STATE OF MINNESOTA
IN SUPREME COURT

A20-1264

Jennifer Schroeder, et al., Petitioners, v. Minnesota Secretary of State Steve Simon, Respondent.	**BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF NEITHER PARTY**

Anthony B. Sanders
(MN Bar No. 0387307)
INSTITUTE FOR JUSTICE
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
Tel: (612) 435-3451
Fax: (612) 435-5875
Email: asanders@ij.org

Adam Shelton* (D.C. Bar No. 1644561)
Anya Bidwell* (Tex. Bar No. 24101516)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: ashelton@ij.org;
abidwell@ij.org

Attorneys for Amicus Curiae Institute for Justice
**Admitted pro hac vice*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

Statement of *Amicus Curiae*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and by restoring constitutional limits on the power of government. As part of that mission, IJ litigates constitutional cases in state and federal courts nationwide to defend property rights, economic liberty, freedom of speech, and educational choice.

IJ's cases are often litigated under state constitutions, including the Minnesota Constitution. As IJ has argued in many cases, state constitutions are an important source of protection for individual rights and many of their provisions must be interpreted independently from their federal counterparts. *See, e.g.*, *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152 (Minn. 2017); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69 (Tex. 2015). In this brief, the Institute for Justice will show why Article I, Section 2 of the Minnesota Constitution must be interpreted differently from the Fourteenth Amendment's Equal Protection Clause.[2]

---

[1] Counsel certifies that this brief was authored in whole by listed counsel for *amicus curiae* Institute for Justice. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the Institute for Justice, which was granted leave to participate as *amicus curiae* by this Court's Order dated August 26, 2021.

[2] The Institute for Justice takes no position on the merits of this dispute. Its interest is solely in the proper interpretation of Article 1, Section 2.

Statement of the Case and Facts

Amicus adopts the Statement of the Case and Statement of Facts set forth in the Brief of Petitioner Jennifer Schroeder, et al.

Argument

Unchanged since 1857, the first sentence of Article I, Section 2, of the Minnesota Constitution states:

> No 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.

In contrast, the Equal Protection Clause of the Fourteenth Amendment, adopted eleven years later, states:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

While both are fundamental and noble protections of our constitutional liberties, they are not the same. Their text cannot even charitably be said to be similar. They are different protections with different backgrounds and different purposes, as different from each other as, for example, they each are from the First or Eighth Amendments. The federal clause is, of course, an equal protection clause. Article I, Section 2, on the other hand, is not. As explained below, it is a law of the land clause, otherwise known as a due process clause.

So why does this Court interpret these two clauses as the same—not just similarly but, with a very small exception, *exactly the same*? There is no defensible

justification. For decades this Court has called Article I, Section 2 "Minnesota's Equal Protection Clause." That is confusing enough, but for some time at least the Court interpreted the clause a bit differently from the federal clause, with a Minnesota-specific "rational basis test" that protected Minnesotans from arbitrary distinctions at a higher level than the federal courts do under the Fourteenth Amendment. *See, e.g.*, *State v. Russell*, 477 N.W.2d 886 (Minn. 1991).

But that ended last year when this Court took a wrong turn in *Fletcher Properties v. City of Minneapolis*, 947 N.W.2d 1 (Minn. 2020). There, the Court walked away from *Russell* and held that the rational basis test for the Fourteenth Amendment's Equal Protection Clause is the standard of review for most challenges under Article I, Section 2. While there remains a higher standard for fundamental rights and suspect classes, that division simply borrows from federal jurisprudence. The one other exception—invoked by Petitioners here—is that claims involving a disparate impact based on race are also entitled to a higher level of protection. *Id.* at 27. Amicus takes no position on the merits of Petitioners' challenge. Amicus does note, however, that it is extremely odd that Petitioners are forced to draw upon a sliver of difference between the interpretation of two textually distinct clauses, where this Court's interpretation of one of them is entirely free of any binding federal authority. The narrow

window Petitioners find themselves in is a creation entirely of this Court's making.

Which means this Court is entirely free to put things right. This is a brief of first principles, principles that the Court should return to if Article I, Section 2 is to realize its independent value as a protection of the "rights or privileges" of Minnesotans. The Court should overrule *Fletcher Properties* and interpret Article I, Section 2 as it was written and designed: as a due process clause. Failing that, at a minimum this Court should reject the federal rational basis test in interpreting Article I, Section 2 and apply the well-understood three-part test from cases such as *Russell* in all rational basis challenges, not just those involving race.

