other public official restoring the right to vote short of a pardon, or a legislative act that generally restores the right to vote upon the occurrence of certain events. Article VII, Section 1, does not provide that the right to vote is automatically restored upon release or excuse from incarceration. It is essential to our conclusion that appellants do not claim that the limitation on the voting rights of persons convicted of a felony is itself unconstitutional because it conflicts with other provisions of the Minnesota Constitution.

Under Article VII, Section 1, the Legislature has broad, general discretion to choose a mechanism for restoring the entitlement and permission to vote to persons convicted of a felony, including the discretion to refuse to restore the right to vote at all. But that discretion is not unbounded. Among other things, a statute that restores the right to vote must comply with all provisions of the United States and Minnesota Constitutions. The mechanism that the Legislature has chosen for restoring the right to vote to persons convicted of a felony is "discharge" from the conviction. Minn. Stat. § 609.165, subd. 1.

Section 609.165 does not deny appellants' fundamental right to vote because Minnesotans can define in their constitution who may vote and who may not vote, subject to the constraints of the United States Constitution and perhaps other provisions of the Minnesota Constitution. Minnesotans decided in Article VII, Section 1, that persons who have committed a felony may not vote, subject to being restored to that right by the Governor through the pardon process or by a different process approved by the Legislature. Appellants do not contend that Article VII, Section 1, is itself unconstitutional.

With these underlying principles in mind, *on the record in this case*, appellants have not proven that section 609.165 violates the equal protection principle of the Minnesota Constitution. Appellants do, however, satisfy the threshold similarly situated inquiry. Persons in appellants' position—those persons who have been convicted of a felony, are living in the community, and have not yet completed their sentence or satisfied the conditions of their stay of sentence—are similarly situated to those persons who have been convicted of a felony and have completed their sentence or satisfied the conditions of their stay of sentence. On this threshold question, we disagree with the district court and the court of appeals. The question of whether section 609.165 violates the equal protection principle cannot be dismissed at the threshold inquiry stage.

The next question is then what standard of scrutiny applies to the equal protection analysis. Strict scrutiny does not apply. And because of the way the parties argued the case, the record is insufficient to allow us to determine whether heightened rational basis review applies. We also, of course, express no opinion on whether section 609.165 would be subject to and survive heightened rational basis scrutiny if evidence were submitted.[24] We thus analyze section 609.165 under traditional rational basis review, which it survives.

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[24] Given our determination that appellants have not demonstrated that section 609.165 violates the equal protection principle of the Minnesota Constitution, we need not consider what remedy would have applied had we arrived at a different conclusion. We observe, however, that an effective judicial remedy may not have been possible. Under our jurisprudence, when an unconstitutional part of a statute cannot be severed, we must completely invalidate the statute. *In the Matter of A.J.B.*, 929 N.W.2d 840, 848 (Minn. 2019); *see* Minn. Stat. § 645.20 (2022); *Back v. State*, 902 N.W.2d 23, 33 (Minn. 2017) (invalidating the statute when severance was not possible with the consequence that we proceed as if the statute had never been enacted at all). If that course

At the same time, although section 609.165, on the claim raised here, passes constitutional muster, we recognize the troubling consequences, including the disparate racial impacts, flowing from the disenfranchisement of persons convicted of a felony. The Legislature retains the power to respond to those consequences. The Minnesota Constitution empowers the Legislature to address the public policy concerns raised by appellants in this case; public policy concerns that the Secretary of State shares and that directly implicate—even if section 609.165 does not violate—the fundamental right to vote. We should all take care that persons not be deprived of the ability to participate in the political process out of fear of our fellow citizens.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

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had been deemed appropriate here, the result would have been to completely invalidate section 609.165, subdivision 1, with the result that no statutory mechanism would exist to automatically restore the right to vote to persons who have been convicted of a felony. An individual pardon would then be the sole path to restoration of civil rights until the Legislature adopted a different, constitutional mechanism.

C O N C U R R E N C E

ANDERSON, Justice (concurring).

At the outset, it is important to reaffirm the court's responsibility to fiercely protect the fundamental right to vote enshrined in Article VII of the Minnesota Constitution and to serve as the final protector of equality and fairness as provided by the constitution. If Article VII enshrined a universal right to vote without exception and the Legislature had enacted a statute that denied that universal right to convicted felons, this would be a very different dispute.

But this is not that case. This appeal requires us to interpret the language of Article VII, Section 1, of the Minnesota Constitution, which denies the fundamental right to vote to "a person who has been convicted of treason or felony, unless restored to civil rights . . . ." We must then decide whether the Legislature violated the fundamental right to vote or the guarantee of equal protection embedded in the Minnesota Constitution when it enacted Minn. Stat. § 609.165 (2022), which automatically restores the civil rights of convicted felons, including the right to vote, upon discharge of the felony sentence.

Like the court, I conclude that the clause "unless restored to civil rights" in Article VII, Section 1, cannot be reasonably interpreted to mean "unless released or excused from incarceration." Moreover, because section 609.165 does not limit or withhold the restoration of civil rights, but instead the statute automatically restores the civil rights of convicted felons, including their right to vote, I conclude that the Legislature did not violate Article VII, Section 1, when it enacted section 609.165.

That said, I cannot join the court's equal protection analysis regarding the heightened rational basis standard because it relies on an argument that was not raised by the parties to find the threshold similarly situated requirement to the equal protection analysis satisfied. But because I agree that appellants' arguments based on a comparison of the voting eligibility of all Minnesotans of voting age and those Minnesotans who have committed a felony are irrelevant to the similarly situated analysis,[1] I concur in the result reached by the court on the equal protection issue.

