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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case No.: 62-CV-21-3582

Minnesota Chiefs of Police Association, Minnesota Sheriffs' Association, Minnesota Police and Peace Officers Association, and Law Enforcement Labor Services, Inc.,

Plaintiffs,

v.

Governor Timothy Walz and State of Minnesota,

Defendants.

Case Type: Civil Other/Misc.
Judge: Leonardo Castro

ORDER AND MEMORANDUM

This matter came before the Honorable Leonardo Castro, Chief Judge of District Court, Second Judicial District, on August 30, 2021, on Plaintiffs' Motion for Temporary Injunction, and Defendants' Motion to Dismiss. The matter was heard remotely via Zoom. The Plaintiffs were represented by Mark J. Schneider, Esq., and Gary Luloff, Esq. Defendants were represented by Anna Veit-Carter, Assistant Attorney General, and Leah Tabbert, Assistant Attorney General. All other appearances were made on the record.

The Court having considered the facts, the arguments of counsel and the parties, and all of the files, records, submissions and proceeding herein,

IT IS HEREBY ORDERED:

1. Defendants' motion to dismiss is **DENIED**.

2. Defendants' motion to remove the State of Minnesota and the

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Governor of Minnesota as improper defendants is **DENIED**.

3. Plaintiffs' motion for temporary injunctive relief is **GRANTED**.

4. Minn. Stat. § 609.066, as amended, with an effective date of March 1, 2021, is temporarily stayed pending a decision on the merits of Plaintiffs' complaint for declaratory relief.

5. Minn. Stat. § 609.066, as it existed prior to March 1, 2021, shall remain in force pending a decision on the merits of Plaintiffs' complaint for declaratory relief.

6. The briefing and oral argument schedule shall be expedited.

7. The attached Memorandum shall be incorporated into this Order.

IT IS SO ORDERED.

BY THE COURT

Castro, Leonardo (Judge)
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Dated: September 13, 2021

Leonardo Castro
Chief Judge
Second Judicial District

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MEMORANDUM

The Plaintiffs are the: 1. Minnesota Chiefs of Police Association ("Chiefs") representing hundreds of law enforcement and public safety leader members on legislative, regulatory, and community issues related to crime, public safety, and law enforcement; 2. The Minnesota Sheriffs' Association ("Sheriffs") consisting of 87 Minnesota elected sheriffs and their staffs, representing them at the legislature, and providing training and support for chief county law enforcement officers; 3. The Minnesota Police and Peace Officers Association ("MPPOA"), a statewide professional association representing police officers, and supports the effective, practical and thorough training of police officers; and 4. The Law Enforcement Labor Services, Inc. ("LELS"), an employee labor organization representing nearly 6,400 licensed peace officers, firefighters, corrections officers, emergency dispatchers, and public safety support staff, and providing legal representation, contract negotiation, discipline, mediation representation, and grievance representation, arbitration, and labor advocacy for its 410 locals throughout the State of Minnesota.

In the summer of 2020, the Minnesota Legislature passed, and Governor Walz signed, a police reform bill during a special legislative session (2020 Laws of Minnesota, 2nd Special Session, H.F. 1, Chapter 1). The bill included revisions to Minn. Stat. § 609.066, which governs the use of deadly force by peace officers ("Revised Statute"). The Revised Statute outlines when the use of deadly force is legally justified and serves as an affirmative defense for law enforcement officers criminally charged with a crime resulting from the alleged unauthorized use of deadly force. The Revised Statute was effective on March 1, 2021.

Prior to the revision, peace officers in the line of duty were statutorily authorized to use deadly force "to protect the peace officer or another from *apparent* death or great bodily harm." Minn. Stat. § 609.066, subd. 2(1) (2019) (emphasis added). The Revised Statute eliminated the

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word "apparent" and added three requirements to justify the use of deadly force. Specifically, that the threat of death or great bodily harm must be able to "be articulated with specificity by the law enforcement officer; is reasonably likely to occur absent action by the law enforcement officer; and must be addressed through the use of deadly force without unreasonable delay." Minn. Stat. § 609.066, subd. 2(a)(1)(i-iii) (2020).

Plaintiffs argue the provision requiring a law enforcement officer to articulate the threat with specificity is an unconstitutional violation of the fundamental right that a person cannot be compelled to testify against themselves in a criminal proceeding, citing U.S. Const. amend. V, and Minn. Const. art. 1 § 7 ("No person shall... be compelled in any criminal case to be a Witness against himself.")