While this Court decided *Fletcher Properties* recently, this Court has not hesitated to reverse course quickly in the past. For example, in *Nyflot v. Commissioner of Public Safety*, the Court determined that the Sixth Amendment's right to counsel did not attach to "the decision of whether to submit to chemical testing" in the context of a blood alcohol test. 369 N.W.2d 512, 516 (Minn. 1985). Just six years later, this Court held: "an individual has the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). The decision in *Nyflot* was based on the U.S. Constitution,

while the decision in *Friedman* was based on the Minnesota Constitution. But the Court nevertheless overturned its reasoning. *Id.* at 832 ("Because we do not find the *Nyflot* analysis persuasive under our constitution, we conclude that article I, section 6 requires that the right to counsel attaches at the chemical testing stage."). Amicus is asking this Court to overturn a recent decision on independent state constitutional grounds and arguing that this Court should interpret the Minnesota Constitution independently from the U.S. Constitution—much like it did in *Friedman*. Further, this would be far from the only time that this Court has overturned, at least in part, its own recent decisions.[3]

In Section I of this brief, Amicus examines some obvious but nevertheless all-too-often overlooked differences between Article I, Section 2 and the Fourteenth Amendment's Equal Protection Clause. Section 2 is textually very

---

[3] *See, e.g.*, *State v. Fleck*, 810 N.W.2d 303, 311-12 (Minn. 2012) (overruling *State v. Vance*, 734 N.W.2d 650 (Minn. 2007), insofar as *Vance* explained that "assault harm" was a specific intent crime, rather than a general intent crime); *State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988) (overruling *State v. Howard*, 324 N.W.2d 216 (Minn. 1982), insofar as *Howard* held that a totality of the circumstances test was required for determining whether an individual had invoked the right to counsel, rather than an arguable standard that *Robinson* adopted); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977) (overruling *Janke v. Janke*, 195 N.W.2d 185 (Minn. 1972), insofar as *Janke* held that a woman did not have a general right to recover medical expenses as that right belonged exclusively to her husband); *Beaudette v. Frana,* 173 N.W.2d 416 (Minn. 1969) (overruling *Hovanetz v. Anderson*, 148 N.W.2d 564 (Minn. 1967), insofar as *Hovanetz* upheld interspousal immunity for tort actions).

different and was adopted over a decade before the Fourteenth Amendment. It should not be interpreted to mean the same thing.

In Section II of this brief, Amicus explains how this Court should interpret Article I, Section 2. It first details how Article I, Section 2 and the due process clause of Article I, Section 7 came to be: through the two rival conventions of 1857 drafting them independently and placing them both in the same Constitution. Thus, the Minnesota Constitution in fact has two clauses that protect due process principles: Article I, Section 2, and Article I, Section 7. But the two clauses are nevertheless different from each other and not surplusage. Each section applies to different groups and protects different rights, with Section 2 protecting a more-expansive set of "rights or privileges" than those in Section 7.

Amicus next explains how having two independent due process clauses would be a return to past practices for this Court. In Minnesota's early years this Court *did* interpret Section 2 as a due process clause, but since then the Court has strayed from the clause's text and history. After many years of confusion, and little explanation, it came to regard Section 2 as an equal protection clause. There is no reason the Court needs to stay on that wrong path.

Next, Amicus provides the background to both Section 2 and Section 7: Magna Carta. The principles of Chapter 39 of Magna Carta were understood to be common to both "law of the land clauses" and "due process clauses" at the

time of the state's founding. This should animate how the Court interprets Section 2.

Further, Amicus explains how reinterpreting Article I, Section 2 as a due process clause in no way means there will not be equal protection guarantees in this state. There are several other sources of equal protection principles in the Minnesota Constitution, including—in a crucially different way than it is interpreted today—Section 2 itself.

Finally, Amicus states that if this Court does not yet wish to take the step of reorienting Section 2 as a due process clause, it should nevertheless at a minimum overrule *Fletcher Properties* and reinstate the former three-part test for all equal protection rational basis claims. That test at least accounts for the distinctive textual formulations of Section 2 and the Fourteenth Amendment and better protects the "rights and privileges" of Minnesotans.

I. Article I, Section 2 and the Equal Protection Clause of the Fourteenth Amendment are Textually and Historically Distinct and Should Be Interpreted Independently.

Last year, in *Fletcher Properties v. City of Minneapolis*, this Court held that the federal rational basis test is the rational basis test for challenges brought under Article I, Section 2 with a narrow exception for racial disparate impact claims. 947 N.W.2d 1, 22 (Minn. 2020). Seeking to clear up Minnesota's equal protection jurisprudence, which had been "inconsistent and confusing," *State v.*

Cox, 798 N.W.2d 517, 525 (Minn. 2011) (Stras, J., concurring), *Fletcher Properties* abandoned the three-part state specific test for evaluating challenged laws that treat groups differently. 947 N.W.2d at 22. As Justice Stras once explained, Minnesota's equal protection jurisprudence had been inconsistent and confusing due, in part, to "equal protection" not being enumerated in the Minnesota Constitution and "[d]eterming the nature of a right that is not specifically enumerated . . . is unsurprisingly a matter of some complexity and difficulty." *Cox*, 798 N.W.2d at 526 (Stras, J., concurring). *Fletcher Properties* certainly cleared up some confusion, but only by continuing to ignore the clause's text and its differences from the Fourteenth Amendment.