"In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Under the principle of party presentation, "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* The principle of party presentation is more than a prudential rule of convenience. As the United States Supreme Court observed in *NASA v. Nelson*, "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." 562 U.S. 134, 147 n.10 (2011) (citation omitted) (internal quotation marks omitted).

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[1] I also agree with the court that the statistical data presented by appellants fails to show that section 609.165 creates a racial classification in practice that triggers our "heightened" rational basis standard, and that section 609.165 survives our "traditional" rational basis standard. *Supra* at 41–46.

We recently applied the principle of party presentation in *Leuthard v. Indep. Sch. Dist. 912 – Milaca*, 958 N.W.2d 640 (Minn. 2021).[2] In *Leuthard*, the Workers' Compensation Court of Appeals (WCCA) vacated a compensation judge's decision based on the rare case exception, which was not asserted in the notice of appeal. *Id.* at 650. Applying the principle of party presentation, we reversed the decision of the WCCA, explaining that the WCCA had erred as a matter of law when it vacated the compensation judge's decision based on the rare case exception. *Id.*

I acknowledge that appellate courts have a responsibility "to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (citation omitted) (internal quotation marks omitted). But that responsibility is limited to well-established law and does not allow courts to create new law. *Id.* (explaining that we could consider the unraised issue because it was neither novel nor questionable).

The principal equal protection argument advanced by appellants is that Minn. Stat. § 609.165 is unconstitutional under the "heightened" rational basis standard articulated in *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991). We apply the *Russell* "heightened"

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[2] The principle of party presentation has also been discussed by members of the court in separate writings. *See, e.g.*, *State v. Berry*, 959 N.W.2d 184, 194 (Minn. 2021) (Moore, III, J., dissenting) (arguing the court violated the principle of party presentation discussed in *Greenlaw* when it sua sponte reviewed a finding for clear error); *Heilman v. Courtney*, 926 N.W.2d 387, 398–400 (Minn. 2019) (Hudson, J., concurring) (explaining that in our adversary system, we follow the principle of party presentation); *Ries v. State*, 920 N.W.2d 620, 641 (Minn. 2018) (Hudson, J., concurring in part and dissenting in part) (explaining that the principle of party presentation "is more than a prudential rule of convenience").

rational basis standard "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."[3] *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 19 (Minn. 2020). We have referred to this type of classification as "a race-based classification in practice." *State v. Frazier*, 649 N.W.2d 828, 836 (Minn. 2002). Under the heightened rational basis standard, "we require actual (and not just conceivable or theoretical) proof that a statutory classification serves the legislative purpose." *Fletcher Props.*, 947 N.W.2d at 19.

But whether under heightened or traditional rational basis review, the starting point of each formulation is to discern whether the law being challenged "creates distinct classes within a broader group of similarly situated persons." *Fletcher Props.*, 947 N.W.2d at 22. Stated another way, before we turn to any other questions, appellants must prove that the automatic restoration statute, Minn. Stat. § 609.165, subd. 1, leads to different outcomes between persons who are similarly situated "in all relevant respects." *State v. Johnson*, 813 N.W.2d 1, 12 (Minn. 2012).

Appellants limit their argument on this threshold issue to the assertion that they are similarly situated in all relevant respects to Minnesotans of voting age that are eligible to

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[3] Appellants do not allege, or point to any evidence suggesting, that the Legislature passed Minn. Stat. § 609.165 with a discriminatory intent. I acknowledge that when the record indicates a legislature has enacted a felon disenfranchisement system with an expressly discriminatory purpose, courts have struck down the system. *See Hunter v. Underwood*, 471 U.S. 222, 228–233 (1985). But because appellants have presented no evidence that Minn. Const. art. VII or Minn. Stat. § 609.165 was adopted with an expressly discriminatory purpose, the facts of appellants' case are materially distinguishable from the facts of *Underwood*.

vote and that Minn. Stat. § 609.165 creates a racial classification in practice based on statistical data that shows that, in denying convicted felons the fundamental right to vote, Article VII, Section 1, of the Minnesota Constitution impacts a disproportionate number of nonwhite Minnesotans.[4] More specifically, appellants' statistical data shows that as of 2018, Minn. Const. art. VII, § 1, denied the fundamental right to vote to less than 1 percent of white adults living in Minnesota, while it denied the fundamental right to vote to nearly 4½ percent of Black adults living in Minnesota and more than 8 percent of Native American adults living in Minnesota. Because a higher proportion of nonwhite individuals are awaiting automatic restoration of their right to vote, appellants claim that section 609.165 demonstrably and adversely affects one race differently than other races.

The Secretary of State argues that appellants' comparison of the voting eligibility of all Minnesotans of voting age who are eligible to vote and those Minnesotans who have committed a felony is irrelevant to the similarly situated analysis, and that the statistical data presented by appellants fails to show that section 609.165 creates a racial classification in practice. In support of his argument, the Secretary of State asserts that the disparities reflected in the statistical data are "caused by many other factors related to the

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[4] The evidence appellants presented in the district court includes statistical data on the average length of pronounced probation sentences by race. Minnesota Sentencing Guidelines Commission, *Average Pronounced Probation Lengths: Sentenced 1981–2018* (2020). Facially, this data show that since at least 1981, white defendants on average are sentenced to longer terms of probation than Black or Native American defendants. Between 2001 and 2018, white defendants on average received probation sentences that were 13 months longer than Black defendants and 9 months longer than Native American defendants. *Id.* In other words, section 609.165 restores the civil rights to Black and Native American defendants more quickly than it restores the civil rights of white defendants.

disenfranchisement imposed by the constitution," as opposed to section 609.165. (Emphasis added.) According to the Secretary of State, there is no evidence in this case that the racially neutral criterion in section 609.165 has been applied differently based on race.