Plaintiffs seek Declaratory Judgment finding unconstitutional, on its face, the Revised Statute provision requiring a law enforcement officer to specifically articulate the threat. Plaintiffs also seek injunctive relief and ask this Court to delay the effective date of the Revised Statute until such time as proper training can be developed and provided to law enforcement officer in accordance with an authorized use of deadly force statute that satisfies constitutional requirements.

Sheriffs and chiefs of police are statutorily required to establish and enforce written policies and provide training and instruction annually on the use of deadly force to all its law enforcement officers. *See*, Minn. Stat. 626.8452, subds. 1-3 (The head of every local and state law enforcement agency shall provide instruction on the use of deadly force to every peace officer and part-time peace officer). Plaintiffs argue that the heads of local and state law enforcement agencies have been unable to provide the statutorily required training on the Revised Statute because those agencies which have traditionally provided guidance and developed training in these areas (i.e. The Department of Public Safety and the Minnesota Peace Officers Standard and Training Board)

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have failed to provide the heads of state and local law enforcement agencies with adequate assistance "in developing training protocols, curricula, or instruction for the nuanced new approach required to address dynamic situations." (Potts Decl. ¶¶ 11-14). Consequently, most Minnesota law enforcement officers have failed to receive adequate training on the new requirements of the Revised Statute. Moreover, the ability to provide guidance and training on the Revised Statute is significantly compounding by the uncertainty of its constitutionality. In other words, how do chiefs of police and sheriffs provide training to what Plaintiffs argue is an unconstitutional requirement?

STANDARD OF REVIEW

Motion to Dismiss

Defendants move to dismiss the Complaint arguing Plaintiffs have failed to state a claim upon which relief can be granted, and this Court lacks subject matter jurisdiction because Plaintiffs lack standing and this matter is not ripe for review, therefore, no justiciable controversy exist. Minnesota Rule of Civil Procedure 12.02(e) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted." A district court may dismiss a complaint if "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Walsh v. U.S. Bank N.A.*, 851 N.W.2d 598, 602 (Minn. 2014) (quotation omitted). The issue is whether the complaint sets forth a legally sufficient claim for relief, which is a question of law. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). "[I]t is immaterial whether or not the plaintiff can prove the facts alleged," and a court should not grant a dismissal under Rule 12.02(e) "if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded…" *Martens v. Minnesota Min. & Mfg. Co*., 616 N.W.2d 732, 739-40 (Minn. 2000)

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(internal quotes and citations omitted). The district court must consider and accept as true only the facts alleged in the complaint and construe all reasonable inferences in favor of the nonmoving party. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

On a motion to dismiss for lack of subject matter jurisdiction, this Court must analyze whether it has the authority to consider an action. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Minn. R. Civ. P. 12.08(c). A plaintiff must provide more than labels and legal conclusions to survive a motion to dismiss. *Bahr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010). "The rule in Minnesota is that a justiciable controversy must exist before the courts have jurisdiction to render a declaratory judgment regarding the constitutionality of a statute." *St. Paul Area Chamber of Com. v. Marzitelli*, 258 N.W.2d 585, 587 (Minn. 1977). To be justiciable, a claim must be ripe, and the plaintiffs must have standing. *Id.* at 589.

Standing

Defendants contend that Plaintiffs lack standing to seek declaratory relief. "Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *Lorix v. Crompton Corp*., 736 N.W.2d 619, 624 (Minn. 2007); *see also State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). Standing is essential to a Minnesota court's exercise of jurisdiction. *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989). If a plaintiff lacks standing to bring a suit, the attempt to seek court relief fails. *Id.* "A party has standing when (1) the party has suffered an injury-in-fact, or (2) the party is the beneficiary of a legislative enactment granting standing." *Id.* (citation omitted).

