

NO. A12-0591

State of Minnesota
 In Court of Appeals

HEALTHSTAR HOME HEALTH, INC., a Minnesota corporation;
 V-CARE HOME HEALTH, INC., a Minnesota corporation; BREAK-THRU
 HOME HEALTH CARE, INC., a Minnesota corporation; UNITED HOME
 HEALTH CARE, INC., a Minnesota corporation; HMONG HOME
 HEALTH CARE, INC., a Minnesota corporation; CARE PLANNERS INC., a
 Minnesota corporation; ABBEYCARE, INC., a Minnesota corporation;
 LIFE FOUNTAIN, HOME HEALTH CARE, INC., a Minnesota corporation;
 JEAN ROGERS, an individual; NANCY LARSON, an individual;
 ANNIE PEARL BROWN, an individual; MA LEE, an individual; WANG
 LAO YANG, an individual; DAVID KUE, an individual; PEE TEE, an
 individual; FREDDIE TINSLEY, an individual; MAI IA HER, an individual;
 CHRISTOPHER JOHNSON, an individual; FELISA VILLACAMPA, an
 individual; KENNER HARROWAY, an individual; DEONTE FRANKLIN,
 an individual; SAMMIE BANKS, an individual; SUSAN ARELLANO, an
 individual; TERRY STRICKLAND, an individual; and
 JOHNNELL LANE, an individual,

Appellants,

vs.

LUCINDA JESSON, in her official capacity as
 Commissioner of Human Services,

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION.

There are, among other things, three fundamental points on which Appellants and Commissioner Jesson disagree: (1) the proper standard of review to be applied in this equal protection challenge to Minn. Stat. § 256B.0659, subd. 11(c) (the “Statute”); (2) which party bears the burden of proving that the Statute complies with Minnesota’s three-pronged heightened rational basis standard; and (3) whether that burden of proof has been met. As demonstrated in Appellants’ initial brief and as explained below:

- (1) under the proper standard of review a Minnesota court may not hypothesize a rational basis to save a legislative classification challenged on equal protection grounds;
- (2) the Commissioner bears the burden of proving that the Statute’s classification is based on genuine and substantial distinctions between similarly situated classes; and
- (3) the Commissioner cannot meet her burden because the record is devoid of any evidence that the legislature considered anything other than anecdotal evidence, or that the District Court’s ruling is based on anything other than hypothetical and stereotypical presumptions regarding family relationships.

Accordingly, because the Commissioner does not dispute that relative and non-relative PCA’s are similarly situated, and because there is no record from which this Court may find that the legislature’s differential classification of relative and non-relative PCA’s has a rational basis that is reasonably related to the purpose of the Statute, the

challenged Statutory classification must be declared to be in violation of the Minnesota Constitution's guarantee of equal protection.¹

II. ARGUMENT.

A. Standard of Review: Courts May Not Hypothesize a Rational Basis to Justify a Classification Challenged on Equal Protection Grounds.

Appellants and the Commissioner agree that when no fundamental right is at issue a legislative classification challenged on equal protection grounds must be reviewed under Minnesota's three-prong rational basis standard. Appellant's Brief 17 (reciting the three-prong analysis as stated in *Gluba v. Bitzan & Ohern Masonry*, 735 N.W.2d 713, 721 (Minn. 2007)); Respondent's Br. ("R. Br.") 14 (reciting the identical three-prong analysis as stated in *ILHC of Eagan v. County of Dakota*, 693 N.W.2d 412, 421 (Minn. 2005)).² Contrary to the Commissioner's stated position, however, the test prescribed by the cited decisions does not permit a court to save a classification challenged on equal protection grounds by hypothesizing a rational basis.

Minnesota's rational basis test plainly requires that "the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection

¹ The Commissioner's remaining arguments have been fully discussed in Appellant's initial brief, and will not be addressed here.