After considering the arguments presented by the parties, I agree with the court that a comparison of the voting eligibility of all Minnesotans of voting age and those Minnesotans who have committed a felony is irrelevant to the similarly situated analysis because, for voting eligibility purposes, the Minnesota Constitution treats persons who have been convicted of a felony differently than those who have not been convicted of a felony and appellants are not challenging the legitimacy of that provision. Thus, arguments based on comparisons of the voting eligibility of all Minnesotans of voting age eligible to vote and those Minnesotans who have committed a felony—the sole arguments raised by appellants—are irrelevant to the equal protection analysis of section 609.165. In my view, this should be the end of the equal protection analysis.[5] As we have observed elsewhere, "[w]hat is most important is identifying clearly the specific equal protection concern *raised by the party challenging the law*." *Fletcher Props.*, 947 N.W.2d at 22 (emphasis added).

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[5] The court, relying on an argument not made by any party, advances another approach to the similarly situated analysis and under this re-framing, concludes that the similarly situated requirement is met. Given our adherence to the principle of party presentation, *Leuthard*, 958 N.W.2d at 650, I do not join that portion of the court's opinion. Without the benefit of argument and analysis, by both the parties and our district court and appellate colleagues, we know neither the strengths nor weaknesses of the court's proposed framework.

Although the court is bound by the language of Article VII, Section 1, of the Minnesota Constitution, which expressly denies the fundamental right to vote to convicted felons, I acknowledge that appellants and amici have identified serious public policy concerns that are reflected in troubling statistical data and academic studies. But whether these serious public policy concerns warrant an amendment to Article VII, Section 1, is a question that must be answered by the Legislature and ultimately the voters of Minnesota.[6] *See* Minn. Const. art. IX, § 1 (defining the process required to pass a constitutional amendment).

In sum, the clause "unless restored to civil rights" in Article VII, Section 1, cannot be reasonably interpreted to mean "unless released or excused from incarceration." The Legislature did not violate Article VII, Section 1, when it enacted section 609.165 because the statute does not limit or withhold the restoration of civil rights, but instead automatically restores the civil rights of convicted felons, including their right to vote. I cannot join the court's equal protection analysis because it relies on an argument that was not raised by the parties to find the similarly situated requirement met. But turning to the arguments the parties did make, because I agree with the court that appellants' arguments based on a comparison of the voting eligibility of all Minnesotans of voting age and those

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[6] Short of a constitutional amendment, in addition to other possible legislative changes, the Legislature could consider an amendment to Minn. Stat. § 609.165, allowing discretionary restoration of voting rights in a manner similar to Minn. Stat. § 609.165, subd. 1d, which permits discretionary restoration of the right to possess a firearm.

Minnesotans who have committed a felony are irrelevant to the similarly situated analysis, I concur in the result reached by the court on the equal protection issue.

GILDEA, Chief Justice (concurring).

I join the concurrence of Justice Anderson.

D I S S E N T

HUDSON, Justice (dissenting).

The fundamental right to vote, enshrined in Article VII of the Minnesota Constitution, demands generous and fierce protection by the judiciary. Likewise, the guarantee of equal protection, found in Article I, Section 2, of our state constitution, mandates that this court serve as the final guarantor of equality and fairness, and that we scrutinize any statute that improperly discriminates among the people of this state. Appellants ask us to fulfill that revered responsibility by invalidating the disenfranchisement provision for people convicted of felonies under Minnesota Statutes section 609.165 (2022). The court eschews that responsibility. I would not, and because I conclude that section 609.165 fails under the equal protection guarantee of Article I, I respectfully dissent.[1]

A.

1.

Based on Article I of the Minnesota Constitution, we have articulated a more stringent equal protection principle that "hold[s] lawmakers to a higher standard" when a statute restricts a fundamental right or has a racially disparate impact. *Fletcher Props., Inc. v. City of Minneapolis*, 947 N.W.2d 1, 19 (Minn. 2020). When a statute creates a racial classification in practice, we evaluate it under heightened rational basis review. *Id.* (citing

[1] Because I conclude that section 609.165 violates the equal protection guarantee of Article I, I do not address appellants' other theories, nor do I respond to the court's treatment of those theories.

State v. Russell, 477 N.W.2d 886, 890 (Minn. 1991)). I conclude that this statute—on its own—is unconstitutional under heightened rational basis review.

I begin by describing Minnesota's highly protective approach to equal protection claims based on racial discrimination. In general, "a law subject to rational basis review," as opposed to strict scrutiny, "does not violate the equal protection principle of the Minnesota Constitution when it is a rational means of achieving a legislative body's legitimate policy goal." *Fletcher*, 947 N.W.2d at 19. But since our seminal decision in *State v. Russell*, Minnesota courts have used heightened rational basis review to determine whether statutes with disproportionate racial effects are constitutional. Thus, in *Russell*, we held that "[i]t is particularly appropriate that we apply our stricter standard of rational basis review in a case such as this where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection." 477 N.W.2d at 889. We recently reaffirmed this principle in *Fletcher*:

> [T]he principle we apply in analyzing laws subject to rational basis review under the Minnesota Constitution is the same principle applied to such laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. But under our precedent, this rule is subject to an important exception: under 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*.