Here, Plaintiffs must establish an injury-in-fact to have standing because the challenged

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laws do not include an explicit or implicit legislative grant of standing and they do not argue otherwise. "An injury-in-fact is a concrete and particularized invasion of a legally protected interest." *Webb Golden Valley, LLC. v. State*, 865 N.W.2d 689, 693 (Minn. 2015). An injury-in-fact must not only be concrete, but must also be "'actual or imminent, not conjectural or hypothetical.'" *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "The injury must be more than mere dissatisfaction with [the State's] interpretation of a statute." *Webb*, 865 N.W.2d at 693 (citing *In re Complaint Against Sandy Pappas Senate Comm.*, 488 N.W.2d 795, 797 (Minn. 1992)). "A party questioning a statute must show that it is at some disadvantage, has an injury, or an imminent problem." *All. for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 (Minn. Ct. App. 2003). A party claiming to have standing "must have a direct interest in the statute that is different from the interest of citizens in general." *Id.* (citation omitted).

Plaintiffs argue direct organizational standing because the Revised Statute has impediments to its mission, and that they may also sue on behalf of their members under the doctrine of associational standing, which permits an organization to sue to redress the injuries of its members. *See, Warth v. Seldin,* 422 U.S. 490 (1975). Organizations can establish standing by meeting the requirements of associational standing or direct organizational standing. Associational standing requires that the organization's members have standing as individuals, the interests that the organization seeks to protect are germane to its purpose, and neither the claim asserted, nor the relief requested requires the participation of individual members. *Philip Morris,*551 N.W.2d at 497-98 (stating that Minnesota's "approach [to associational standing] is derived from the seminal case" of *Hunt v. Wash. State Apple Advertis. Comm'n*, 432 U.S. 333 (1977)); *Hunt*, 432 U.S. at 342-43 (discussing three-part test).

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Direct organizational standing focuses on the entity rather than its members or constituents; it requires that the organization satisfy the injury-in-fact standing test applicable to individuals. *See, Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. Ct. App. 2004) ("Minnesota courts recognize impediments to an organization's activities and mission as an injury sufficient for standing"). At the pleading stage, a plaintiff need only allege an injury resulting from the defendant's challenged conduct. *Forslund v. State*, 924 N.W.2d 25, 33 (Minn. Ct. App. 2019) ("Whether appellants can prove that the challenged statutes impinge their children's right to an adequate education (and whether such impingement states a viable claim) is more appropriately addressed in connection with the merits."). The Minnesota Supreme Court has adopted a liberal standard for organizational standing. *All. for Metro. Stability*, 671 N.W.2d at 913 (citing *Snyder Drug Stores, Inc. v. Minn. State Bd. of Pharmacy*, 221 N.W.2d 162, 166 (Minn. 1974)).

Plaintiffs represent chiefs of police, sheriffs and deputy sheriffs, and law enforcement officer in Minnesota. All law enforcement officers are the class of people who are subject to the Revised Statute on a daily basis. The Revised Statute is not applicable to the general public.

Here, Plaintiffs allege that its members are subject to an infringement on a constitutionally protected fundamental right. At this stage of the proceeding, this Court must accept this allegation as true. If the Revised Statute is unconstitutional, its application is not speculative or hypothetical, but rather actual and imminent. This Court does not question the state's power and duty to indict or charge law enforcement officer with crimes, but rather recognizes that today it is more of a reality than a possibility. Clearly, the interests that Plaintiffs seek to protect are germane to its purpose. Moreover, the sheriffs and chiefs of police that are statutorily required to establish and enforce written policies and provide training and instruction on the use of deadly force to all its law enforcement officers are directly impacted by the Revised Statute and suffer an injury-in-fact

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by being required to provide instruction on an alleged unconstitutional provision. Plaintiffs do not allege that they are merely dissatisfied with the Revised Statute, but that on its face it is unconstitutional. This Court concludes that Plaintiffs have standing.

Ripeness

A party challenging the constitutionality of a law must show that the law "is, or *is about to be*, applied to his disadvantage." *Lee v. Delmont,* 36 N.W.2d 530, 537 (Minn. 1949); *see also State ex rel. Smith v. Haveland,* 25 N.W.2d 474, 478 (Minn. 1946) (explaining that litigants must be able to show that they have sustained or are immediately in danger of sustaining some direct injury) (emphasis added). "Issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable." *Lee,* 36 N.W.2d at 537. Few can argue today that the use of the affirmative defense of justifiable use deadly force be a law enforcement officer is an issue which rests only in the realm of possibility or purely hypothetical. It is real, it is probable, and more than likely to be exercised as more and more police officers are charged with murder and manslaughter.[1] This Court takes judicial notice that in the past five years at least seven Minnesota police officers have been charged with murder or manslaughter.