² "(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 adapted 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; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve." *Gluba*, 735 N.W.2d at 721; *ILHC of Eagan*, 693 N.W.2d at 421.

between the distinctive needs particular to the class and the prescribed remedy.” *Gluba*, 735 N.W.2d at 721; *ILHC of Eagan*, 693 N.W.2d at 421. That “evident connection” between the classification and the remedy, however, may not rest on anecdotal evidence. *Id.*

Just the opposite, “[s]ince the early eighties [the Minnesota Supreme Court], in equal protection cases, articulated a rational basis test that differs from the federal standard,” and it has “been unwilling to hypothesize a rational basis to justify a classification.” *State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991). This Court too has affirmed that, “[t]he key distinction between the federal and Minnesota tests is that under the Minnesota test, ‘we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.’” *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004); *see also Benson v. Alverson*, 2012 WL 171399, at *5 (Minn. Ct. App.) (“The supreme court has stated that ‘[t]he key distinction between the federal and Minnesota test is that under the Minnesota test we have been unwilling to hypothesize a rational relations basis to justify a classification, as the more deferential federal standard requires.’”) (quoting *Gluba*, 735 N.W.2d at 721); *Murphy v. Comm’r of Human Serv.*, 765 N.W.2d 100, 106 (Minn. Ct. App. 2009) (“In Minnesota, courts ‘have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.’”) (quoting *Russell*, 477 N.W.2d at 889). The “rational basis test under the Minnesota Constitution . . . is different and more stringent than its federal counterpart.” *Mitchell v. Steffen*, 487 N.W.2d 896, 904 (Minn. Ct. App. 1992), *aff’d*, 504 N.W.2d 198 (Minn. 1993). Furthermore, “this stricter standard

applies when analyzing *any* case under the equal protection clause of the Minnesota Constitution.” *Id.* at 904 n.2 (court’s emphasis).

Pointing to *Gluba*, and contrary to all of the cases cited in the preceding paragraph, the Commissioner argues that Minnesota courts are not only permitted to, but will in fact hypothesize a rational basis to justify a classification in certain cases. R. Br. 26. The Commissioner’s argument, however, is based on the mistaken premise that although “the *Gluba* Court recited [the controlling] proposition in describing Minnesota’s rational basis test,” it nevertheless rejected that standard. *Id.* The Commissioner is wrong for two reasons.

First, the Commissioner ignores the plain language of *Gluba*, in which the Court said in no uncertain terms that, “under the Minnesota test, ‘we have been unwilling to hypothesize a rational basis to justify a classification.’” 735 N.W.2d at 721 (quoting from *Garcia*, 683 N.W.2d at 299). And, second, *Gluba* did not reject the heightened standard applied to the rational basis analysis in *Russell*, *Mitchell*, *Garcia*, and other cases. Instead, *Gluba* merely determined that a somewhat more deferential standard should be applied in assessing the constitutionality of workers’ compensation statutes. As *Gluba* explained, “the formulation of rational basis review that we use in workers’ compensation cases shares some common features with the Minnesota rational basis test,” but in cases such as workers’ compensation statutes and tax-related classifications the court gives greater deference to the legislature. 735 N.W.2d at 722-723.

The Statute at issue here is not a workers’ compensation statute and does not involve a tax-related classification. Consequently, its classification of relative and non-

relative PCA's is not due any additional deference but, instead, must be based on genuine and substantial differences to survive an equal protection challenge. The Commissioner, of course, can point to no authority for the contrary proposition that Minnesota's three-pronged equal protection test -- which has been repeatedly reaffirmed and which does not permit a court to hypothesize a rational basis to save a legislative classification -- has been rejected.

Because Minnesota's heightened equal protection analysis does not permit a court to hypothesize a rational basis to save the legislature's classification of relative and non-relative PCA's for differential treatment, the District Court erred and this Court should strike the Statute down on equal protection grounds.

B. The Commissioner Bears the Burden Proving a Reasonable Connection Between the Actual, and Not Just the Theoretical, Effect of the Challenged Classification and the Statute's Goals.

The Commissioner argues that Appellants bear the heavy burden of proving beyond a reasonable doubt that the Statute is unconstitutional. R. Br. 13. But while it is true that a party challenging a statute bears a heavy burden, the Statute must be declared unconstitutional because the Commissioner also bears a burden that she cannot meet.