Article I, Section 2 of the Minnesota Constitution states, 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." Meanwhile, according to the Fourteenth Amendment's Equal Protection Clause, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Remarkably, this Court has not explained in detail how the former means the same as the latter despite their obvious textual and historical differences. Nor has this Court recently analyzed how the interpretation of this clause has shifted since its adoption. *See infra*, Section II.B.

This is obvious, but bears restating: Minnesota's Constitution was adopted a decade before the Fourteenth Amendment, five years before the Emancipation Proclamation, and four years before the Civil War. The Civil War and resulting protections for the freedmen were critical catalysts for adopting the Fourteenth Amendment. *See, e.g.*, *Pena-Rodriguez v. Colorado*, 173 S. Ct. 855, 867 (2017); Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 2 (2014) *("*"[T]he overall goal of the Amendment [was] repairing and reconstructing the United States in the aftermath of a civil war in which the slaveholding states betrayed their oaths and rebelled against the Union in order to preserve their 'peculiar institution.'"); Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 30, 67 (1993). But these motivations and series of events were not present when Minnesota adopted its Constitution. There were certainly debates over race and extending the franchise—and these disagreements were part of the reason for the split constitutional convention—but these debates did not concern the first sentence of Article I, Section 2 and were not the same as the problems addressed by the Fourteenth Amendment.[4] *See* Section II.A, *infra*. In contrast, instead of

[4] It should be noted that Minnesota forbade slavery (which, in any case, had been banned since the Northwest Ordinance of 1787) in the *second* sentence of Article I, Section 2, anticipating the Thirteenth Amendment but not the Fourteenth's Equal Protection Clause: "There shall be neither slavery nor involuntary servitude in

ensuring the equal protection of the freedmen and all other citizens, as the federal Equal Protection Clause was intended to do, the first sentence of Article I, Section 2 was intended to serve as a due process or law of the land clause. *See* Section II.C, *infra*.

The textual and historical differences of the two clauses raise two obvious questions: (1) Why does the Court nevertheless interpret Article I, Section 2 as an "equal protection clause"? and (2) Even if the Court should interpret Section 2 as an "equal protection clause," why does it apply the jurisprudence of the United States Supreme Court, interpreting a textually and historically different "equal protection clause"? As the detailed analysis of recent caselaw in *Fletcher Properties* unintentionally made clear, the answer to both questions is simply inertia.[5] Despite providing an extensive analysis of recent caselaw on the proper standard for interpreting Minnesota's "equal protection guarantee," the Court in *Fletcher*

---

the state otherwise than as punishment for a crime of which the party has been convicted." Minn. Const. art. I, § 2.

[5] The closest to an answer came in Justice Anderson's concurrence, where he stated that applying the federal rational basis test "brings predictability and greater certainty to our law." *Fletcher Properties*, 947 N.W.2d at 31 (Anderson, J., concurring). Yet this could be said for interpreting any provision of the Minnesota Constitution in line with its federal counterpart, no matter how different the text or strained the analogy. As Justice Thomas has said in a similar context, "Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied." *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (detailing how applying the federal rational basis test to the Public Use Clause renders it free of most protection, and thus more predictable and certain).

Properties spent no time addressing *why* Section 2 is such a guarantee and why the federal test should apply to it. Moreover, in over 10 pages discussing Section 2, the Court never addressed the Section's text. *Fletcher Properties*, 947 N.W.2d at 19-30. Nor did it consider the factors this Court usually applies when it considers if it should interpret the Minnesota Constitution independently, nor question whether the underlying standard, the federal rational basis test, is any good.

It is time for this Court to correct that omission. After all, this Court has attempted to answer these questions with other clauses in the Minnesota Constitution, even where the constitutional text and motivations are much more analogous. *See, e.g.*, *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994) (search and seizure clauses); *State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985) (double jeopardy clauses). *See also Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005) (providing standards for deciding whether to interpret the Minnesota Constitution differently from the U.S. Constitution).

Factors that this Court takes into consideration when it asks if it should follow federal interpretations include "variations in text, constitutional history, early state precedent construing the applicable provision of the state constitution, [and] relatedness of the subject matter to state-level enforcement." *State v. Harris,* 590 N.W.2d 90, 97-98 (Minn. 1999). With Article I, Section 2, all of these factors counsel against following the U.S. Supreme Court's lead. Section II, *infra*.

While this Court has not determined a complete hierarchy of these and other factors, textual similarities between the Minnesota Constitution and the U.S. Constitution are, unsurprisingly, paramount. *See State v. Fuller*, 374 N.W.2d 722, 727 (Minn. 1985) (describing federal court interpretation of textually similar phrases "inherently persuasive"); *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152, 157 (Minn. 2017) (explaining that the analysis starts with the text, and when the text in the same, only special circumstances will warrant departure). Common sense also supports this position. If two clauses are textually identical, and if the state constitution was drafted and adopted after the drafting and adoption of the language in the U.S. Constitution, then there is some logic to looking to the U.S. Constitution in interpreting the state constitution, absent any historical evidence showing that such a relationship was not intended. But that is not the situation here, as there are no textual similarities between the relevant provisions of Article I, Section 2, and the Fourteenth Amendment's Equal Protection Clause.