Fletcher, 947 N.W.2d at 19 (citing *Russell*, 477 N.W.2d at 890) (emphasis added); *see also* *State v. Frazier*, 649 N.W.2d 828, 834 (Minn. 2002) (acknowledging that a constitutional

violation may be found when a "statute creates a racial classification in practice").[2] Heightened rational basis review is "more stringent" than rational basis review, *Russell*, 477 N.W.2d at 889, and demands "a tighter fit between the government interest and the means employed to achieve it in the form of actual evidence (as opposed to hypothetical or conceivable proof) that the challenged classification will accomplish the government interest," *Fletcher*, 947 N.W.2d at 19 n.12.[3]

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[2] Although the concurrence notes that appellants have presented no evidence that Article VII or section 609.165 were adopted with an expressly discriminatory purpose, *Russell*, too, involved a facially neutral statute—but a statute that, in application, had a "substantial discriminatory racial impact." *Russell*, 477 N.W.2d at 894 (Simonett, J., concurring). It was that impact that necessitated a more stringent standard of review. And, of course, we cannot rest too heavily on our laurels because it is well-documented that the history of disenfranchisement in the United States and Minnesota is fraught with intentional racism. When ratified in 1858, the Minnesota Constitution included a provision in which Native Americans could become citizens entitled to vote *only* if they adopted the "language, customs, and habits of civilization . . . ." Minn. Const. art. VII, § 1(4) (1858). Additionally, Jim Crow laws led to mass incarceration, specifically to limit Black American voting power. *See* Jeff Manza et al., *The Racial Origins of Felon Disenfranchisement*, *in Locked Out: Felon Disenfranchisement and American Democracy* 41, 55–57 (Jeff Manza & Christopher Uggen eds., 2006).

[3] For equal protection claims based on statutory classifications, the threshold task is identifying the challenged classification in the statute. *Fletcher*, 947 N.W.2d at 19; *see also State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) ("We impose this threshold showing because the guarantee of equal protection does not require that the State treat persons who are differently situated as though they were the same." (internal quotation marks omitted) (citation omitted)). However, insofar as the majority claims that we require this similarly situated inquiry for a *Russell* claim, the majority is wrong. Instead, in a *Russell* claim challenging a facially neutral statute, we have applied heightened rational basis review when the plaintiff "demonstrate[s] that the statute creates a racial classification in practice." *Frazier*, 649 N.W.2d at 834; *see also Russell*, 477 N.W.2d at 889. Indeed, in *Frazier*, we were confronted with two distinct equal protection challenges: one under traditional rational basis review, and one under *Russell*'s heightened rational basis review. *See Frazier*, 649 N.W.2d at 832–39. While we engaged in a similarly situated analysis for the claim under traditional rational basis review, *see id.* at 837–39, critically, we did not engage

As the name suggests, the racial-classification-in-practice theory examines a statute to determine whether it has a disparate impact that creates a racial classification in practice, and it is the plaintiff's burden to make that demonstration. *Frazier*, 649 N.W.2d at 834–36. This evidentiary requirement demands more than simply presenting data showing that different numbers of racial groups are affected by the challenged statute. Instead, the plaintiff's evidence must evoke—through a robust and reliable record—the same variety of skepticism as a statute that makes a racial classification *on its face*. *See id.* at 833–36.[4]

After establishing the existence of either a facially discriminatory classification or a racial classification "in practice" based on a disparate impact, the court proceeds to the

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in a similarly situated analysis for the *Russell* claim, instead jumping immediately into evaluating whether the statute created a racial classification in practice, *see id.* at 832–34. Rather than stating that a similarly situated inquiry was the threshold question, we explicitly stated that "the threshold question before us is whether Frazier's data demonstrate that [the statute] creates a racial classification." *Id.* at 834. It is therefore highly illuminating that in the only other case to examine a *Russell* claim other than *Russell*, we clearly jettisoned the similarly situated analysis for equal protection claims predicated on a racial classification in practice.

[4] It is worth noting that at no point has the Secretary of State denied or contradicted the accuracy of appellants' data, or their conclusion that people of color are disproportionately impacted by the State's disenfranchisement scheme.

"fit" part of the equal protection analysis. *See Fletcher*, 947 N.W.2d at 19 n.12 (describing the "tighter fit" analysis for heightened rational basis review claims).

Apart from *Russell*, we have only had the opportunity to analyze a racial classification in practice in one prior case. In *Frazier*, we concluded that the appellant, Frazier, failed to meet his evidentiary burden to make a disparate impact claim under a racial-classification-in-practice theory.[5] 649 N.W.2d at 836–37. Frazier presented only two sets of data purporting to show disparate impact with small sample sizes and questionable metrics. *Id.* at 834–36. Given our concerns about the "reliability and validity of Frazier's data and data analysis," we concluded that we could not evaluate whether the statute had a racially disparate impact. *Id.* at 835–36.

2.

Here, unlike in *Frazier*, appellants present strong, uncontested evidence that section 609.165 has a disparate impact by creating a racial classification in practice.[6]

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[5] As discussed above, in addition to his racial-classification-in-practice theory, Frazier also advanced a similarly situated theory that compared two statutes criminalizing similar conduct with different sentences: the benefit-of-a-gang statute, Minnesota Statutes section 609.229 (2000), and the racketeer influenced and corrupt organizations (RICO) statute, Minnesota Statutes section 609.901 et seq. (2000). *Frazier*, 649 N.W.2d at 837. We concluded that Frazier was not "similarly situated to an individual convicted under RICO." *Id.* at 839.