The State of Minnesota is required to treat similarly situated individuals alike unless a discriminatory classification can be constitutionally justified. *See, e.g., Mitchell v. Steffen*, 504 N.W.2d 198, 203 (Minn. 1993) (noting that, although a state is not required to provide welfare benefits in an adequate amount or in any amount at all, once the state does it must do so in compliance with equal protection guarantees). Here, the District Court expressly found that "[r]elative PCAs and non-relative PCAs are similarly

situated individuals.” Respondent’s Addendum (“RAD”) 6 (Dist. Ct. Concl. 8). Under *Mitchell*, therefore, they must be treated alike unless there is a rational basis for doing otherwise.

Because the District Court held that relative and non-relative PCA’s are similarly situated -- in a ruling which the Commissioner did not challenge by cross-appeal -- the Commissioner bears the burden of proving the legislature relied on something other than anecdotal evidence when it created the challenged classification, and that there is a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals. RAD 7 (citing *Gluba*, the District Court held in Conclusion of Law No. 9 that “[t]he State must . . . show that the classification is genuine and relevant to the purpose of the law”); *see also Russell*, 477 N.W.2d at 889 (“In order to meet this standard, *the state must provide* more than anecdotal support for classifying users of crack cocaine differently from users of cocaine powder.”) (emphasis added); *Mitchell*, 487 N.W.2d at 904 (“The statute also fails because *appellant [the State of Minnesota] has not shown* that the classification created is relevant to its asserted purpose.”) (emphasis added).

As demonstrated below, the Commissioner cannot prove that the legislature considered anything other than anecdotal evidence, or that there is any reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals. Accordingly, this Court should reverse and should declare the Statute to be unconstitutional.

C. **The Commissioner Cannot Show that the Legislature Relied on Anything Other than Anecdotal Evidence.**

Under Minnesota law, the rational basis test requires the court “to determine ‘whether the challenged classification has a legitimate purpose and whether it was *reasonable for the legislature to believe* that use of the challenged classification would promote that purpose.’” *Murphy*, 765 N.W.2d at 106 (emphasis added).

The Commissioner’s brief is, for the most part, entirely devoid of any references to information actually considered by the legislature to determine that (i) genuine and substantial differences exist between relative and non-relative PCAs, and (ii) the challenged classification furthers the purposes of Minnesota’s Medical Assistance program. According to the Commissioner, in fact, a February 2011 fiscal note is the only piece of information that was before the legislature when the challenged classification was created. R. Br. 24. But, as explained below, the fiscal note is precisely the sort of anecdotal evidence that Minnesota courts have routinely characterized as being insufficient to justify discrimination between similarly situated classes of individuals.

The issue before this Court is whether it was reasonable for the legislature to believe, based on the fiscal note alone -- because there was no other evidence before it -- that genuine and substantial differences exist between relative and non-relative PCAs, and that use of the challenged classification would promote the goals of Minnesota’s Medical Assistance program. *See Russell*, 477 N.W.2d at 889-90; *Murphy*, 765 N.W.2d at 106.

From the record, it can be determined that the fiscal note was authored by Robert Meyer, Director of the Fiscal Analysis and Performance Management Section of the Continuing Care Administration of the Minnesota Department of Human Services. Respondent's Appendix ("RA") 8. But as Meyer himself concedes in the affidavit he filed with the District Court to authenticate the fiscal note, he based his analysis and estimates entirely on a number of assumptions. RA 8 ("I estimated that approximately 31 percent of PCA service"; "I assumed that a number of program recipients"; "I assumed a saving offset"). RA 8, 9 (underline emphasis added). Moreover, the fiscal note itself includes a number of footnotes, which also refer to several additional estimates, including one that is based on an unidentified and unscientific "provider survey." RA 11. Additionally, even the Commissioner concedes that at least one of Meyer's assumptions was wrong.³ Or, in other words, the legislature had no evidence before it, and had nothing on which to base its differential classification of relative and non-relative PCA's other than untested, and in some cases unidentified, assumptions and estimates.

