

No. A08-1042 and A08-1148

STATE OF MINNESOTA
IN COURT OF APPEALS

Shannon Murphy,
Relator,

vs.

Cal Ludeman, Commissioner of Human Services,
Respondent (A08-1042),
and
Dr. Sanne Magnan, Commissioner of Health,
Respondent (A08-1148).

RESPONDENTS' CONSOLIDATED BRIEF

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LEGAL ISSUES

- I. Did Relator demonstrate that the Minnesota Department of Human Services (“DHS”) and the Department of Health (“Health”) acted in an arbitrary, oppressive or capricious manner when DHS and Health refused to set aside Relator’s disqualification?

In accordance with Minn. Stat. § 245C.24, subd. 2 (2006), the State properly refused to set aside Relator’s disqualification.

Most Apposite Authorities:

In re: Excess Surplus Status of Blue Cross Blue Shield of Minnesota, 624 N.W.2d 264 (Minn. 2001).

Minn. Stat. § 144.057 (2006).

Minn. Stat. § 245C.15, subd. 1 (2006).

Minn. Stat. § 245C.24, subd. 2 (2006).

- II. Did Relator demonstrate beyond a reasonable doubt that the application of Minn. Stat. §§ 245C.14, 15 and 24 violates the Minnesota Constitution because the law deprived her of due process of law, violated equal protection and violates the Remedies Clause by disqualifying her from working in facilities licensed by DHS and Health on the basis of the involuntary termination of her parental rights?

DHS and Health refused to set aside Relator’s disqualification.

Most Apposite Authorities:

Rodne v. Comm’r of Human Servs., 547 N.W.2d 440 (Minn. Ct. App. 1996).

Sweet v. Comm’r of Human Servs., 702 N.W.2d. 314 (Minn. Ct. App. 2005), *rev. denied* (Minn. Nov. 15, 2005).

Minn. Stat. § 245C.14.

Minn. Stat. § 245C.15, subd. 1.

STATEMENT OF THE CASE

This is a certiorari appeal by Shannon Murphy (“Relator”) from final agency decisions by the Commissioner of Human Services (“DHS”) and the Commissioner of Health (“Health”) (referred to jointly as the “State”). In Minnesota, individuals who work with vulnerable populations in certain facilities that are licensed by the State must undergo a background study pursuant to the Background Study Law, Minn. Stat. ch. 245C. On November 27, 2007, pursuant to Minn. Stat. §§ 245C.14-15 (2006), DHS notified Relator that she was disqualified from “any position allowing direct contact with, or access to, persons receiving services from programs licensed by DHS and the Department of Health, from facilities serving children or youth licensed by the Department of Corrections, and from unlicensed personal care provider organizations.” See Relator’s Appendix (“Rel. App.”) at 1-2. The grounds for Relator’s disqualification are statutory: under the Background Study Law, DHS determined that Relator’s parental rights were involuntarily terminated on September 12, 1986, by order of the Nicollet County District Court. See *id.* Termination of parental rights is a disqualifying characteristic under the Background Study Law, resulting in Relator’s permanent disqualification. See Minn. Stat. § 245C.15, subd. 1 (2006). A law passed in 2005 provided that a permanent disqualification cannot be set aside. See Minn. Stat. § 245C.24, subd. 2.¹

¹ Prior to 2005, involuntary termination of parental rights resulted in a permanent disqualification under Minn. Stat. § 245C.15, subd. 1, but the Commissioner had the discretion to set aside the disqualification. In 2005, Minn. Stat. § 245C.24, subd. 2 was (Footnote Continued on Next Page)

Relator requested, pursuant to Minn. Stat. § 245C.21 (2006), “that the Commissioner of DHS and the Commissioner of Health set aside” her disqualification. *See* Rel. App. at 3-13. On April 22, 2008, DHS denied Relator’s request. *See* Rel. App. at 34-37. The Commissioner of Health denied her request in a letter dated May 29, 2008. *See* Rel. App. at 53-54. This appeal followed.

STATEMENT OF FACTS

A. Relator’s Relevant History.

Relator’s parental rights were involuntarily terminated by the Nicollet County District Court in 1986, based upon evidence that was clear and convincing. *See* Rel. App. at 38-48. Relator was present at the trial. *See id.* Relator has worked in facilities licensed by the State since that time, based upon “set asides” of Relator’s disqualification, which were issued prior to 2005. *See id.* at 16-19.

B. Relator’s Disqualification.

In 2007, after the amendments to the Background Study Law, MRCI, licensed by DHS, and Alterra Sterling of Owatonna, licensed by Health, submitted background study requests on Relator to DHS pursuant to the Law. *See* Minn. Stat. § 245C.03 (2006). DHS conducted a background study on Relator in November 2007 and determined that Relator had a disqualifying characteristic in that her parental rights were involuntarily

(Footnote Continued From Previous Page)

amended to provide that the Commissioner could not set aside a permanent disqualification in any program. *See* Laws 2005, ch. 136, art. 6 § 7 and Laws 2005, 1st Spec. Sess. ch. 4, § 39.

terminated in 1986. *See* Rel. App. at 1, and Minn. Stat. § 245C.15, subd. 1(a).² On November 27, 2007, DHS notified Relator that the 1986 involuntary termination of her parental rights disqualified her from working in the facilities in question.

C. The State's Reconsideration Of Relator's Disqualification.

The Background Study Law allows individuals to request reconsideration of a disqualification. *See* Minn. Stat. § 245C.21. Requests for reconsideration involving facilities licensed by Health are reviewed by the Commissioner of Health. *See* Minn. Stat. § 144.057, subd. 3 (2006). The Commissioner of DHS reviews requests for facilities licensed by DHS (Minn. Stat. § 245C.22) and for facilities jointly licensed. *See* Minn. Stat. § 144.057, subd. 1(5). When the Commissioner receives a request for reconsideration, the Commissioner reviews the request to determine: 1) whether the underlying information is correct, and 2) whether the person presents a risk of harm to persons served by the program or facility. If the underlying information is incorrect, the disqualification is rescinded; if the person does not present a risk of harm, the disqualification is "set aside." *See* Minn. Stat. § 245C.22, subs. 2 and 4 (2006). Minnesota law, however, does not allow the Commissioner to "set aside" a permanent disqualification. *See* Minn. Stat. § 245C.24, subd. 2 (2006).