[6] The uncontested record in this matter is robust and reliable, and therefore sufficient for review. It contains numerous data from a variety of reputable sources, including the Minnesota Sentencing Guidelines Commission, the Minnesota Department of Corrections, the Minnesota Justice Resource Center, the U.S. Census Bureau, law reviews, and peer-reviewed academic journals. Appellants' experts, Dr. Barbara Carson and Dr. Christopher Uggen, each a well-credentialed scholar, prepared substantial expert reports explaining and analyzing relevant data, including explanations of their sources and

Section 609.165 creates a group of people for which the effects are disparate based on race, that group being people convicted of felonies who are awaiting re-enfranchisement until their sentences are discharged. The record shows that the statute withholds the right to vote from just 1 percent of voting-age white Minnesotans, compared to over 4 percent of Black Minnesotans and nearly 9 percent of Native Americans in the state.[7] And although there is a generally uniform low rate of community supervision—and, therefore, felony disenfranchisement—across Minnesota counties for otherwise eligible white voters, the disenfranchisement rate for otherwise eligible Black and Native American voters varies and reaches a staggering 12 percent in some counties. In 2016, Black Minnesotans accounted for more than 20 percent of disenfranchised voters in the state. Native Americans, despite comprising less than 1 percent of the state population, accounted for nearly 7 percent of the state's disenfranchised voters. Notably, among other harms, the discharge requirement in the statute transforms historic racial disparities within the criminal justice system into persistent disparities in political power. In sum, the statute

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methodologies. Nearly a dozen amici provided briefs supporting the conclusions that the current system has a disparate impact on people of color that results in a variety of harms, including disproportionate voting power. (No amicus brief disagreed.) Moreover, the Secretary of State does not dispute any of the evidence presented by the appellants. In sum, this record contrasts sharply to the data and analysis we found insufficient to substantiate the racial-classification-in-practice claim in *Frazier*. *See Frazier*, 649 N.W.2d at 836 ("What we do require . . . is a factual record that permits us to evaluate the reliability and validity of both the data and the data analysis. We do not have such a record here."). Based on this robust record, I would conclude that the evidence shows a disparate impact that establishes a racial classification in practice.

[7] These undisputed figures are the percentages of each racial group subject to felony disenfranchisement who are still serving their sentences, the bulk of which are on probation.

creates a racial classification in practice because white voting-age Minnesotans are eligible to vote at a higher—sometimes much higher—percentage than voting-age Black and Native American Minnesotans, in particular.

Despite the uncontested record, the Secretary of State argues that the disproportionate share of people of color with felony convictions—a "serious concern"—is not traceable to section 609.165. Likewise, the district court concluded that heightened rational basis review did not apply by observing that the statute does not cause all of the racial disparities in the criminal justice system. And today, this court follows suit by laying blame for the racial-classification-in-practice squarely on Article VII's felony disenfranchisement provision.

But section 609.165 is not blameless, and the court misapprehends its impact by portraying it as a charitable "automatic restoration" statute. In reality, section 609.165 acts as a gatekeeper to the franchise, determining who will have a voice in the democratic process and who will continue to be relegated to political marginalization. In its gatekeeper role, section 609.165 channels and gives effect to the racial disparities generated from Article VII's felony disenfranchisement provision. Sanctioning such discrimination is particularly perverse in the voting rights context because it inhibits the ability of the politically powerless to redress discrimination through ordinary political means, further marginalizing those seeking to reenter society. *See* Christina Beeler, *Felony Disenfranchisement: Paying and Re-Paying a Debt to Society*, 21 U. Pa. J. Const. L. 1071, 1087 (2019).

A related disagreement between myself and the court is the question of the proper comparator groups for the *Russell* analysis. Both the majority and the concurrence disagree that we must compare, as appellants do, the racial disparities between Minnesotans convicted of a felony and disenfranchised under section 609.165 and other voting-age Minnesotans.

But rejecting appellants' formulation of the relevant comparator groups is only possible by erroneously portraying section 609.165 as a charitable "automatic restoration" statute. Rather, as I have explained, section 609.165 effectively enacts and extends Article VII into the criminal code. In fact, felony disenfranchisement is not the constitutional baseline because Article VII does not mandate appellants' disenfranchisement—indeed, Article VII would ostensibly permit the Legislature to restore to civil rights a person convicted of a felony at the moment of conviction. In promulgating section 609.165, the Legislature has chosen to disenfranchise people convicted of felonies until their sentences are discharged, and it is that *legislative choice* that disenfranchises persons like appellants. Because section 609.165 is a disenfranchisement statute, we must examine the racial disparities between Minnesotans convicted of a felony (that is, those subject to the mandate of the statute) and voting-age Minnesotans not subject to the disenfranchisement wrought by section 609.165.[8] *See Russell*, 477 N.W.2d at 887–89 (comparing the racial disparities

[8] Remarkably, despite being the decision of the court, it is difficult to decipher exactly what the majority decides. Indeed, the majority says it need not decide whether the similarly situated analysis applies to *Russell* claims, it need not decide whether the court of appeals erred in reasoning that *Russell* was inapplicable, it need not decide whether *Russell* applies to a so-called "remedial statute" like section 609.165, and it need not decide

between those affected by a legislative choice—that is, harsher punishments for crack cocaine possession—and those not affected by that legislative choice).