The Commissioner readily concedes that the legislature did not hold any committee or other hearings, but nevertheless asks the Court to assume that the legislature was fully informed and could rationally conclude that there is a legitimate basis for classifying relative and non-relative PCA's differently. R. Br. 25. Desperate to find anything the legislature might have relied on to determine that (i) genuine and substantial

³ "The fiscal note assumed that all PCA provider agencies would pass the reduction on to their employees who were caring for close relatives. * * * However, when the rate reduction went into effect, PCA agencies varied in their response." R. Br. 4.

differences exist between relative and non-relative PCAs, and (ii) the challenged classification furthers the purposes of Minnesota's Medical Assistance program, the Commissioner refers to unidentified "input legislators may have received from their constituents" and apparently faults Appellants for not having contacted their legislators before the Statute's enactment. R. Br. 25, 27.

The Commissioner also attempts to make up for the complete absence of a legislative record by citing to various public documents. But there is no evidence that any of the cited documents were known to or actually considered by the legislature. Unlike the federal standard of review, the Commissioner must show that the legislature actually considered evidence -- not just that it theoretically could have. And, in any event, many of the documents on which the Commissioner asks this Court to rely do not even support the contention for which they are cited.

As an example, the Commissioner points to one newspaper article and one newspaper editorial published by the *Star Tribune* after the Statute had been enacted and which purport to include comments by two individuals affected by the Statute's discriminatory classification. After-the-fact news clippings, however, do not constitute admissible, competent evidence in this proceeding and, even if they did, do not provide any basis to conclude that the legislature considered anything said in those articles.

Similarly, the Commissioner cites to a twelve-page excerpt from a 2006 report by an organization called the Family Care Alliance. R. Br. 18. The unauthenticated excerpt was attached to an affidavit from Respondent's counsel, was not before the legislature when the challenged classification was created, and is not competent evidence in this

case. Indeed, even were the Family Care Alliance report relevant to this proceeding, which it is not, it must be noted that the Commissioner chose to submit only a few pages from one of two volumes of a much larger report; and in so doing failed even to include any of the footnotes (footnotes 23-27) cited as authority for the statements quoted in Respondent's brief.⁴ Unauthenticated and out-of-context excerpts from an inadmissible report the legislature never considered cannot be used as a basis to find that the legislature had a rational basis to discriminate against relative PCA's.

The Commissioner also cites to a federal government report containing a variety of statistics, including that 16 percent of the U.S. population age 15 years and older provides unpaid care to an individual over age 65. R. Br. 19. But, again, there is no evidence that any of the statistics contained in the cited report were before the legislature when it created the challenged classification. At best, the statistics the Commissioner offers invite the Court to hypothesize a rational basis for the legislature's classification which, of course, this Court may not do.

In short, there is nothing in the Commissioner's brief to refute the undisputed fact that the legislature held no hearings and considered no evidence or other information

⁴ The Affidavit of Patricia Sonnenberg (filed with the District Court but not included with Respondent's appendix) used to purportedly authenticate the report, states that "[a]ttached to this affidavit as Exhibit 1 is a true and correct copy of Family Caregiver Alliance (2006), Caregiver Assessment: Principles, Guidelines and Strategies for Change, The Pivotal Roles of Family Care." In fact, attached as Exhibit 1 to the Sonnenberg Affidavit were only a few pages from a large two-volume report by the Family Caregiver Alliance. Respondent's excerpt from Exhibit 1, quoted at R. Br. 18, did not indicate Respondent was omitting footnotes from the quote. The footnote numbers are found on the excerpt made a part of Respondent's Appendix at RA 13-24 but, as noted, the excerpt filed with the district court not only did not include the whole report but also did not even include the footnotes to the quote at R. Br. 18.

before arbitrarily deciding to balance the budget on the backs of relative PCAs who devote their time to caring for loved ones. Instead, the Commissioner asks this Court to do the legislature's job for it, after-the-fact, by scouring public data for any information that could be used to retroactively provide a hypothetical justification for the legislature's classification.

Contrary to what the Commissioner writes in her brief, Appellants do not contest that many relatives may care for their family members without receiving any compensation. But, while it may or may not be true that many relatives will continue to care for family members without being paid, that proposition has absolutely no relevance to the issue now before this Court. In the final analysis, it remains undisputed that the legislature did not consider any evidence, other than perhaps the fiscal note, when it determined to discriminate against relative PCA's even though they are, in all respects, similarly situated to their non-relative PCA counterparts. This has never been enough for a Minnesota court to find the existence of a rational basis, and it should not be enough here. *See Russell*, 477 N.W.2d at 889-90; *Murphy*, 765 N.W.2d at 106.