DHS, in its letter of November 27, 2007, notified Relator that she could request reconsideration of the correctness of her disqualification. *See* Rel. App. at 1-2. DHS also advised Relator that if the information used to disqualify her was incorrect, she should

² Health contracts with DHS to conduct background studies for individuals who apply to work at facilities that are licensed by Health. *See* Minn. Stat. § 144.057 (2006).

identify what information was wrong, why the information was wrong, and send in the correct information. *See id.* Relator requested reconsideration from both agencies. *See* Rel. Brief at 6.

On April 22, 2008, DHS sent Relator written notice that her disqualification had been affirmed and that Relator could appeal the DHS decision to the Court of Appeals. *See* Rel. App. at 34-37 and Minn. Stat. § 245C.27, subd. 1(c). On May 29, 2008, Health notified Relator that her disqualification had been affirmed, and that Relator could appeal Health's decision to the Court of Appeals. *See* Rel. App. 23-54 and Minn. Stat. § 245C.27, subd.1(c) (2006). By *writ of certiorari* filed with this Court on June 20, 2008, Relator appealed the decision by DHS. *See* Rel. App. at 51-52. By *writ of certiorari* filed with this Court on July 9, 2008, Relator appealed the decision of Health. *See* Rel. App. at 57-58. Those appeals were consolidated pursuant to the Order of this Court, issued July 18, 2008.

SCOPE OF REVIEW

Relator's certiorari appeal is before this Court pursuant to Minn. Stat. § 480A.06, subd. 3 (2006), and Minn. Stat. ch. 606. *See Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444 (Minn. Ct. App. 1996). A decision concerning a request for reconsideration is a quasi-judicial decision. *See id.* at 444. On certiorari appeal from a quasi-judicial decision of a state agency not subject to the Administrative Procedures Act, the Court inspects the record to review:

. . . questions affecting the jurisdiction of the agency, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable,

fraudulent, under an erroneous theory of law, or without any evidence to support it.

Rodne, 547 N.W.2d at 444-45 (quoting *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (other quotations omitted)).³

Relator bears the burden of proving at least one of the above criteria apply to the Commissioner's Order. See *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). In this case Relator has argued that the State's decisions are arbitrary and capricious, and in violation of several provisions of the Minnesota Constitution. Those arguments are not supported by the facts or the law of this case.

In considering the appeal of the agencies' decisions, deference should be given to the agencies' expertise in administering and enforcing the disqualification statutes. As the Minnesota Supreme Court stated in *In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota* (hereinafter "*Blue Cross*"), 624 N.W.2d 264, 278 (Minn. 2001):

When reviewing agency decisions we "adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agency's expertise and their special knowledge in the field of their technical training, education, and experience." [Citation omitted.] The agency decision maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, [citation omitted] and judicial deference, rooted in the separation of powers doctrine, [footnote

³ Minn. Stat. § 14.69, which applies to contested case decisions under Minn. Stat. ch. 14, provides that an agency decision may be reversed if the substantial rights of a party were prejudiced because the agency decision was in violation of constitutional provisions, in excess of statutory authority, made upon unlawful procedure, affected by errors of law, unsupported by substantial evidence, or arbitrary or capricious. The Minnesota Supreme Court has applied the standard outlined at Minn. Stat. § 14.69 to judicial review of other agency determinations. See *Brunner v. State Dep't. of Pub. Welfare*, 285 N.W.2d 74 (Minn. 1979).

omitted] is extended to an agency decision maker in the interpretation of the statutes that the agency is charged with administering and enforcing.

Blue Cross, 624 N.W.2d at 278 [Citation omitted].

The constitutionality of the statute is a question of law which this court reviews *de novo*. See *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314, 319 (Minn. Ct. App. 2005), *rev. denied* (Minn. Nov. 15, 2005). Minnesota statutes are presumed constitutional, and the power to declare the statutes unconstitutional should be exercised with extreme caution and only when absolutely necessary. See *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 298-99 (Minn. 2000); *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A party challenging the constitutionality of a statute “carries the heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional.” See *Sweet*, 702 N.W.2d at 319 (quoting *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 591 (Minn. Ct. App. 2005), *rev. dismissed* (Minn. June 29, 2005)); *see also Haggerty*, 448 N.W.2d at 364.

Further, an agency’s decisions “are not arbitrary and capricious so long as a ‘rational connection between the facts found and the choice made’ has been articulated.” *Blue Cross*, 624 N.W.2d at 277, quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239 (1962). As demonstrated below, the State’s decisions were not arbitrary or capricious, and Relator has not shown that the Background Study Law is unconstitutional.

ARGUMENT

I. THE STATE'S DECISIONS, REFUSING TO SET ASIDE RELATOR'S DISQUALIFICATION, ARE NOT ARBITRARY OR CAPRICIOUS.

Relator claims that the State's decisions, refusing to set aside her disqualification, were arbitrary or capricious based on the agencies' failure to consider evidence that she did not pose a risk of harm and their disregard of prior set asides granted to her. Relator's claim fails. The State correctly applied the law which does not grant it any discretion in this matter, and thus did not act arbitrarily or capriciously.

First, Relator's claim fails as a matter of law because under the Background Study Act as amended in 2005, DHS and Health cannot set aside a permanent disqualification; they can only rescind a disqualification if it is based upon incorrect information. *See* Minn. Stat. § 245C.24, subd. 2(a) (Commissioner may not set aside a permanent disqualification); 245C.22, subd. 2 (Commissioner shall rescind a disqualification based on incorrect information). The record here supports that the disqualification was based upon correct information.