The undisputed record draws a direct connection between the disproportionate levels of felony disenfranchisement in communities of color to section 609.165, which restricts those same communities of color from voting until their full sentence is discharged. Notably, appellants do *not* challenge the disproportionate arrest, incarceration, and conviction of persons of color. They are challenging the *legislative decision to extend disenfranchisement as a collateral consequence of conviction* to the 53,585 persons living in the community on probation, parole, or supervised release. There is no intervening cause between that legislative decision and racial disparities in the right to vote: the legislative classification directly causes the disparate impact. The Legislature's denial of voting rights to persons living in the community before discharge of sentence "adversely affects one race differently than other races." *Fletcher*, 947 N.W.2d at 19, 27.

The resulting racial disparity in voting rights perpetuated by section 609.165 "cries out for closer scrutiny." *Russell*, 477 N.W.2d at 888 n.2. In ignoring that cry, the court effectively sanctions a pernicious statutory racial classification regime that maintains the disenfranchisement of large swaths of Minnesota's communities of color, thereby diminishing their political power and influence in this state. We are better than this.

"whether [section 609.165] serves the purpose to be achieved at the appropriate level of fit." Nonetheless, the majority offers its own musings about answers to those questions by, for example, suggesting that the court of appeals' reasoning was too "simple" and observing that restoring the right to vote "serve[s] a rehabilitative purpose." I worry that the majority will only inject more uncertainty into our equal protection jurisprudence.

Having concluded that section 609.165 creates a racial classification in practice, I would follow *Russell* and apply heightened rational basis review, which asks whether actual evidence shows a "tighter fit" than the fit required under traditional rational basis review between the government's interest in enacting section 609.165 and the statute's means to achieve that interest. *Fletcher*, 947 N.W.2d at 19 n.12. The first inquiry is whether the government has articulated a "legitimate interest" in that purpose. *Id.* If there is a legitimate interest, we then evaluate whether "actual evidence" shows a tighter fit between the interest and the "means employed to achieve it." *Id.*

It is uncontested that the only interest the Legislature specifically articulated by enacting section 609.165 is rehabilitation. *See* Advisory Committee on Revision of the Criminal Code, *Proposed Minnesota Criminal Code* 42 (1962) (explaining that restoration of voting rights "is deemed desirable to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen"); *id.* at 60–61 (reasoning that "rehabilitation will be promoted by removing the stigma and disqualification to active community participation resulting from the denial of his civil rights").

Rehabilitation is surely a legitimate interest, as it promotes public safety and a competent citizenry, and has long been part of the Legislature's stated purposes for the criminal code in general. *See* Minn. Stat. § 609.01 (2022) (stating that "rehabilitation of those convicted" is among the purposes for the Criminal Code of 1963). But it is also true

that the purpose of rehabilitation is a poor fit with the "means employed to achieve it" in section 609.165.[9]

Section 609.165 maintains a person's disenfranchisement until their full sentence is discharged. The record contains substantial evidence that this sentence-discharge requirement, which denies the right to vote to people in the community on probation and supervised release, can sometimes delay re-enfranchisement for decades, as appellants' lengthy probation terms demonstrate, and at a massive scope and scale.[10] Section 609.165 is unquestionably a poor fit with the stated goal of rehabilitation. In fact, there is broad

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[9] The Secretary of State's counsel acknowledged at oral argument that, under different circumstances, "the parties would likely be aligned," and that "[t]he Secretary [of State] has been a public advocate for changing this statute." Oral Argument at 28:01-08, *Schroeder v. Simon*, No. A20-1264 (Minn. argued Nov. 30, 2021), *available at* https://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1507.

[10] Appellants' brief takes note of Minnesota's increased high rates of incarceration and probation, resulting in an expanding number of persons subject to felony disenfranchisement, including a disproportionate number of people of color. In 1974, for example, there were 2,546,000 voting-age adults in Minnesota and a total of 6,143 persons convicted of felonies living in the community on parole or probation. By 2018, there were 4,307,433 voting-age adults and 52,549 persons convicted of felonies living in the community on parole or probation. Thus, the number of people living in the community who were disenfranchised because they were serving a felony sentence rose from 0.24 percent of the state's voting-age population in 1974 to 1.22 percent in 2018.

It is true that as of August 1, 2020, the Sentencing Guidelines provide for a presumptive 5-year cap on probation terms for felony offenders. Minn. Sent. Guidelines 3.A.2.a. However, that guideline is riddled with exceptions. First, the guideline cap does not apply to murder offenses, criminal vehicular homicide, and criminal sexual conduct offenses. Minn. Sent. Guidelines 3.A.2.d. Second, the sentencing judge can impose a probation term longer than 5 years if she "identifies and articulates substantial and compelling reasons to support a departure." Minn. Sent. Guidelines 3.A.2.a. And third, the amendment is not retroactive, meaning the presumptive 5-year cap is cold comfort for individuals with existing lengthy probation terms.

consensus that re-enfranchisement is critical for rehabilitation, in part, because voting is the ultimate act of civic engagement. *See* Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 Minn. L. Rev. 1913, 1927 (2015); Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 429 (2012); Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 Ann. Rev. Soc. 89, 97–98 (2003).