D. The Commissioner's Reliance on *Carter v. Gregorie* and Other Federal Cases Is Misplaced.

The Commissioner devotes three pages of her brief to argue that the opinion in *Carter v. Gregorie*, 672 F. Supp. 2d at 1146 (W.D. Wa. 2009) supports the District Court's decision in this case. R. Br. 29-31. *Carter* is inapposite and provides no guidance for at least three reasons.

First, *Carter* was not a decision on the merits. Rather, *Carter* merely held that the plaintiffs in that case had failed to make a sufficient showing to justify a preliminary injunction. 672 F. Supp. 2d at 1154, 1161. Second, *Carter* applied federal law, not Minnesota's more stringent rational basis test. 672 F. Supp. 2d at 1159. And, third, *Carter* failed to fully analyze the equal protection claim even under federal law. Instead, the *Carter* court considered only one prong of the federal test and, as to that one prong, simply accepted verbatim defendants' rational for the statute's disparate treatment. 672 F. Supp. 2d at 1159-60. *Carter* does not address the issues before this Court and does not support the district court's decision below.

To the contrary, *Carter* corrupted the District Court's decision below by erroneously serving as the basis for two of its key -- and erroneous -- findings. To explain, the District Court relied on *Carter*, 672 F. Supp. 2d at 1153, 1159-60, as the basis for its Finding of Fact No. 20 that:

Provider Agencies' costs of recruiting, hiring and training personal care assistants are reduced when Medical Assistance recipients are receiving PCA services from close family members who are already familiar with the individual's needs, preferences, and homes.

RAD 5. There was absolutely no evidence before the District Court on which that finding could have been based. Nor did the *Carter* court make any such finding anywhere in the reported opinion. Moreover, even could such finding be extrapolated from *Carter*, the fact remains that it is not a decision on the merits but rather is a decision on a motion for a preliminary injunction that was decided under federal -- not Minnesota

-- law. *Carter*, therefore, is not binding or persuasive authority and offers no guidance whatsoever for this Court.

The District Court similarly relied on *Carter*, 672 F. Supp. 2d at 1159-60, as the basis for Conclusion of Law No. 15, that “Minnesota can reasonably expect family members to contribute to the care of their loved ones.” RAD 8. But the District Court’s quoted language is taken directly from the defendants’ brief in *Carter* and is not based on any facts adduced on the record in that case or here. *See Carter*, 672 F. Supp. 2d at 1159-60 (“Defendants argue that: because the state can reasonably expect family members to contribute to the care of their loved ones . . .”). Again, therefore, *Carter* provides no support for Conclusion of Law No. 15, just as it provides no support for Findings of Fact No. 20.⁵

The Commissioner also relies on other similarly inapposite federal cases for the proposition that “[r]educing Medical Assistance expenditures is a permissible purpose.” Citing *Pharm. Research and Mfrs. of America v. Walsh*, 538 U.S. 644 (2003) and *Pharm. Research and Mfrs. of America v. Meadows*, 304 F.3d 1197 (11th Cir. 2001). But the Commissioner’s reliance on those cases to sustain the Statute here is misplaced, since neither case involved an equal protection challenge, and neither was decided under

⁵ The district court cited two other federal equal protection cases in support of its decision: *Youakim v. Miller*, 374 F. Supp 1204 (N.D. Ill. 1974) and *Lipscomb v. Simmons*, 962 F.2d 1374 (9th Cir. 1992). But they too are inapplicable as having been decided under the less stringent federal equal protection analysis, which is perhaps why the Commissioner chose not to cite either case in her brief to this Court.

Minnesota law. As noted above, a statutory classification that may pass under federal law may not pass under Minnesota's heightened equal protection analysis.