Also, Minnesota courts have recognized the "preventative" purpose of declaratory judgment actions. *Petition for Improvement of Cnty. Ditch No. 86 v. Phillips,* 625 N.W.2d 813, 821 (Minn. 2001). "Declaratory judgment actions allow parties 'to be relieved of an uncertainty and insecurity arising out of an actual controversy' with respect to their legal rights before those rights actually have been invaded:

[1] In the past year 934 people have been shot and killed by law enforcement officers. https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ From 2005 through June 24, 2019, 104 nonfederal sworn law enforcement officers have been arrested for murder or manslaughter resulting from an on-duty shooting. https://www.bgsu.edu/content/dam/BGSU/health-and-human-services/document/Criminal-Justice-Program/policeintegritylostresearch/-9-On-Duty-Shootings-Police-Officers-Charged-with-Murder-or-Manslaughter.pdf

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> [J]urisdiction exists although the *status quo* between the parties has not yet been destroyed or impaired and even though no relief is or can be claimed or afforded beyond that of merely declaring the complainant's rights so as to relieve him from a present uncertainty and insecurity.

McNaughtry v. City of Red Wing, 808 N.W.2d 331, 339 (Minn. 2011) citing *Minneapolis Fed'n of Men Teachers, Local 238, AFL v. Bd. of Educ. of Minneapolis,* 56 N.W.2d 203, 205–06 (Minn. 1952) (footnote omitted).

This Court concludes that Plaintiffs' challenge to the constitutionality of the peace officer use of force statute presents a justiciable controversy. Plaintiffs need not wait for one of its members to be charged with a homicide crime before the question of the constitutionality of the provision Plaintiffs challenge is answered. The uncertainty and insecurity would be unconscionable. Additionally, reason and common sense dictate that we do not allow chiefs of police and sheriffs to prepare and implement training programs that may be based on an unconstitutional premise. If the Revised Statute provision is unconstitutional, it is best we know that now before it is too late.

Plaintiffs present a facial challenge to the constitutionality of the Revised Statute. A facial challenge asserts that a law "always operates unconstitutionally." *Black's Law Dictionary* 261 (9th ed. 2009). Therefore, because this case presents a purely legal question and does not require the development of a factual record, there is no reason to delay resolution of the constitutional questions. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (a claim is ripe for adjudication when "[t]he issue presented ... is purely legal, and will not be clarified by further factual development"); *Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1308 (11th Cir. 2009) (stating that "a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record"); *Gray v. City of Valley Park,* 567 F.3d 976, 984 (8th Cir. 2009) ("[p]laintiffs have standing to challenge the facial validity of a regulation

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notwithstanding the pre-enforcement nature of a lawsuit, where the impact of the regulation is direct and immediate and they allege an actual, well-founded fear that the law will be enforced against them). The criteria for ripeness have been satisfied in this case.

The Defendants are Proper Parties

The Governor

Defendants contend that the Governor is not a proper Defendant because he is entitled to legislative immunity and he cannot implement the relief sought by Plaintiffs. This Court agrees that under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law. *Supreme Ct. of Va. v. Consumers Union of United States, Inc.,* 446 U.S. 719 (1980). The Governor's bill-signing power, found in Minn. Const. art. IV, § 23, is legislative in nature. *Inter Fac. Org. v. Carlson,* 478 N.W.2d 192, 194 (Minn. 1991); *see also Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (reiterating that "a Governor's signing or vetoing of a bill constitutes part of the legislative process"). "[O]fficials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." *Bogan*, 523 U.S. at 55. Accordingly, the Governor has legislative immunity from suit for the exercise of his bill-signing authority. The Plaintiffs do not name the Governor on the basis that he signed the statute.

Rather, Plaintiffs argue that the Governor, as the chief executive officer of the State is charged by the State Constitution to ensure that all of Minnesota's "laws [are] faithfully executed." Minn. Const. art. V, § 3. The Governor also has the power to direct the Attorney General to prosecute a criminal offense. *See*, Minn. Stat. § 8.01 ("Whenever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, … and exercise the powers of a county attorney); *see also State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 616 (Minn. 1995) ("we believe that the first portion of this statute "whenever the

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governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense is a directive mandating that the attorney general prosecute if a person is charged with an indictable offense."). Plaintiffs maintain it is appropriate to sue the Governor to prevent enforcement of unconstitutional laws. It is the Governor's potential power to direct prosecution, rather than his actual direction of prosecution, that makes the Governor a proper defendant. *See, Doe v. Bolton*, 410 U.S. 179, 188 (1973) ("They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.) (citations omitted).