Amici here compellingly illustrate this point. For example, the American Parole and Probation Association noted that "in addition to helping individuals re-enter their communities, reinstating the right to vote is strongly tied to lower recidivism rates and increased public safety." Likewise, the Ramsey County Attorney's Office argued that disenfranchising residents living in the community amounts to a disservice for both the person and the entire community. The Legislature has never offered an affirmative reason to disenfranchise persons on probation, parole, or supervised release. The sole stated interest related to voting rights of persons in the community is in restoring them to effective citizenship. But the record reveals that the statute does just the opposite. Accordingly, not only is the record devoid of any actual evidence of a tight fit between the statute and the government's interest in rehabilitation, but the current statute also actually *undermines* that

goal.[11] I would therefore conclude that section 609.165 fails under the equal protection guarantee of Article I, Section 2, of the Minnesota Constitution.[12]

B.

I am reminded of Justice Wahl's poignant observation in *Russell*: "There comes a time when we cannot and must not close our eyes when presented with evidence that certain laws, regardless of the purpose for which they were enacted, discriminate unfairly on the basis of race." *Russell*, 477 N.W.2d at 888 n.2. Indeed, Justice Wahl's admonition reminds

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[11] My application of *Russell* in this case would not lead to a parade of horribles invalidating every criminal statute that may disproportionately impact a racial minority. Section 609.165 is unique in the criminal code in two respects: first, it involves voting rights, not criminalizing conduct, and second, it has a single, undisputed purpose: rehabilitation. In this case, the means-end fit analysis is not a close call; section 609.165's means to achieve its sole objective of rehabilitation—delaying re-enfranchisement until the sentence is discharged—is entirely antithetical to rehabilitation.

In contrast, for other criminal statutes, the Legislature's overarching purposes for the criminal code apply, including protecting public safety. *See* Minn. Stat. § 609.01, subd. 1(1) (listing public safety first among the general purposes of the criminal code). Thus, even if a litigant were able to demonstrate that rates of convictions for crimes such as murder, robbery, and assault are disproportionately higher for racial minorities, the litigant would then have the additional burden of demonstrating that there is no fit between the "government interest and the means employed to achieve it in the form of actual evidence." *Fletcher*, 947 N.W.2d at 19 n.12 (citing *Russell*, 477 N.W.2d at 888 n.2). One cannot seriously maintain that there is not a tight fit between protecting public safety and criminalizing conduct such as murder, robbery, and assault. I therefore do not believe that my theory would open the floodgates to *Russell* challenges of every criminal statute.

[12] Because my position has not won the day, I do not discuss potential remedies for the unconstitutionality of section 609.165. But I reject the majority's musing that had we found section 609.165 unconstitutional, "an effective judicial remedy may not have been possible." That suggestion "is incompatible with the principle that where there is a right, there is a remedy." *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018). The difficulty of fashioning an effective remedy does not excuse us from honoring appellants' constitutional entitlement to a "remedy in the laws for all injuries or wrongs which [they] may receive to [their] person, property or character." Minn. Const. art. I, § 8.

Minnesotans that our state constitution vigorously guards against the surreptitious ways that laws, even well-meaning laws, can harm communities of color in this state. In closing its eyes to the clear racial disparities emanating from section 609.165, this court demeans our constitution's promise of equal protection and all but relegates *Russell*'s wisdom to a footnote in history.

Upholding the constitutionality of section 609.165, as the court does here, rationalizes and sanctions the racial discrimination inexorably woven into the statute. The real-world consequence of this legislation is that more than 50,000 Minnesotans—disproportionately Minnesotans of color—are politically voiceless until lengthy probation and supervised-release terms conclude. And these sentences emerge from a backdrop of persistent racial discrimination and disparate impacts across the criminal justice system. It is well-documented that felony convictions—and the resulting imprisonment and disenfranchisement—have been and continue to be a prominent modern method of racial discrimination. *See, e.g.*, Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 Am. J. Socio. 559, 563–64 (2003); Pippa Holloway, *"A Chicken-Stealer Shall Lose His Vote": Disenfranchisement for Larceny in the South, 1874–1890*, 75 J. S. Hist. 931, 934–35 (2009); *see generally* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (arguing that mass incarceration is a rebirth of Jim Crow, in which criminal convictions are used to continue denying Black Americans civil rights).

Our laws have largely advanced from color-coded provisions, explicit classifications, and *de jure* discrimination. Yet, beyond the pages of codes and reporters, our legal system still harbors inequality. Although our tools of equal protection analysis may not always be perfectly tailored for addressing the insidious ways in which racial discrimination permeates our laws, that challenge does not absolve us from our responsibility to apply those tools to address the claims before us. As we stated in *Erlandson v. Kiffmeyer*, 659 N.W.2d 724 (Minn. 2003), unjustified deprivation of voting rights strikes at the fabric of the State's constitutional system, making it essential that the courts exercise particular care in reviewing any "statute that denies some residents the right to vote." *Id.* at 733 (citation omitted) (internal quotation marks omitted).

Nevertheless, in arriving at its conclusion by a path for which no party has advocated, the majority relies upon a disingenuous portrayal of section 609.165 and an unduly cramped version of our *Russell* doctrine. I cannot acquiesce in the majority's rough treatment of our innovative precedent. Properly understood, *Russell* requires us to look beyond form and examine how section 609.165 functionally disenfranchises a disproportionate number of Minnesotans of color. Indeed, *Russell* deserves a broad rather than a begrudging application, for it embodies our state and nation's abiding commitment to equality for "the very class of persons whose history inspired the principles of equal protection." *Russell*, 477 N.W.2d at 889. It is the solemn duty of the judiciary, when called upon, to act decisively when that commitment to a more equal union is dishonored. Today, we were called to act; today, we failed to do so. And with judicial redress largely

foreclosed by today's decision, the ball is now in the Legislature's court, and it must decide whether it will continue denying the right to vote to over 53,000 Minnesotans.