There is no dispute that Relator's parental rights were terminated in 1986 after a three-day trial and upon a finding, supported by clear and convincing evidence, of neglect of Relator's minor children. *See* Rel. App. at 48. Likewise, there is no dispute that when Relator requested reconsideration in 2007, the law prohibited the State from setting aside Relator's disqualification because the Background Study Law, which had been amended in 2005, made termination of parental rights a permanent disqualifying characteristic, not subject to set asides. *See* Minn. Stat. §§ 245C.15, subd. 1 and 245C.24, subd. 2.

Specifically, the Background Study Law provides that “regardless of how much time has passed since the involuntary termination of the individual’s parental rights under § 260C.301,” an individual whose parental rights have been involuntarily terminated is permanently disqualified. *See* Minn. Stat. § 245C.15, subd. 1(a) (2006). Under the Law as amended in 2005, an individual who is permanently disqualified may not be granted a set aside, and a facility that wishes to employ such an individual may not be granted a variance. *See* Minn. Stat. § 245C.24, subd. 2.

The State’s actions in this matter were not arbitrary and capricious because the facts and the law in this case mandate that Relator be permanently disqualified under the Background Study Law, without the opportunity for set aside. The State did not disregard any evidence. Rather, the State had no discretion in this matter and correctly applied the law in effect at the time that Relator submitted her request for reconsideration.

Second, the fact that Relator’s disqualification previously had been “set aside” under an old law has no bearing on whether her disqualification should be set aside after the change in the law and does not render the State’s actions arbitrary and capricious. Indeed, even if the law had not changed, the agencies could not rely on the prior set asides in making their decision. The prior set asides granted to Relator were not applicable to the 2007 request for a set aside because the Background Study Law clearly requires a new study when the study subject begins a position or applies to work at a different facility or program. *See* Minn. Stat. § 245C.04 (2006). The Law further provides that the State’s set aside “is limited solely to the licensed program, applicant, or

agency specified in the set aside notice.” *See* Minn. Stat. § 245C.22, subd. 5. Accordingly, the plain language of the Background Study Law requires DHS to conduct a background study for each licensed program or facility. The “set asides” granted to Relator in 2003 and 2004 were only for the specific programs/facilities studied at the time and do not apply to other programs or facilities. Accordingly, Relator misconstrues the statute when she claims “there is no textual basis” for granting “less legal finality” to the 2003 and 2004 set asides granted to Relator by the State. *See* Relator’s Brief at 14. The Background Study Law requires the State to review an individual’s risk of harm “to persons served by the program where the individual studied will have direct contact.”⁴ *See* Minn. Stat. § 245C.16, subd. 1. Each request for a “set aside” is analyzed separately since the State could determine that a person studied would not present a risk of harm in one program or facility, but would present a risk of harm in another setting with a different type of client.

Third, Relator argues that Blue Earth County Human Services’ reliance on the 2003 set aside supports her claim that the State’s decisions were arbitrary and capricious. *See* Relator’s Brief at 14. This argument also fails. The 2003 set aside applies to Habilitative Services, Inc. (the employer for which the study was conducted), and DHS’

⁴ The law provides that when the State studies an individual’s risk of harm, it must consider specific factors set forth in the law, including: the motive, severity and consequences of the event, the number of disqualifying events, the age and vulnerability of the victim, the harm suffered by the victim, the vulnerability of the persons served by the program, the recency of the event, the documentation of successful completion of training or rehabilitation and any other relevant information. *See* Minn. Stat. § 245C.22, subd. 4 (2006).

letter advises the county that Relator's disqualification for the "above-listed license program" had been set aside. *See* Rel. App. at 20. But as explained above, the statutory scheme requires a separate "set aside" analysis for each program where an applicant wants to work. The licensed entity in the 2007 study was MRCL. *See* Rel. App. at 1. There is no information in the record to suggest that the 2003 set aside allowed Relator to work at MRCL. Moreover, even if the 2003 set aside applied to MRCL, as explained above, the 2005 change in the Law would not allow DHS to set aside Relator's disqualification after 2005.

Relator quotes *Malloy v. Comm'r of Human Servs.*, 657 N.W.2d 294 (Minn. App. 2003) and suggests that "licensed programs are entitled to rely" on a set aside, and that it is not rational for an agency to reverse its decision. The facts of the instant case are clearly distinguishable from *Malloy*. In *Malloy*, DHS reversed a set aside based upon new information. In this case, the State refused to set aside a disqualification based upon a change in the law.

The action that Relator claims is arbitrary and capricious is based upon the State's compliance with the 2005 change in the law, not on any discretionary act of the State. Relator is permanently disqualified under Minn. Stat. ch. 245C based upon the clear language of the law, which does not grant the State any discretion in its application of the law. Relator does not dispute the fact that her parental rights were terminated in 1986; thus the State is not attempting to change "a factual reality." Rather, the State properly implemented the change in the law, which resulted in subsequent collateral consequences

to Relator. Those collateral consequences are mandated by the law, not by the discretionary acts of the state agencies named in this appeal.⁵

The change in the law reflects a policy determination made by the Legislature that individuals who have a history of certain conduct, such as the involuntary termination of parental rights, are not suitable to care for vulnerable populations, and thus will not be allowed to have direct contact with those populations. This change in the law is a policy decision made by the Legislature, rationally related to the important State interest of protecting a vulnerable population from individuals who have a history of certain acts. The State had no discretion in applying the law to the undisputed facts, and thus the State's actions are not arbitrary or capricious. *See Blue Cross*, 624 N.W.2d at 277.