Therefore, given the Governor's responsibility to ensure the faithful execution of the laws under the Minnesota Constitution, and the statutory authority to mandate the chief enforcement officer of this state to prosecute and enforce the criminal laws of the State of Minnesota, this Court concludes the Governor is a proper defendant. This is more than a general duty; it is that nexus between the Governor's power to order mandate prosecution and the injury Plaintiffs may suffer that bring this Court to its conclusion.

The State of Minnesota

Defendants also argue that the State of Minnesota is an improper defendant because the state can provide no relief other than that provided by its agencies. Defendants site *Meriwether Minn. Land & Timber, LLC. v. State*, 818 N.W.2d 557 (Minn. Ct. App. 2012) wherein the court did not provide guidance but rather simply questioned if the state was a proper party in that case because "the state can provide no relief other than that provided by the commissioner of revenue."). *id.* at 573. Defendants provide other unpublished and nonbinding decisions in support of its argument. Plaintiffs also do not provide this Court much guidance in answering this question.

The question for this Court is whether that State of Minnesota is a proper party in a constitutional challenge to its criminal laws. As argued by Plaintiffs' counsel during oral

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arguments, "If not the defendants, then who?" In this case the claimed injury is traceable to the law itself and the enforcement of that law is done in the name of the State. If in all criminal prosecutions it is the "*State v. Defendant*," it seems logical that a party challenging the constitutionality of a law found within a criminal statute would seek its redress from those set to enforce it. Perhaps Plaintiffs could have additionally named as defendants the Attorney General and all 87 Minnesota county attorneys; that would result in a chaotic process. Therefore, this Court concludes that because the criminal laws are enforced by the State, and prosecuted in the State's name, the State is a proper party to defend them.

Defendants argue Plaintiffs cannot obtain declaratory relief from the State because the State is not a "person" and point this Court to the definition of a "person" under the Declaratory Judgments Act, and conclude it refers to the limitation of those subject to suit under the Act. The definition of "person" found in Minn. Stat. § 555.13 does not appear to limit against whom one may seek a declaratory judgment in the context of declaring a statute unconstitutional. Defendants also point this Court to Minn. Stat. § 645.27 (the codification of the State's common-law sovereign immunity). Minnesota courts have recognized that individuals may seek relief directly from the State for constitutional violations. *Dale Properties, LLC v. State*, 619 N.W.2d 567, 570 (Minn. Ct. App. 2000), *rev'd on other grounds*, 638 N.W.2d 763 (Minn. 2002).

Injunctive Relief

Rule 65.01 of the Minnesota Rules of Civil Procedure provides that a court may issue a temporary restraining order if "immediate and irreparable injury, loss, or damage will result to the applicant . . .." Similarly, a court may grant a temporary injunction "if by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor." Minn. R.

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Civ. P. 65.02(b). The issuance of injunctive relief is a decision which rests with the discretion of the trial court. *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 91 (Minn. 1979).

Minnesota courts consider five factors in determining whether to grant injunctive relief:

> (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;
> (2) The harm to be suffered by the moving party if the injunction is denied compared to that inflicted on the non-moving party if the injunction is issued;
> (3) The likelihood of success on the merits;
> (4) The public interest; and
> (5) The administrative burdens involved in judicial supervision and enforcement of the injunction.

Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965). It is not necessary for every factor to weigh in favor of injunctive relief; rather, injunctive relief should be granted if the factors as a whole support it. *See, e.g.*, *Strangis v. Metro. Bank*, 385 N.W.2d 47, 48 (Minn. Ct. App. 1986) (affirming temporary injunction where the "trial court found four of the factors to be inconclusive but concluded factor two was dispositive in [plaintiffs'] favor"). Of the five factors, the most important is the likelihood of success on the merits. *Softchoice v. Schmidt*, 763 N.W.2d 660, 666 (Minn. Ct. App. 2009). As a first step, the Court will address whether Plaintiffs have demonstrated a likelihood of success on the merits of their claim.