These textual differences should be reason enough to interpret Article I, Section 2 independently. But bolstering this conclusion is the fact that the Minnesota Constitution was adopted over a decade *before* the Fourteenth Amendment and the historical context surrounding the two operative provisions is different—substantially so.

Thus, this Court should interpret Article I, Section 2 independently of the Fourteenth Amendment's Equal Protection Clause.

II. Article I, Section 2 of the Minnesota Constitution Should Be Interpreted as a Due Process Clause.

This Court should interpret Article 1, Section 2 as a due process clause. Such an interpretation fits with the text of Section 2, which protects members from being "disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land." Such interpretation is also consistent with Section 2's history, which has its roots in Magna Carta.

Article I, Section 7 *also* is a due process clause, stating, in relevant part that "[n]o person shall . . . be deprived of life, liberty or property without due process of law." But as demonstrated by Minnesota's constitutional history, the two due process clauses do not overlap to a significant degree and, in crucial ways, complement each other. Further, and importantly, even if Article I, Section 2 is interpreted consistently with its original meaning (as a due process clause and not an equal protection clause), other provisions in the Minnesota Constitution would still ensure the equal protection guarantee.

The following details how this admittedly odd situation of two due process clauses came to be in the Minnesota Constitution's framing, how—despite an early appreciation for how Section 2 should be interpreted—this Court went off course over the years in Section 2's interpretation; how "law of the land" and

"due process" were well understood to have similar meanings because of their roots in Magna Carta; and how Article I, Section 2 and other provisions in the Minnesota Constitution still protect equal protection even if Article I, Section 2 is interpreted as protecting due process.

A. Minnesota's two constitutional "conventions" yielded two clauses that protect due process principles, but each is different in important ways.

Minnesota has a unique constitutional history because Minnesota had two separate and simultaneous constitutional "conventions" (really two rival factions within the same convention). A single convention convened on July 13, 1857, but the Republican and Democratic delegates could not stop fighting—they were not even able to elect officers for the convention. Fred L. Morrison, *An Introduction to the Minnesota Constitution*, 20 Wm. Mitchell L. Rev. 287, 296 (1994). So they split apart, holding their own "conventions," and drafting their own constitutions. *Id*. Then delegates from both groups met together in a joint committee—a compromise committee—and melded the two together. *Id*.

What is now Article I, Section 2 originated at the Democratic convention. William Anderson & Albert J. Lobb, *A History of the Constitution of Minnesota* 118 (1921); *see also The Debates and Proceedings of the Minnesota Constitutional Constitution* 203 (Francis H. Smith, rept., St. Paul 1857) (record of the Democratic convention) (hereinafter "*Democratic Convention*"). It was introduced to the convention by a committee that drafted a proposed bill of rights. *Democratic*

Convention at 203. What is now Section 2's first sentence, other than punctuation changes, was proposed as the second section of the draft bill of rights, and the proposed third section was similar to what is now Section 2's second sentence, forbidding slavery. *Id.* No debate is recorded concerning the language.

As for the due process clause in what came to be Article 1, Section 7, it was drafted by the Republican convention. *Debates and Proceedings for the Minnesota Constitution for the Territory of Minnesota* 105 (T. Andrews, rept., St. Paul 1858) (record of the Republican convention) (hereinafter "*Republican Convention*"). A provision extremely similar to what is now Section 7 was introduced as Section 8 of a proposed bill of rights by the Republican convention's Bill of Rights Committee, but it lacked the due process language. *Id.* at 104. Delegate Secombe then moved to add "nor be deprived of life, liberty or property without due process of law" to the middle of the draft section, where it is now, and the motion carried. Again, no debate is recorded.

A search by Amicus counsel through the record of both conventions reveals no mention of the phrase "due process" anywhere in the Democratic record other than in the completed, post-compromise, Constitution itself, and no mention of the phrase "law of the land" in the Republican convention in the context of constitutional text (there are some statements that the state constitution will be "the law of the land," and the like, but nothing about those

words being in the Constitution itself). It seems both sets of delegates had the same basic idea in mind, using one of the two accepted (though different) ways to articulate it without using, let alone discussing, the other formulation.