II. THE STATE'S PERMANENT DISQUALIFICATION OF RELATOR UNDER THE BACKGROUND STUDIES ACT IS CONSTITUTIONAL.

Relator erroneously contends that her permanent disqualification violates the Minnesota Constitution's equal protection and due process guarantees and the Remedies Clause.⁶ Her disqualification complies with the state constitutional protection to equal protection because it is rationally related to legitimate state interests of protecting the safety of Minnesota's most vulnerable populations served by DHS and MDH. She was

⁵ Collateral consequences which flow from certain acts have been upheld if they are "civil and regulatory in nature and are imposed in the interest of public safety." *See Kaiser v. State*, 641 N.W.2d 900, 905 (Minn. App. 2002). Such collateral consequences include: revocation of driving privileges after a DWI conviction, loss of the right to possess a firearm after conviction of a violent felony, predatory offender registration for individuals who commit certain crimes, and deportation of non-citizens who commit certain crimes. *See id.*

not denied due process because her disqualification was based upon correct information and she was provided a meaningful opportunity to present a challenge to the disqualification. Finally, her disqualification under the Background Study Law did not violate her rights under the Remedies Clause since the Act does not eliminate any remedy vested in common law.

A. The Background Study Law Does Not Violate Relator’s Right to Equal Protection Under The Minnesota Constitution.

The Equal Protection Clause of the Minnesota Constitution, Article I, § 2, reads in relevant part, “No member of this state shall be disenfranchised 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.” Minn. Const. Art. I, § 2. The Minnesota Supreme Court has stated that this clause is analyzed under the same principles as the Equal Protection Clause of the United States Constitution and begins with the mandate that all similarly situated individuals shall be treated alike, but only invidious discrimination is deemed constitutionally offensive. *See Scott v. Minneapolis Police Relief Ass’n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000) (quotation omitted). In addition, unless a constitutional challenge involves a “suspect classification or a fundamental right,”⁷ we review the challenge under a rational basis standard . . .” *Scott*, 615 N.W.2d at 74.

(Footnote Continued From Previous Page)

⁶ Relator does not make any challenges under the U.S. Constitution.

⁷ Murphy does not contend that her equal protection challenge to the disqualification statute involves a suspect classification or a fundamental right.

All statutes are presumed constitutional. *Id.* (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254 (1985)). A court's power to declare a statute unconstitutional "must be exercised 'only when absolutely necessary and then only with great caution.'" *Lundberg v. Jeep Corp.*, 582 N.W.2d 268, 270 (Minn. Ct. App. 1998) (quoting *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 788 (Minn. 1989)). An individual challenging the constitutionality of a statute has the heavy burden of proving the law's invalidity. *Skeen v. State of Minnesota*, 505 N.W.2d 299, 312 (Minn. 1993). The individual must establish beyond a reasonable doubt that the statute violates a constitutional right. *In Re Conservatorship of Foster*, 547 N.W.2d 81, 85 (Minn. 1996). Moreover a court, when determining the constitutionality of a statute, cannot substitute its judgment for that of the Legislature. *Skeen*, 505 N.W.2d at 312. When a challenge does not impact a suspect classification or fundamental right, a statute must be upheld if it is rationally related to the achievement of a legitimate state purpose. *Id.* Finally, any conceivable rationale supporting the legitimate reason for the law will provide the rational basis necessary to satisfy equal protection requirements. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 423 (Minn. 2005).

1. Relator fails to show that she is similarly situated to others who may be treated differently.

Equal protection analysis begins with the mandate that all similarly situated individuals must be treated alike unless there is a sufficient basis for distinguishing among them. *See Doll v. Barnell*, 693 N.W.2d 455, 462 (Minn. Ct. App. 2005); *Lundberg*, 582 N.W.2d at 271 (equal protection under the Minnesota constitution

“requires that individuals who are similarly situated be treated alike unless there is”). Whether individuals are similarly situated is a dispositive issue in cases involving equal protection claims. *See Lundberg*, 582 N.W.2d at 272; *State ex rel. Spannas v. Lutsen Resorts, Inc.*, 310 N.W.2d 495, 497 (Minn. 1981) (a finding that disparately treated persons are similarly situated is “essential” to an equal protection ruling).

Relator fails to meet this threshold requirement. She has not shown that she is similarly situated to others who are treated differently. By failing to establish this threshold element, Relator fails to make a case under *any* standard of review.

Relator claims to have been treated differently. First, she alleges that the Background Study Law divides individuals into two classes - one that results in permanent disqualification without the option for a set aside, and the second that results in disqualification with the option for a set aside (*see* Relator’s Brief at 16-17). Relator suggests that she is more appropriately included in the second category, and thus, her disqualification should not be permanent and without the possibility of a set aside. Second, she equates herself with those who work in the chemical dependency field and whose conduct resulted in a permanent disqualification prior to July 1, 2005. Relator contends she is being treated differently because an individual in the chemical dependency field may be given the chance to return to work for a license holder in a program serving chemically dependent adults through a Department approve variance. In neither case, however, can Murphy establish that she is similarly situated.

Relator is not similarly situated to individuals whose disqualifying conduct does not fall under Minn. Stat. § 245C.15, subd. 1(a). She suggests that because her

involuntary termination of parental rights required proof by clear and convincing evidence, not evidence beyond a reasonable doubt and proof of intent as required for the other permanent disqualifying convictions, she is being treated differently when subject to a permanent disqualification (*see* Relator's Brief at 17-18). This argument is without merit. The evidentiary standard required to establish that an individual is responsible for disqualifying conduct does not dictate whether a disqualification is permanent. In fact, a preponderance of evidence standard can also provide the basis for a permanent disqualification. *See* Minn. Stat. § 245C 15, subd. 1(d). Relator's distinction is meaningless in this context.

The more important distinction between the two classes, one that shows Relator is not similarly situated to this group, is seen when one considers her parental rights termination itself. Relator was permanently disqualified because she lost her parental rights *involuntarily* after an evidentiary hearing before the court pursuant to Minn. Stat. § 260C.301. Murphy contrasts her involuntary termination with *voluntary* termination of parental rights under the statute, and for which an individual is disqualified from providing foster care and family child care services for a period of 15 years from the voluntary termination. *See* § 245C.15, subd. 2(c). Here, the distinction between involuntary and voluntary termination of parental rights is vital. In an involuntary termination, the court must rule in a *contested* proceeding whether clear and convincing evidence shows that conditions of neglect and dependency establish that the best interest of the children require the termination of a parent's rights. *See* Minn. Stat. § 260C.301, subd. 1(b)(2). In a voluntary termination the court acknowledges that the *written consent*

of a parent establishes good cause for the termination of parental rights. *See* Minn. Stat. § 260C.301, subd. 1(a). Relator makes a plea to similarly situate herself with the voluntary class by arguing that the circumstances surrounding her parental rights' termination were more akin to a voluntary termination to support her equal protection challenge. (*see* Relator's Brief at 18-19). The involuntary termination of her parental rights prevents her from establishing that she is similarly situated.