I regret that the court limits the ability of the Minnesota Constitution's equal protection principle to address this injustice. The right to vote is too central to our democracy, and the constraints on that right are too perilous, for us to ignore. I dissent.

MINNESOTA JUSTICE RESEARCH CENTER

FELON DISENFRANCHISEMENT IN MINNESOTA

February 21, 2019

The Minnesota Constitution prohibits individuals convicted of felony-level offenses from voting "unless restored to civil rights…" (Art. VII, Sec. 1). Under current Minnesota law, the right to vote is restored once the sentence is fully completed, including any periods of incarceration, probation, or post-prison supervision (Minn. Stat. 609.165, subd. 1; 201.014, subd. 2). Proposed legislation (HF 40/SF 856) would restore the right to vote for people convicted of felony offenses following the completion of any period of incarceration imposed and executed as part of the sentence.

Table 1. Disenfranchisement in Minnesota by Correctional Status (as of 1/1/2018)[i]

	Prison/Jail	Probation	Post-Prison Release	Total
Total	9,963	45,652	7,668	63,283
Federal	N/A	103	991	1,094
State	9,963	45,549	6,677	62,189
State only				
Male	9,275	34,727	6,030	50,032
Female	688	10,822	647	12,157
American Indian	966	2,968	563	4,497
Asian/Pacific Islander	256	1,207	155	1,618
Black	3,469	8,997	1,731	14,197
White	5,233	30,478	4,210	39,921
Other/Unknown	39	1,899	18	1,956
Hispanic	564	2,572	479	3,615
Non-Hispanic	9,399	42,977	6,198	58,574

At the beginning of 2018, an estimated 63,283 Minnesotans incarcerated in prison or jail (not including people in federal prison), on probation, or on post-prison supervision for felony-level offenses were disenfranchised (see **Table 1**).[i] Though demographic information was unavailable for federal probationers and post-prison releasees, the majority of the 62,189 disenfranchised for felony offenses convicted in Minnesota state court were White, Non-Hispanic, and male.[ii]

Racial Distribution of Disenfranchisement

The rate of disenfranchisement (that is, the number disenfranchised divided by the voting age population[iii] for each group) is not evenly distributed across race groups. As shown in **Figure 1**, the disenfranchisement rate under current law for Minnesotans who identify as American Indian (9.2%) and Black (5.9%) is considerably higher than for White (1.1%) and Asian/Pacific Islander (0.8%).

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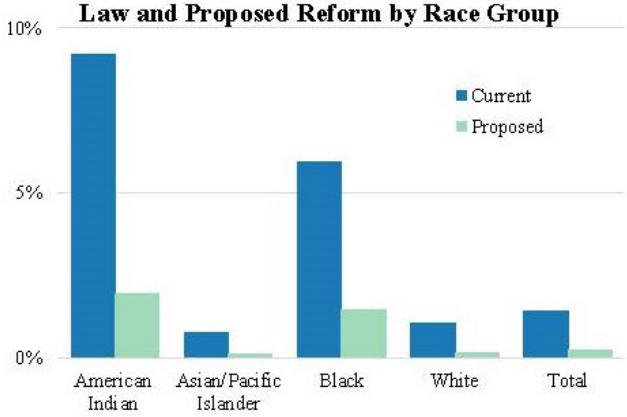
But under the proposed legislation that would restore the right to vote upon release from incarceration, disenfranchisement rates would shrink to fractions of what they are under current law. The American Indian rate would drop to almost a fifth of the current rate, or 2%; the Black rate would fall to 1.5%, and both the White and Asian/Pacific Islander rates would fall to 0.1%. While disparities would persist, the proposed legislation would reduce disenfranchisement rates markedly.

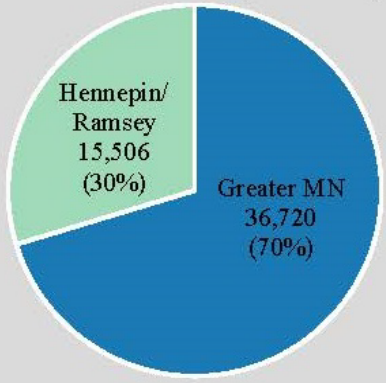
Figure 1. Disenfranchisement under Current Law and Proposed Reform by Race Group



Geographic Distribution of Disenfranchisement

The proposed legislation would restore the right to vote for the estimated 53,320 Minnesotans serving on state or federal felony probation or post-prison supervision (as of 01/01/2018).[i] Minnesota's non-incarcerated disenfranchised population is spread throughout the state, but of those on felony supervision for state felony offenses, approximately 70% live outside of Hennepin or Ramsey counties (see **Figure 2**). There are an additional 1,094 disenfranchised Minnesotans under supervision by the federal criminal court system (mostly post-prison supervision), but location data for those individuals were not available.

Figure 2. State Probation/Post-Prison Supervision Population, Metro vs Non-Metro (as of 1/1/18)[i]



This unequal distribution is due, at least in part, to both longer average probation sentences and the sheer volume of felony convictions in Greater Minnesota compared to Hennepin/Ramsey, as shown in **Table 2**. According to sentencing data from the Minnesota Sentencing Guidelines Commission, only one-third (31,511) of felony cases sentenced from 2012-2017 were in Hennepin or Ramsey county, while two-thirds (66,138) were in counties in Greater Minnesota.[ii]