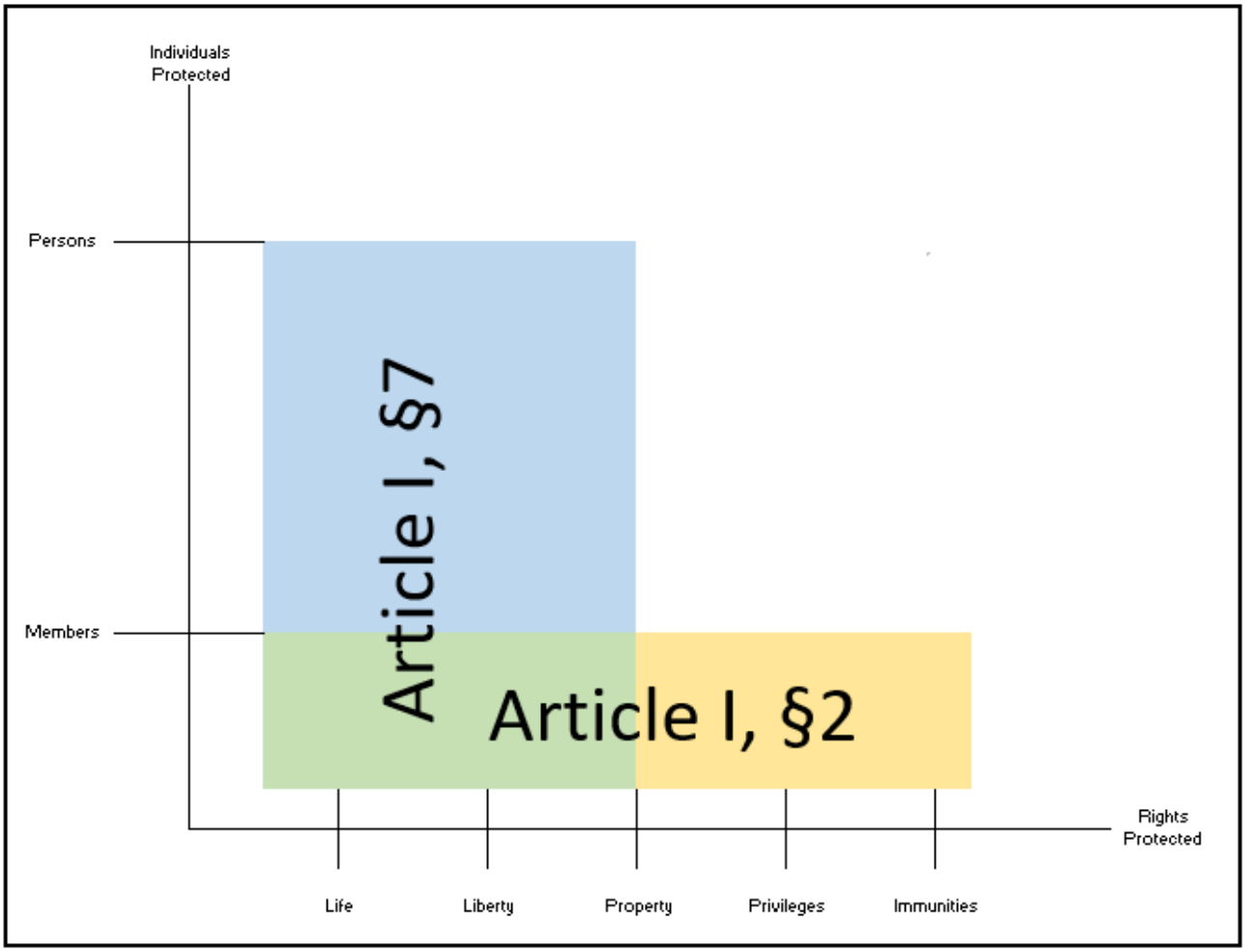
By 1857, indeed by 1789, "law of the land" and "due process" clauses were generally accepted to have the same meaning. Andrew T. Bodoh, *The Road to "Due Process": Evolving Constitutional Language From 1776 to 1789*, 40 T. Jefferson L. Rev. 103, 115-16, 120-160 (2018); see also Section II.C, *infra*. Yet there is no explanation as to why the joint compromise committee nevertheless adopted both the law of the land clause in Article I, Section 2, and the due process clause of Article I, Section 7. Now, as this Court knows well, the process by which the handiwork of the two "conventions" came to be Minnesota's Constitution was not exactly a masterstroke of Madisonian draftsmanship. *See* Mary Jane Morrison, *The Minnesota State Constitution: A Reference Guide* 1-2 (2002) (detailing the rushed work of the compromise committee). For example, the adopted Constitution lacked, and still lacks, a protection for peaceable assembly even though both groups included one in their drafts. *Id.* at 2. And, while most of what is now Section 16, regarding religion, comes from the Republican convention, the first sentence, regarding unenumerated rights, comes from the Democratic convention. *Republican Convention* at 109; *Democratic Convention* at 204 (proposed Section 20). Why these two sets of protections are put in the same

section, rather than different ones, is inextricable and best answered with Occam's Razor: They were put together in a hurry. This same explanation applies to the existence of the two due process clauses: one in Article I, Section 2; another one in Article I, Section 7.