Relator also suggests that she is similarly situated to individuals in the chemically dependency field permanently disqualified for conduct under Minn. Stat. § 245C.15, subd. 1(a) prior to July 1, 2005, who may be permitted to work for a license holder dealing primarily with chemically dependent adults if the license holder is granted a variance by DHS or MDH. *See* Minn. Stat. § 245C.24, subd. 2(b). Relator does not work in the chemical dependency field, and she has failed to show how she is similarly situated with individuals in the chemical dependency field. While Relator compares herself to a group that is also permanently disqualified for conduct under § 245C.15, subd. 1(a), she ignores the significant differences between the vulnerability of the group she seeks to work with, vulnerable adults, and those that individuals in the chemical dependency field may be allowed to work with. A remarkable number of individuals with a history of chemical dependency history work in the chemical dependency field. Clearly, a chemical dependency history helps individuals relate to and care for those being served by chemical dependency programs. No similar benefit can be claimed by those with an involuntary termination of parental rights. Again, Relator has not met the threshold

requirement of demonstrating that she is similarly situated to a group that is treated differently.

2. Rational basis is the appropriate level of scrutiny for Relator's equal protection challenge.

The Background Study Law does not violate equal protection. Because Relator is not a member of a suspect class, and does not claim that the law denies her a fundamental right, the rational basis test is the appropriate level of scrutiny her equal protection claim. *Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002). This Court has recognized that the rational basis test “is always a relatively easy test to meet for those who seek to uphold the validity of a statutory classification.” *Blue Earth County Welfare Dep't v. Cabellero*, 302 Minn. 329, 342, 225 N.W.2d 373, 381 (Minn. 1974).

The Minnesota Supreme Court has developed “two formulations for the rational basis test.” *State v. Garcia*, 683 N.W.2d 294, 298 (Minn. 2004); *see Scott v. Minneapolis Police Relief Association*, 615 N.W.2d 66, 74 (Minn. 2000) (acknowledging the existence of two tests and confusion as to their application); *see also Kolton*, 645 N.W.2d at 411. The first test is identical to the highly deferential federal rational basis test. It analyzes whether the legislation “has a legitimate purpose and whether it was reasonable to believe that the use of the challenged classification would promote that purpose.” *State v. Garcia*, 683 N.W.2d at 298. Minnesota appellate courts continue to apply the federal test to state constitution equal protection claims. *See Kolton*, 628 N.W.2d at 648-49 (applying deferential federal rational basis test and refusing to apply a heightened

standard of review); *Skeen v. State of Minnesota*, 505 N.W.2d 299, 316 (Minn. 1993) (applying two-part rational basis test).

The second test, known as the Minnesota rational basis test, requires that:

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adopted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

State v. Russell, 477 N.W.2d 886, 888 (Minn. 1991) (quotation omitted). Under this version of the rational basis test, the Court examines whether there is a “reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.” *Garcia*, 683 N.W.2d at 299 (quotation omitted). As shown below, the challenged statutes comply with either formulation of the rational basis test.

3. **The permanent disqualification of an individual whose parental rights have been involuntarily terminated is rationally related to the state’s legitimate interest in protecting the safety of individuals who are vulnerable due to age or physical, mental, cognitive or other disabilities.**

The Background Study Law is rationally related to protecting the safety of the vulnerable populations DHS and MDH serve. Murphy’s challenge must be rejected.

The statutory scheme embodied in the Background Study Law supports and furthers the legitimate state interest of protecting the safety of our state’s most vulnerable citizens. *See Sweet v. Comm’r of Human Services*, 702 N.W.2d 314 (Minn. Ct. App.

2005). In the context of a due process challenge, this Court in *Sweet* determined that the Background Study Law purpose to protect the safety of vulnerable populations is of paramount importance. *Id.* at 321-22; *see also* Minn. Stat. § 245C.22, subd. 3 (declaring that the safety of vulnerable individuals served by a license holder must be given preeminent weight on a request for reconsideration of a disqualification). Minnesota has a legitimate purpose in protecting the safety of its most vulnerable citizens. This legitimate purpose satisfies the key federal requirement of the rational basis test and the third prong of the Minnesota rational basis test.

This Court may properly find that the Minnesota legislature reasonably believed that, to ensure the state's overall statutory scheme of protecting the safety of our most vulnerable individuals, disqualifying those whose parental rights had been involuntarily terminated must be made permanent and not subject to set aside or a variance. The permanent disqualification eliminates any concern for the harm that could come to vulnerable individuals from someone known to have been neglectful, harmful and damaging to their own child. Consequently, a rational basis exists for the permanent disqualification of those subject to a court order involuntarily terminating their parental rights.

It also comports with the first and second prongs of the Minnesota rational basis test as the distinctions in the classifications are genuine and substantial, and are related to the law's purpose. First, by limiting the permanent disqualification to involuntary termination of parental rights, as opposed to both involuntary and voluntary termination, the legislature recognized the substantial difference between the two groups' acceptance,

understanding and acknowledgment of the harmful conduct. An involuntary termination clearly demonstrates a reluctance to recognize and acknowledge that the nature of one's conduct has been harmful and damaging to the well-being, health and safety of one's children. Using this genuine classification distinction to extend the permanent disqualification to this group furthers the state's legitimate purpose of protecting the safety of vulnerable citizens in need of licensed services.