E. The Commissioner's Policy Statements Do Not Save the Statute from Being Declared Unconstitutional.

The Commissioner makes a number of abstract policy statements which, while true in their proper application, have no application here. For example, she argues that the Court may not "second guess the Legislature's public policy judgments expressed in statute." R. Br. 28. True on one level; but the Court may declare invalid a legislative classification that violates Minnesota's equal protection guarantee. The Commissioner similarly asserts that Minnesota is not required to maintain rates at a uniform level." R. Br. 28. True enough; but whatever rates the legislature chooses to pay PCA's must not be based on constitutionally infirm classifications. She also points out that the decision on how to reduce expenditures is left to the legislature, which "can proceed on a step by step basis." Without a doubt that is true; so long as in doing so the legislature does not violate Minnesota's constitution or impermissibly discriminate against similarly situated classes of individuals.

As she did in the lower court, the Commissioner likewise mischaracterizes Appellants' position by claiming their argument to be that Minnesota law "requires a system in which once a benefit is given, it can never be taken away." R. Br. 28-29. That could not be further from the truth. Appellants freely acknowledge that the legislature could decide not to fund the Medical Assistance Program at all. Once the legislature chooses to do so, however, its funding decisions cannot be discriminatory, and must treat

similarly situated classes of individuals alike. Here, however, after making its decision to fund the Program, the legislature then made an arbitrary decision to balance the Commissioner's budget on the backs of relative PCA's by reducing their reimbursement rates, but not reducing reimbursement rates for their similarly situated, non-relative PCA counterparts. That decision is discriminatory, without a rational basis, and it violates Appellant's right to equal protection of the laws. *See Mitchell*, 504 N.W.2d at 203 (although a state is not required to provide welfare benefits in an adequate amount or in any amount at all, once the state does it must do so in compliance with equal protection guarantees).

F. The Commissioner's References to Other Laws Do Not Save the Statute from Being Declared Unconstitutional.

The Commissioner's references to other statutes, rules, regulations or laws that treat family members differently from non-family members do not save the Statute from being declared unconstitutional on equal protection grounds. Among other things, the Commissioner says that familial status has been a long-standing classification under both federal and state laws governing PCA services, and she cites to statutes and cases that recognize and protect families and relationships between and among family members. R. Br. 11-16. The Commissioner goes on to argue that the legislature has the right, and has exercised that right in the past, to deny any PCA benefits to family members and, because it has, "it would be anomalous to find the 80 percent agency payment unconstitutional while the more drastic action of totally denying all payment would be constitutional." R. Br. 23.

The Commissioner's arguments miss the mark. The only issue before the Court is whether the Statute, as it currently reads, is unconstitutional. The Commissioner can take no comfort that there may be historical or other statutes that discriminate based on family relationships -- because none of the statutes to which she refers, current or past, have been challenged under Minnesota's heightened rational basis analysis. The fact that other statutes may or may not make familial-based classifications in other contexts for other reasons, none of which appear to have been subject to constitutional scrutiny, is irrelevant to the Court's decision in this case.

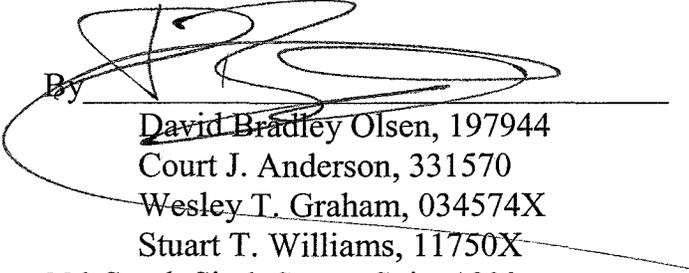
III. CONCLUSION.

The District Court found that “[r]elative PCAs and non-relative PCAs are similarly situated individuals.” RAD 6. Whatever moral, emotional, or other bonds that may exist between family members -- which vary enormously among the many, varied families which make up Minnesota's incredibly rich and diverse population -- those presumed bonds do not justify the legislature mandating different payments to similarly situated individuals who care for Medical Assistance recipients based on classifications which do not pass muster under Minnesota's heightened rational basis analysis. The District Court's judgment should be vacated and the Statute declared unconstitutional as being in violation of Minnesota's equal protection guarantee.

Respectfully submitted,

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Dated: August 20, 2012

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