But just because a *type* of "due process clause" is in the Constitution twice does not mean one or the other is mere surplusage. Although they are of the same kind, they do not have identical text. They should be interpreted to have different, although related, meanings.

A review of the texts demonstrates that each ensures the protection of due process principles in different situations. First, each clause applies to different groups: Section 2 protects "member[s] of this state" and "citizens" while Section 7 protects "person[s]." Second, each protects different constitutional rights: Section 2, protects "rights or privileges" while Section 7 protects "life, liberty or property." While life, liberty, and property are "rights or privileges," there are many more rights or privileges than just those three. In sum, the due process protections in Section 7 may apply to more people (persons v. members), but the due process protections in Section 2 protect more rights (rights or privileges v. life, liberty or property). This chart illustrates the overlapping, yet distinct,

protections each clause provides.



Thus, both clauses should be interpreted as due process clauses, but distinct due process clauses. While each protects due process principles, each protects different rights and different groups. There will be circumstances of overlap between the two clauses when each can be invoked as protecting the same litigant and the same right. But there are situations when only one or the other will apply. Thus, this Court should interpret Article I, Section 2, as a due process clause so that members of the state cannot "be disfranchised or deprived

of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or judgment of his peers." Minn. Const. art. 1, § 2.

Further, whether Section 2 is a due process clause that has substantive as well as procedural protections is not a question this Court has to answer today. However, given the use of law of the land clauses at the time it was adopted, there is strong evidence that Section 2 provides substantive guarantees. *See generally* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 409 (2010).

B. This Court originally interpreted Section 2 as a due process clause, but without explanation shifted its approach over the years.

If this Court reorientates Section 2 as a due process clause, it will not be the first time it has interpreted it in that way. The early jurisprudence for Article I, Section 2, made clear that it protected and ensured due process. Yet, that did not last. Importantly, the evolution away from due process occurred gradually and without consideration of what the Section means or even how the Section guarantees equal protection. The result is that there is now a monumental difference between how the Section was originally interpreted and how it is interpreted now. This Court should correct that error.

This Court first discussed the meaning of Section 2 in *Baker v. Kelley*, 11 Minn. 480 (1866). There, this Court paired Article I, Sections 2 and 7 together in holding unconstitutional a law that limited to a year the time an individual had

to challenge a conveyance of their property for tax purposes. In doing so, this Court looked to, and quoted extensively from, a New York state court decision interpreting the New York Constitution, the only other state constitution that included both a "law of the land" clause *and* a "due process" clause. N.Y. Const. art. I, §§ 1, 6; NY. Const. of 1846, art. I, §§ 1, 6.[6] This Court reaffirmed Section 2's due process principles in the 1860s, 1880s, and 1890s. *See Beaupre v. Hoerr*, 13 Minn. 366, 368-69 (1868) (citing approvingly to the interpretation of both clauses together in *Baker*); *State v. State Bd. of Med. Exam'rs*, 26 N.W. 123, 124 (Minn. 1885) (explaining that due process and law of the land mean the same thing); *Cameron v. Chi., Milwaukee & St. Paul Ry. Co.*, 65 N.W. 652, 653 (Minn. 1896) (explaining that Article I, Sections 2 and 7 were the same as the Fourteenth Amendment's Due Process Clause).

In 1897, however, this Court began to shift the interpretation of the clause. In holding unconstitutional a Minnesota law that required peddlers of goods

[6] The language of the provisions of the 1846 constitution has remained largely unchanged, except the omission of a comma in the "due process clause" in New York's current constitution. Additionally, it bears noting that the "law of the land" clause originated in New York original constitution, which predates the U.S. Constitution, and by extension the Fifth Amendment's Due Process Clause. *See* N.Y. Const. of 1777, art. XIII ("no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers."). The explicit due process language seems to have been added in with the constitution of 1821. N.Y. Const. of 1821, art. VII, Sec. 7.

who did not manufacture products to obtain a license when the manufacturer could sell the same products without a license, the Court relied upon Minnesota's prohibition on special laws, Article IV, Sections 33 and 34 (now Article XII, Sections 1 and 2). *State v. Wagener*, 72 N.W. 67, 68 (Minn. 1897). Justice Mitchell concurred in this opinion explaining that he would have found the law unconstitutional even if the special laws provisions had not been adopted in 1891. *Id.* (Mitchell, J., concurring). He believed that Article I, Section 2, prohibited "class legislation" and that the licensing requirement was unconstitutional under that provision. *Id.* Unfortunately, Justice Mitchell gave no reason for this conclusion and cited no precedent in arriving at it.