Likelihood of Success on the Merits

Defendants argue that Plaintiffs' claim for an injunction on the enforcement of Minn. Stat. § 609.066 is not justiciable because it violates the political question doctrine, and even if it were justiciable, Plaintiffs have failed to set forth a legally sufficient claim for relief. Defendants appear to have comingled their motion to dismiss with their motion to deny injunctive relief and do not, in any meaningful way, argue the merits of the constitutionality of the Revised Statute.

Plaintiffs are correct in stating the well-settled law that the judiciary may not interfere in "a matter which is to be exercised by the people in their primary political capacity," or one that

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"has been specifically delegated to some other department or particular officer of the government, with discretionary power to act." *In re McConaughy*, 119 N.W. 408, 417 (Minn. 1909); *see also Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 623 (Minn. 2017) (when parties invite the judiciary to decide questions that have been committed to the discretion of the other branches of government, they present "disputes that are ill-suited for judicial resolution." However, this Court is not being asked to write a statute, nor is it second-guessing the wisdom of the policy considerations associated with the Revised Statute. Rather, it has been called upon to determine if the challenged provision of the statute is on its face unconstitutional. The judicial branch of the government is charged with ensuring equal justice under the law, and functions as the guardian and interpreter of the Constitution.

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Marbury v. Madison, 5 U.S. 137, 178 (1803).

Statutes are presumptively constitutional. *In re Haggerty,* 448 N.W.2d 363, 364 (Minn. 1989); *see also In re Tveten,* 402 N.W.2d 551, 556 (Minn. 1987) ("We start with the premise that a duly enacted statute carries with it a presumption in favor of its constitutionality."); *Ninetieth Minnesota State Senate v. Dayton*, 901 N.W.2d 415, 417 (Minn. 2017) ("[A] proper respect for our co-equal branches of government counsels that we intervene in their dispute only when absolutely necessary."). This Court's authority to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary. *Haggerty,* 448 N.W.2d at 364. The party challenging the constitutionality of a statute has the burden of demonstrating, beyond a reasonable doubt, a violation of some provision of the Minnesota Constitution. *Id.* (citing

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McGuire v. C & L Restaurant, Inc., 346 N.W.2d 605, 611 (Minn. 1984)). Here, Plaintiffs allege the Revised Statute is facially unconstitutional as it places a requirement on police officers to forfeit their right to refuse to testify under the Fifth Amendment to the United States Constitution or Art. 1, § 7 of the Minnesota Constitution.

> Where the bill makes an attack upon the constitutionality of a state statute, supported by factual allegations sufficiently strong, as here, to raise 'grave doubts of the constitutionality of the Act' in the mind of the trial court, the motion to dismiss for failure to state a cause of action should be denied.

Gibbs v. Buck, 306 U.S. 66, 76 (1939).

The Revised Statute requires law enforcement officers to specifically articulate the facts causing them to believe that the use of deadly force was justified. Without said articulation they would not be able to avail themselves of the affirmative defense. The Legislature has deemed it appropriate to establish a statutory affirmative defense of self-defense (and defense of others) specific to law enforcement officers and not applicable to the general public. This is clearly within the Legislature's power to do so. But when doing so it cannot run afoul of the state and federal constitutional protections afforded the criminally accused.

In this case the Revised Statute appears to require a defendant to take the witness stand, testify, and thereby be subject to cross-examination by the state. Plaintiffs may argue that it appears to impermissibly burden a defendant's right to not testify. Both the United States and Minnesota Constitutions guarantee a criminal defendant's right not to testify. *See,* U.S. Const. amend. V (stating no person shall be compelled to be a witness against himself in any criminal case); Minn. Const. art. 1, § 7 (No person shall be … compelled in any criminal case to be a witness against himself). Ordinarily, a district court judge should obtain permission from a criminal defendant before instructing the jury with CRIMJIG 3.17, the no-adverse-inference instruction. *State v. Thompson,* 430 N.W .2d 151, 153 (Minn. 1988); *see* 10 *Minnesota Practice* CRIMJIG

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3.17 (2015) (stating that defendant has the right, guaranteed by federal and state constitutions, not to testify in his own defense, and that jury should not draw any inference from fact defendant has not testified).