Further, the legislature's decision to extend the permanent disqualification to this group and not others is a genuine class distinction related to the statute's legitimate purpose. The conduct that permanently disqualifies those whose parental rights have been involuntarily terminated involves harmful and damaging conduct - whether intentional, neglectful or otherwise - to *their own* children.⁸ If a court has determined that an individual has been so egregious in their conduct toward their own children to require an involuntary termination, there is no reason to believe that greater care, attention and concern will be provided to vulnerable persons who *are not* the children of the permanently disqualified individual. Accordingly, a permanent disqualification without the opportunity for a set-aside or variance for this group makes complete sense and furthers the state's legitimate propose of protecting the safety of vulnerable individuals.

B. The Application Of Minn. Stat. § 245C.27, Subd. 1(c) to Relator Did Not Deprive Her Of Procedural Due Process.

⁸ In Relator's case, the court found clear and convincing evidence established that "conditions of neglect and dependency which led to the removal of the children are likely to continue for a prolonged period of time." See Relator's Appendix, A-44.

Relator contends that she has been deprived of procedural due process guaranteed by the Minnesota Constitution because the Background Study Law requires that a person whose parental rights have been involuntarily terminated be permanently disqualified without the ability to present new evidence. *See* Relator's Brief at 23-24. "Procedural due process protections restrain government action which deprives individuals of 'liberty' or 'property' interests within the meaning of the due process clause of . . . Article I, Section 7 of the Minnesota Constitution." *See Humenansky v. Minn. Bd. of Med. Examiners*, 525 N.W.2d 559, 565 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995). A balancing test is used to determine if an individual's right to procedural due process is violated. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). As discussed below, when that standard is applied to the facts of this case, Relator's due process challenge to Minn. Stat. § 245C.27, subd. 1(c), fails.

1. This Court has upheld the Background Study Act from a procedural due process challenge.

Relator's procedural due process challenge to § 245C.27, subd. 1(c), is not a case of first impression in this Court. This statute was upheld against a procedural due process challenge in *Sweet v. Comm'r of Human Services*, 702 N.W.2d 314 (Minn. App. 2005). As the discussion below demonstrates, the principles announced in *Sweet* are applicable to the arguments raised by Relator, and, as occurred in *Sweet*, Relator's procedural due process challenge should be rejected by this Court.

In *Sweet*, a DHS background study revealed that Mr. Sweet had been convicted of crimes listed in Minn. Stat. § 245C.15 (i.e., disqualifying crimes). *See* 702 N.W.2d

at 316. As a result, DHS notified Mr. Sweet that he was disqualified from his counseling job at a drug and alcohol counseling service. *See id.* Mr. Sweet submitted a written request for reconsideration and, according to § 245C.27, subd. 1(c), was given no opportunity to request an evidentiary hearing on DHS' decision refusing to set aside his disqualification. *See id.* at 316-17. On appeal to this Court, Mr. Sweet challenged the constitutionality of § 245C.27, subd. 1(c).

In rejecting Mr. Sweet's procedural due process challenge, the Court's first step was to determine whether Mr. Sweet had a property interest in his ability to pursue employment as a counselor in state-licensed programs. *See Sweet*, 702 N.W.2d at 320. The Court's next step was to employ the three-factor balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 322, 335 (1976), quoted in *Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 462 (Minn. Ct. App. 2000). The factors that must be balanced are: (1) the property interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the burden on the government that additional procedural requirements would entail. *See id.*

The Court found that, as to the first *Mathews* factor, Mr. Sweet had a property interest in his ability to pursue employment as a counselor in state-licensed programs and that this interest weighed heavily in his favor. *See Sweet*, 702 N.W.2d at 320. The Court determined, however, that the second factor (the risk of erroneous deprivation) weighed in favor of DHS. The Court found the following items to be significant in its analysis: (1) that Mr. Sweet had the burden of proof under Minn. Stat. § 245C.22, subd. 4, to show that he is not disqualified by the statutory criteria and that he does not pose a risk of

harm; (2) that Mr. Sweet “had the unfettered right to present all evidence, including letters of support, that he thought the Commissioner should consider in his written submission”; and (3) that the agency presented no controverted testimony, and thus a hearing was not necessary to permit cross-examination of witnesses. *See* 702 N.W.2d at 321. The Court stated:

Based on this record, we discern no likely value to an evidentiary hearing. Whether the case is presented orally or in writing to the commissioner, Relator would submit the same evidence. Therefore, we conclude that allowing the appellant to file written submissions provided appellant with an adequate opportunity to present his case. Secondly, we also conclude that the potential risk of an erroneous decision is the same under either procedure. The commissioner is required to review and analyze Relator’s evidence regardless of the format in which it is presented.

Id.

Finally, as to the third *Mathews* factor (the burden on the government of requiring more process), the Court in *Sweet* found that the government’s interests weighed in favor of the Commissioner. The Court stated:

[T]he governmental interest in protecting the public, especially vulnerable individuals attending counseling for drug and alcohol addiction, is of paramount importance. Minn. Stat. § 245C.22, subd. 3. The government also has an interest in saving time and money by considering disqualifications quickly and efficiently, without the additional time, expenses, and personnel required to provide evidentiary hearings to disqualified individuals. If an individual disqualified for criminal convictions were due an oral evidentiary hearing, the commissioner would need to hold one on the same issue every time the same individual was hired or re-hired by a state-licensed program.

See Sweet, 702 N.W.2d at 321-22. After considering all three factors, the Court concluded that “an evidentiary hearing was not required to afford Relator with procedural due process, providing Relator with the right to submit evidence in writing was adequate

to meet the requirements of due process.” *See id.* at 322. The Court held that the statutory language in Minn. Stat. § 245C.27, subd. 1(c) “is not unconstitutional on its face or as applied to Relator.” *See id.*

2. The State provided due process to Relator.

An analysis of the *Mathews* factors in the instant case demonstrates that Relator’s procedural due process rights have not been violated. First, although Relator may have a property interest in her ability to pursue employment, under *Sweet*, the loss of that interest, when weighed against the other two factors specified in *Mathews*, is not sufficient to violate due process.