This Court continued to cite the special laws provisions together with Article I, Section 2 in determining whether a law was unconstitutional class legislation. *See, e.g.*, *Thomas v. Hous. & Redevelopment Auth. of Duluth*, 48 N.W.2d 175, 188 (Minn. 1951). But there was never an official explanation as to what led to this change in interpretation. And sometimes the special laws provisions were cited alone and other times Article I, Section 2 was cited alone in determining whether a certain law was unconstitutional as a special law or class legislation. *See, e.g.*, *In re Humphrey*, 227 N.W. 179 (Minn. 1929) (holding unconstitutional a law which offered bar admission without examination only to disabled veterans as a "special law" prohibited by Article I, Section 2, and Article IV, Sections 33

and 34 (now Article XII, Sections 1 and 2), without explaining why both were necessary and citing only cases invoking Article IV, Sections 33 and 34); *Fabio v. City of Saint Paul*, 126 N.W.2d 259, 261 (Minn. 1964) (examining Article I, Section 2, Article IV, Sections 33 and 34, and the Fourteenth Amendment together). But Article I, Section 2 continued to be invoked as protecting due process principles into the mid-1900s. *See State ex rel. Palarine v. Ferguson*, 281 N.W. 765, 767 (Minn. 1938); *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949).

Eventually, though, this Court began to interpret Article I, Section 2 as guaranteeing equal protection on its own and quickly began to develop its own equal protection jurisprudence, including a three-part test for claims not implicating a suspect class or fundamental rights. *See Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979). While there was some debate over whether the state specific test and the federal rational basis test were actually different, it is clear that this Court understood them to be, at least in some cases. *See, e.g.*, *Wegman v. Village of Lexington*, 309 N.W.2d 273, 281 n.12 (Minn. 1981). But *Fletcher Properties* did away with the state specific standard in favor of the federal rational basis test, with only the narrow racial disparate impact exception. Thus, instead of righting past wrongs, by rejecting the three-part test *Fletcher Properties* compounded those wrongs, applying a federal standard to a state clause that already was read to mirror a federal clause (the Fourteenth

Amendment's Equal Protection Clause) when it shared none of its relevant language.

C. "Due Process" and "Law of the Land" have equivalent meanings as both find their origins in Magna Carta.

This case presents this Court with a chance to reorient its Article 1, Section 2 jurisprudence and interpretation and realign the meaning of the clause with its original understanding and purpose. In doing so, this Court should keep in mind this clause's connection to Magna Carta. Magna Carta was one of the main sources drawn upon by the drafters of the Minnesota Constitution. William Anderson & Albert J. Lobb, A *History of the Constitution of Minnesota* 131 (1921). And this Court has noted a general connection to Magna Carta for rights protected by the Minnesota Constitution. *See, e.g.*, *State v. Rosenberg*, 192 N.W. 194, 194 (Minn. 1923) (explaining that the right to trial by jury finds its roots in Magna Carta). This is true for Article I, Section 2 as well.

Chapter 39 of the original Magna Carta provided: "No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Magna Carta, ch. 39, in A.E. Dick Howard, *Magna Carta: Text and Commentary* 43 (1964) (translation from the original Latin). This phrase was readopted in the 1225 version of Magna Carta as part of Chapter 29, with some additions to what had been Chapter 39, but the

operative language remained the same. *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law* 340 (Ellis Sandoz ed., 2008).

It is well accepted that this clause is the basis for clauses that protect due process principles. Howard, *supra*, at 50. As early as the seventeenth century Edward Coke recognized the equivalence, and when the first "due process clause" was adopted in an American constitution—in the Fifth Amendment itself—it was understood to have a similar meaning as the law of the land clauses which already were in several state constitutions. Bodoh, *supra*, at 115-16, 120-160 (detailing the various clauses' adoptions). Thus, Magna Carta's "law of the land" guarantee serves as the basis for both Article I, Section 2, and Article I, Section 7.

And more was meant by "law of the land" and "due process" when Minnesota adopted its Constitution than some might argue it does now. This Court acknowledged as much in *Baker*, explaining that "due process of law" does not just mean just "an act of the Legislature." *Baker*, 11 Minn. at 497. This Court further explained: "The true interpretation of these constitutional phrases is, that when rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away." *Id*. The Court also stated that it would be a "simple absurdity" to hold that "law of the land" or "due process of law" mean only the legislative act that "deprives the citizen of

his rights." *Id*. This strongly indicates that the Court understood both clauses to have a substantive component from its early days.

In reorienting the interpretation of this clause to its original understanding, this Court should make an explicit connection between Article I, Section 2, and Chapter 39 of Magna Carta. Such a connection will assist in grounding this clause in the principles it was drafted to protect.

D. Even if this Court reinterprets Article I, Section 2, as a due process clause, the Minnesota Constitution still guarantees equal protection of the laws.

Interpreting Article I, Section 2 as a law of the land clause that protects due process principles does not mean the Minnesota Constitution lacks an equal protection guarantee. There are three principled ways this Constitution can be read to guarantee equal protection.

First, this Court could still locate an equal protection requirement in Article I, Section 2. Again, Article I, Section 2 states: "No 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." This Court could hold that equal protection of the laws is one of the "rights or privileges" that "[n]o member of this state shall be disfranchised or deprived of" absent "the law of the land or the judgment of his peers."