Unlike some other states, our Minnesota Supreme Court has not adopted the restrictive view that a defendant must testify and provide direct evidence of his or her state of mind in order to be entitled to an instruction on self-defense. *State v. Johnson*, 719 U.S. 619, 630 (Minn. 2006); s*ee also People v. Hoskins,* 267 N.W.2d 417, 419 (1978) (holding that "[a] defendant need not take the stand and testify in order to merit an instruction on self-defense" and "a defendant may show his state of mind by circumstantial evidence"); *State v. Boitnott,* 443 N.W.2d 527, 531 (Minn. 1989) (intent is a state of mind and is, therefore, generally provable only by inferences drawn from a person's words or actions in light of all the surrounding circumstances). Therefore, because there is a likelihood of success on the merits, this factor favors the temporary injunctive relief.

Relationship Between the Parties

The factor examining the parties' relationship only supports a temporary injunction if the relief sought would maintain the parties' "existing relationship" before the dispute arose. *See, Metro. Sports Facilities Comm'n v. Minn. Twins P'ship,* 638 N.W.2d 214, 221 (Minn. Ct. App. 2002), *review denied* (Minn. Feb. 4, 2002). This is because the purpose of a temporary injunction is "to preserve the status quo." *Pac. Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. Ct. App. 1994). Defendants argue that an injunction is unnecessary to maintain the status quo because the Revised Statute has not changed the parties' relationship. This Court agrees that Defendants do not specifically license or regulate peace officers. However, this Court should not ignore that the state prosecutors required to enforce the Revised Statute are the same prosecutors that work side-by-side, daily, with law enforcement in prosecuting crimes. Notwithstanding this

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concern, because the named parties' relationship would remain relatively unchanged, this factor does not favor an injunction.

Public Policy and Interest

The public policy implications are severe, and it is imperative that we get this right. In 1979 the U.S. Department of Justice ("DOJ") compiled a report of community concerns and police use of deadly force.[2] The first quote in the report is from Robert Lamb, Jr., who at the time was Regional Director of the DOJ Community Relations Service, and he stated then that "[t]here is no single issue that serves to precipitate a breakdown between law enforcement officials and minority groups – and has the potential for serious disorder – as police use of deadly and excessive force." That same sentiment can be made 42 years later. Few would disagree that the decision to use deadly force is perhaps the most serious, and consequential act a law enforcement officer can make. The consequences reach and impact many more than the parties involved and may damage the relationships of mutual trust between law enforcement and the communities, which is critical to maintaining public safety and effective policing.

How law enforcement officers act in the course of their duties is clearly guided by their own ethics and judgment, but without well-defined practices, constitutional legal guidelines, and proper training, they cannot response in a manner the public expects. The Revised Statute is one of those legal guidelines that requires proper training from our law enforcement leaders. If the challenged provision is unconstitutional and a conviction is reversed as a result, the divide between law enforcement and the public will only get wider, and it will work to create a greater mistrust. The public interest that law enforcement officers be guided by a law that is not unconstitutional is of immense importance. This factor heavily favors the temporary injunction.

[2] A Community Concern: Police Use of Deadly Force https://www.ojp.gov/pdffiles1/Digitization/132789NCJRS.pdf

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Balance of Relative Harms

To show great and irreparable injury, "[t]he moving party must show that the particular relief requested will prevent the certain occurrence of an event that will cause significant injury." *City of Mounds View v. Metro. Airports Comm'n*, 590 N.W.2d 355, 357 (Minn. Ct. App. 1999). The failure to show irreparable harm is alone enough to deny a motion for a temporary injunction. *Morse v. City of Waterville*, 458 N.W.2d 728, 729 (Minn. Ct. App. 1990). Once a moving party has demonstrated irreparable harm, the Court balances this against the potential harm to the enjoined party. *Haley v. Forcelle*, 669 N.W.2d 48, 58 (Minn. Ct. App. 2003).

Plaintiffs represent law enforcement chiefs, sheriffs, and officers that must base their split-second decisions on their training and experience. Defendants argue that Plaintiffs have only themselves to blame for failing to provide police officers with the proper and necessary training. This may be true particularly as it relates to the unchallenged provisions of the Revised Statute, however, the question the Plaintiffs have been unable to answer for themselves is what the proper and necessary training is related to Minn. Stat. § 609.066, subd. 2(a)(1)(i). They ask this Court for time and guidance to ensure that the training provided satisfies constitutional requirements. If police officers are uncertain when it is appropriate to use deadly force, the harm will likely be irreparable.