The second *Mathews* factor, whether there was an erroneous deprivation due to the procedures used, weighs in favor of the State. First, contrary to the assertion of Relator, she was given the opportunity to present evidence on the issue of correctness. *See Rel. App.* at 1-2. The State’s decisions were based on correct information. Indeed, Relator acknowledges that her parental rights were terminated. *See Relator’s Brief* at 4. The State reviewed Relator’s request for reconsideration and determined that the factual basis for the disqualification was correct. *See Rel.’s App.* at 34 and 53. Contrary to Relator’s assertion that there has been an erroneous deprivation of her property interest (Rel.’s Brief at 25), the record shows that the disqualification was based upon correct information. *See Rel. App.* at 38-44.

Relator argues that the State “refused to consider the evidence at all.” *See Relator’s Brief* at 26. In fact, the State invited Relator to submit evidence on the correctness of the underlying disqualifying characteristic, but Relator did not do so.

Instead she submitted evidence on risk of harm and the facts surrounding the termination of her parental rights. *See* Rel. App. at 4-33. Further, Relator had the opportunity to participate in the court proceeding that resulted in the termination of her parental rights. Accordingly, the Court's conclusion in *Sweet*, "that allowing the appellant to file written submissions provided appellant with an adequate opportunity to present his case" (*Sweet*, 702 N.W.2d at 321), applies equally to the instant case and weighs in favor of the statutorily required process used by the State.

Although the Background Study Law specifies that there is no right to a hearing under Minn. Stat. § 256.045 for those individuals disqualified under Minn. Stat. § 245C.15, subd. 1-4, the State's decision is a final decision subject to appeal as a final agency determination. *See* Minn. Stat. § 245C.27, subd. 1(c). The opportunity to provide evidence on correctness and to appeal a final decision is sufficient process to overcome Relator's due process challenge.

Relator also claims that she "rebutted the Commissioner's presumption that the 1986 Order disqualified Relator as a safe and trustworthy caregiver." *See* Relator's Brief at 25. There is, however, no rebuttable presumption in the Background Study Law. If the information relied on by the State is shown to be incorrect, the disqualification is rescinded. *See* Minn. Stat. § 245C.22, subd. 2 (2006). The risk of harm determination that Relator claims to have rebutted does not apply to her after the 2005 change in the law. *See* Minn. Stat. §§ 245C.15, subd. 1 and 245C.24, subd. 2 (2006).

As to the third *Mathews* factor, the burden that additional process would impose on the government, Relator wrongly suggests that the State would not incur additional

expense or administrative burden because it previously reviewed Relator and set aside her disqualification. As noted above, however, a set aside “is limited solely to the licensed program...specified in the set aside notice.” See Minn. Stat. § 245C.22, subd. 5. Accordingly, merely setting aside a disqualification that has been previously set aside is not authorized under the law. Additional review would be required.

Most importantly, the Background Study Law plainly states that the State “may not set aside the disqualification . . . regardless of how much time has passed, if the individual was disqualified for . . . conduct listed in Section 245C.15, subdivision 1.” See Minn. Stat. § 245C.24, subd. 2. It would be absurd to hold an evidentiary hearing or conduct a risk of harm analysis to consider a request that cannot be granted. Further, the Legislature, by specifying categories of individuals who are permanently disqualified from working with vulnerable populations, has already simplified the administrative process and thus has reduced the costs and burden on the State. Accordingly, the third *Mathews* factor supports the process used by the State in reviewing Relator’s case.

In applying the *Mathews* factors as described in *Sweet*, it is clear that Relator received adequate process, and thus her due process challenge fails. The procedural due process that was afforded Relator under the Background Study Law insured that Relator was given a “meaningful opportunity to present [her] case.” See *Mathews*, 424 U.S. at 349. Relator has not met her heavy burden of showing that Minn. Stat. § 245C.27, subd. 1(c) is unconstitutional “beyond a reasonable doubt.” See *Sweet*, 702 N.W.2d at 219 (challenger must show statute is unconstitutional beyond a reasonable doubt). Accordingly, Relator’s procedural due process argument fails.

C. The Background Study Law Provides Substantive Due Process.

Although Relator frames her due process argument as a procedural due process challenge, it is clear that she challenges what she sees as an unfair state law. If this Court decides to analyze Relator's appeal as a facial challenge to the law based on substantive due process concerns, it should consider the following.

The Legislature may adopt statutes to achieve a legitimate government purpose. Unless State legislation employs suspect classifications or impinges on fundamental rights, minimal judicial scrutiny of the legislation is appropriate. *State v. Mitchell*, 577 N.W.2d 481, 491 (Minn. 1998); *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983). Substantive due process for such statutes requires only that the statute be "rationally related to achievement of a legitimate government purpose." *Id.* at 239. Such statutes are subject to a "rational basis" standard of review when challenged on substantive due process grounds. *See Boutin v. LaFleur*, 591 N.W.2d 711, 717-18 (Minn. 1999), *cert. denied*, 528 U.S. 973 (1999). "A defendant carries a great burden in proving that a statute violates substantive due process." *Mitchell*, 577 N.W.2d at 491.

The rational basis standard requires: "(1) that 'the act serve [sic] to promote a public purpose,' (2) that the act 'not be an unreasonable, arbitrary or capricious interference' with a private interest, and (3) that 'the means chosen bear a rational relation to the public purpose sought to be served.'" *Boutin*, 591 N.W.2d at 718, quoting *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979); *see also Doll v. Barnell*, 693 N.W.2d 455, 463 (Minn. Ct. App. 2005), *rev. denied* (Minn. Jun. 14, 2005). As

stated by the United States Supreme Court in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 565 (1981), quoted in *Boutin*, 591 N.W.2d at 718:

States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.