Second, and relatedly, this Court could locate equal protection guarantees in the first sentence of Article I, Section 16, Minnesota's "Baby Ninth Amendment," which protects unenumerated rights.[7] This would not be groundbreaking and multiple justices have pointed to this provision as guaranteeing equal protection. *See State v. Russell*. 477 N.W.2d 886, 893 (Minn. 1991) (Simonett, J., concurring). *Mitchell v. Steffen*, 504 N.W.2d 198, 208 (Minn. 1993) (Tomljanovich, J., dissenting). Additionally, this Court has already held that other unenumerated rights are protected by Article I, Section 16, so holding that section covers equal protection would not require this Court to take any drastic new step. *See, e.g.*, *Thiede v. Town of Scandia Valley*, 14 N.W.2d 400, 405-06 (Minn. 1944); *In re Atkinson*, 291 N.W.2d 396, 398-99 (Minn. 1980) (en banc).

Third, this Court could locate equal protection principles under Article XII, Sections 1 and 2—originally Article IV, Sections 33 and 34. As noted by Justice Simonett, Article XII, Sections 1 and 2 were frequently cited in tandem with Article I, Section 2 in "equal protection" type cases. *Russell*, 477 N.W.2d at 893 (Simonett, J., concurring). Additionally, many early cases cited solely to what is now Article XII, Sections 1 and 2 in aid of equal protection principles.

[7] *See generally* Anthony B. Sanders, *Baby Ninth Amendments and Unenumerated Individual Rights in State Constitutions Before the Civil War*, 68 Mercer L. Rev. 389 (2017).

See, e.g., *Wagener*, 72 N.W. at 68. Thus, it is clear that the provisions guarantee at least some level of equal protection.

Finally, even absent a specific guarantee in the Minnesota Constitution, Minnesotans are still protected under the federal constitution. And given that this Court has determined that for almost all claims the test for the Fourteenth Amendment is the same test for equal protection claims under the Minnesota Constitution, the protections would change very little.

In sum, Article I, Section 2 may guarantee equal protection. But a more nuanced approach is necessary that is consistent with its text and purpose. This Court has not identified how the text of Article I, Section 2 serves as the "equal protection clause." This Court should use this opportunity to make clear how and why it does, or does not. Most importantly, whatever "rights or privileges" Article I, Section 2 protects, it does not do so with the federal rational basis test as its standard of review. The federal rational basis test has nothing to do with the concerns of the framers of Article I, Section 2, and the principles of Magna Carta they wanted to carry forward to future Minnesotans. The Court should at a minimum reject its approach from *Fletcher Properties* and apply its former three-part heightened rational basis test.

CONCLUSION

Article I, Section 2 is not the Fourteenth Amendment's Equal Protection Clause. This Court should interpret its completely different text as a due process clause protecting "rights or privileges" and not tied to the federal courts' rational basis test. This will in no way leave Minnesota without its own equal protection guarantees but instead will better protect the liberties of Minnesotans while being true to the text and purposes of the Minnesota Constitution. Further, even if this Court does not want to take this needed step in this case, at a minimum the Court should return to the heightened three-part test for all equal protection challenges under the Minnesota Constitution, where a rational basis standard applies, until such a time as this Court makes clear the exact foundations and contours of Article I, Section 2.

Dated: September 9, 2021

Respectfully submitted,

/s/ Anthony B. Sanders
Anthony B. Sanders (MN Bar No. 0387307)
INSTITUTE FOR JUSTICE
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
Tel: (612) 435-3451
Fax: (612) 435-5875
Email: asanders@ij.org

Adam Shelton*
Anya Bidwell*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: ashelton@ij.org; abidwell@ij.org

Attorneys for Amicus Curiae Institute for Justice

**Admitted pro hac vice.*

CERTIFICATION OF DOCUMENT LENGTH

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared with proportional font, using Microsoft Word in Office 365, which reports that the brief contains 6, 713 words.

/s/ Anthony B. Sanders
Anthony B. Sanders (MN Bar No. 0387307)
INSTITUTE FOR JUSTICE
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
Tel: (612) 435-3451
Fax: (612) 435-5875
Email: asanders@ij.org

CERTIFICATION OF ELECTRONIC BRIEF

I hereby certify that the content of the accompanying paper brief and addendum or addenda, if applicable, is identical to the electronic version filed and served, except for any binding, colored cover, or colored back, and I understand that any corrections or alterations to a brief filed electronically must be separately served and filed in the form of an errata sheet.

/s/ Anthony B. Sanders
Anthony B. Sanders (MN Bar No. 0387307)
INSTITUTE FOR JUSTICE
520 Nicollet Mall, Suite 550
Minneapolis, MN 55402
Tel: (612) 435-3451
Fax: (612) 435-5875
Email: asanders@ij.org