Any alleged harm to Plaintiffs must be balanced against potential harm to the Defendants. *Haley*, 669 N.W.2d at 58. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (internal quotation omitted). Defendants fail to articulate for this Court how, in this case, the "form" may take shape. In *King*, a divided Maryland Court of Appeals overturned King's conviction, which was in significant part obtained from collecting his DNA on a separate

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crime for which he had not yet been convicted, holding the preconviction collection of his DNA was a constitutional violation. The state sought a stay on that judgment and in finding irreparable harm Justice Roberts wrote "there is … an ongoing and concrete harm to Maryland's law enforcement and public safety interests." *Id*. at 1303. Similarly, in this case, there is an ongoing and concrete harm to Minnesota's law enforcement and public safety interest. This factor favors granting the temporary injunctive relief.

Administrative Burden on the Court

The administrative burden on the Court in enforcing an injunction is minimal. This Court will require expedited written memorandum and arguments on the constitutionality of Minn. Stat. § 609.066, subd. 2(a)(1)(i). No testimony will be required as Plaintiffs seek Declaratory Judgment on the face of the provision of the Revised Statute which they allege violates a fundamental constitutional right. This factor favors granting temporary injunctive relief.

The *Dahlberg* factors as a whole favor issuance of temporary injunctive relief.

Effect of Staying A Statute

An unconstitutional amendment to a statute is not effective. *See, Bongard v. Bongard*, 342 N.W.2d 156 (Minn. Ct. App. 1983); *People ex rel. Barrett v. Sbarbaro*, 54 N.E.2d 559 (Ill. 1944); *Archer v. City of Shreveport*, 77 So. 2d 517 (La. 1955). The effect of an unconstitutional amendment is to leave the statute in force as it existed prior to the adoption of the amendment. *See, Illinois Liquor Control Commission v. Chicago's Last Liquor Store*, 88 N.E.2d 15 (Ill. 1949); *State ex rel. Thornton v. Wannamaker*, 150 S.E.2d 607 (S.C. 1966); *State v. Dixon*, 530 S.W.2d 73 (Tenn. 1975); *Giebelhausen v. Daley*, 95 N.E.2d 84 (Ill. 1950). "When a statute is unconstitutional, it is not a law and it is as inoperative as if it had never been enacted." *Fedziuk v. Commissioner of Public Safety*, 696 N.W.2d 340, 349 (Minn. 2005) citing *State v. Mullen,* 577

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N.W.2d 505, 512 (Minn. 1998). Additionally, the presumption is that unconstitutional provisions are severable.

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Minnesota Statutes § 645.20 (2020).

If a law is unconstitutional, only the latest amendment is severed, and any previous version found constitutional remains in full force and effect. *See, State v. One Oldsmobile Two–Door Sedan, Model 1946,* 35 N.W.2d 525, 530 (Minn. 1948). An unconstitutional law, being void and inoperative, cannot repeal or in any way affect an existing one. *Id.*

This Court is asked to declare as unconstitutional a portion of a properly enacted statute. An obligation it does not take lightly. If the provision Plaintiffs challenge is found to be unconstitutional, this Court will consider its severability in accordance with our rules of statutory construction. Pending this Court's decision on the merits, the Revised Statute shall be stayed and Minn. Stat. § 609.066 as it existed prior to the adoption of the amendment shall remain in force.

Conclusion

The parties must meet and confer and provide this Court with a briefing and oral argument schedule no later than 10 days from the date of this Order. Oral arguments will be conducted remotely and must be held within 60 days of this Order. The parties should contact the undersigned's scheduling clerk, Anna Vue, at Anna.Vue@courts.state.mn.us or 651-266-8252 to confirm court availability and schedule the necessary dates.

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The issues to be briefed and argued are:

1. Is Minn. Stat. § 609.066, subd. 2(a)(1)(i), requiring a law enforcement officer to articulate the threat with specificity, an unconstitutional violation of the fundamental right that a person cannot be compelled to testify against themselves in a criminal proceeding under the U.S. Const. amend. V or Minn. Const. art. 1 § 7?
2. If Minn. Stat. § 609.066, subd. 2(a)(1)(i) is unconstitutional, is the provision severable?

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