Minn. Stat. §§ 245C.14-.15 meet the first prong of the rational basis test because they promote a public purpose. As this Court recognized in *Sweet*, the statutory scheme embodied in Minn. Stat. ch. 245C serves a governmental interest in protecting the public, especially vulnerable individuals. *Sweet*, 702 N.W.2d at 321-22. There is no question that the State has a legitimate interest in assuring the safety of vulnerable individuals needing licensed services.

The second and third prongs of the rational basis test are interrelated. The second prong examines whether the statutes are unreasonable, arbitrary or capricious. As stated by the court in *Contos*, legislative enactments are not arbitrary or capricious if they are “a reasonable means to a permissive objective.” *Contos*, 278 N.W.2d at 741. The third prong examines whether “the means chosen bear a rational relation to the public purpose sought to be served.” *Id.* In conducting this examination, the challenged legislation may be supported by “any set of facts either known or which could reasonably be assumed.” *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), cited with approval in *Boutin*, 591 N.W.2d at 717.

Minn. Stat. §§ 245C.14-.15, as applied to Relator, meet the second and third prongs of the rational basis test because they are rationally related to protecting the health

and safety of individuals who are vulnerable due to their age or their physical, mental, cognitive or other disabilities. It was reasonable for the Legislature to believe that a person convicted of a violent crime or who has had her parental rights involuntarily terminated, has shown a propensity for violence or an inability to care for her children that could manifest itself when working in a job involving direct contact with and access to vulnerable individuals. There is a rational relationship between ensuring the safety of these vulnerable individuals and prohibiting individuals who have a history of committing certain acts - or failing to act - from having direct contact with vulnerable adults.

It was also reasonable for the Legislature to exercise its judgment in determining that, in order to protect vulnerable individuals, different crimes or conduct, according to their nature and level of severity, merit different disqualification periods: permanent (for, e.g., first degree murder, first degree criminal sexual conduct and the involuntary termination of parental rights); 15-year (for various felony-level offenses and the voluntary termination of parental rights.); 10-year (for various gross-misdemeanor offenses); and 7-year (for various misdemeanor offenses and for serious and/or recurring maltreatment). Such judgments are appropriate, as it is “up to the Legislature . . . and not the courts to decide on the wisdom and utility of legislation.” *Essling*, 335 N.W.2d at 240, quoting *Clover Leaf Creamery*, 449 U.S. at 469. The statutory scheme clearly passes constitutional muster, and Relator’s due process challenge fails.

D. Relator's Disqualification Under The Background Studies Act Does Not Violate The Remedies Clause Of The Minnesota Constitution.

Relator contends that her permanent disqualification, which required her removal from a position involving direct contact with vulnerable persons receiving licensed services, violates her to a right to a remedy under the Remedies Clause, Article I, § 8, of the Minnesota Constitution. The Remedies Clause, however, only assures remedies for rights vested at common law. Relator's disqualification under the Background Study Law does not abrogate a vested common law right which entitles her to a remedy.

The Remedies Clause protects and preserves rights and remedies recognized under the common law. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 14 (Minn. 1996). Article I, section 8 of the Minnesota Constitution is not a separate and independent source of legal rights on which to base a constitutional challenge. *Hoelt v. Hennepin County*, __ N.W.2d __, 2008 WL 3835937 * 7 (Minn. Ct. App. 2008) The Minnesota Supreme Court has held that "the Remedies Clause does not guarantee redress for every wrong, but instead enjoins the legislature from eliminating those remedies that have *vested at common law* without a legitimate legislative purpose. *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 497 (Minn. 1997). Remedies are not vested rights. Article I, § 8 neither guarantees nor commands the continuation of a specific remedy. *State ex. rel. Kane v. Stassen*, 208 Minn. 523, 527, 294 N.W. 647, 649 (1940). Additionally, the Remedies Clause does not prohibit the legislature from eliminating common-law rights and remedies when the "legislature has . . . provided a reasonable substitute." *Schermer*

v. State Farm Fire & Cas. Co., 721 N.W.2d 307, 316 (Minn. 2006) (quoting *Hickman*, 396 N.W.2d at 14.).

The threshold question for a Remedies Clause challenge is to identify the alleged remedy vested at common law eliminated by legislative action. See *Hickman*, 396 N.W.2d at 14; *Olson*, 558 N.W.2d at 497 (failed to establish that a remedy for crashworthiness actions vested at common law existed when the legislature passed the seat belt gag rule). For example, in *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 798 (Minn. 1989) the Minnesota Supreme Court examined a Remedies Clause challenge to municipal tort liability caps that put limits on plaintiffs' damage recovery rights.

Here, Murphy cannot, and does not, contend that the Background Study Law eliminated a remedy vested at common law. She contends that she has been harmed by her disqualification and loss of her position and thus, the Remedies Clauses entitles her to a remedy. Relator attempts to use the Remedies Clause as an independent source of legal rights on which to base a constitutional challenge. Relator contends that as a result of her disqualification and removal from her position her "character has been injured" and she has suffered "harm to her good name and reputation." (Relator's Brief at 28, 29). What she suggests is that she has been defamed. Passing the Background Study Law, the legislature did not eliminate an individual's right to recover on a defamation claim. Because Relator cannot establish that the Background Study Law abrogated a particular common-law right, the Remedies Clause does not provide her an independent source of legal rights on which to base a constitutional challenge. Her challenge must be rejected.

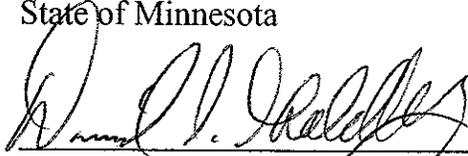
CONCLUSION

Based upon the foregoing, the State respectfully requests this Court to affirm its decisions to deny Relator's requests to set aside her disqualification.

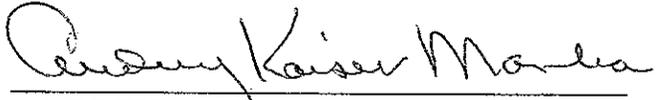
Dated: September 10, 2008

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 8,901 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

