UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Voters Alliance, Mary Amlaw, Ken Wendling, and Tim Kirk, Plaintiffs, vs. Keith Ellison, in his official capacity as Attorney General, and Brad Johnson, in his official capacity as Anoka County Attorney, Defendants.	Court File No.: 0:23-cv-2774 (NEB/TNL) **THE ANOKA COUNTY ATTORNEY'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiffs fundamentally misunderstand the purpose of a preliminary injunction. Preliminary injunctive relief is an equitable remedy designed to preserve the status quo until a court can rule on the merits of a party's claim. That is not at all what Plaintiffs seek here. Plaintiffs are not trying to preserve the status quo that currently exists between the parties; they are instead asking this Court to grant on an interim basis the ultimate relief they seek through their Amended Complaint. Plaintiffs ask this Court to grant them a license to violate a law duly enacted by the Minnesota legislature before this Court decides whether that law is constitutional or not. Plaintiffs' Amended Complaint and motion for preliminary injunction both ask this Court to declare Minn. Stat. § 211B.075 unconstitutional and prevent Anoka County Attorney Johnson from enforcing that statute

against them. There is no reason this Court should resolve the ultimate issue on a preliminary motion rather than allowing the normal litigation process to play out.

Not only do Plaintiffs improperly seek ultimate relief, but their motion for preliminary injunction is also not yet ripe. Attorney General Ellison has brought a motion to dismiss Plaintiffs' Amended Complaint, arguing that the statute is constitutional both facially and as applied to Plaintiffs. County Attorney Johnson has brought a similar motion for judgment on the pleadings. Both those motions are scheduled to be heard on February 21, the same date on which Plaintiffs have scheduled their motion for preliminary injunction. Defendants' pending motions will require this Court to directly consider the constitutionality of Section 211B.075. At best, then, Plaintiffs' motion for injunctive relief is premature. There is no reason for this Court to consider whether an injunction is appropriate until it first decides whether Plaintiffs' claims even survive.

If Defendants prevail on their dispositive motions, then Plaintiffs' motion would be moot because Plaintiffs would, by definition, be unlikely to succeed on the merits of their claims. If this Court denies Defendants' motions because it finds the statute unconstitutional, then it goes without saying that County Attorney Johnson would not seek to enforce the statute against Defendants unless a higher court reversed this Court's decision, again making Plaintiffs' motion moot. The only scenario in which this Court actually needs to consider a motion for preliminary injunction is if this Court finds that some issue prevents it from ruling on the merits of Defendants' pending motions until the record is more fully developed. This Court cannot decide whether preliminary relief is warranted until it first decides the pending dispositive motions.

Even if this Court were inclined to consider the issue now, however, it is not clear what relief this Court could grant Plaintiffs anyway given that County Attorney Johnson has voluntarily agreed to stay his counterclaim pending this Court's resolution of the pending dispositive motions. (ECF 29). What Plaintiffs really seek is a judicial stamp of approval to violate Section 211B.075 for the time it takes this Court to consider whether that statute is constitutional or not. But again, that relief would not be preserving the status quo; it would be granting Plaintiffs the ultimate relief they seek through their Amended Complaint. The status quo that currently exists is that the Minnesota legislature passed a law in June that prohibits Plaintiffs from misleading eligible voters about their right to vote. Plaintiffs waited nearly 90 days to challenge that statute's constitutionality. They then waited more than 75 additional days before bringing their motion for preliminary injunction (but only after taking the time to revise their allegations through an Amended Complaint). Section 211B.075 had been on the books for almost six months by the time Plaintiffs sought to enjoin it. During that time, Minnesota conducted an election on November 7, 2023, without any suggestion from Plaintiffs that they would be harmed if the statute were not enjoined.

Plaintiffs now want to **change** the status quo that has existed since June by preventing anyone from enforcing Section 211B.075, thereby allowing them to mislead prospective voters in future elections with impunity until this Court rules on the merits of their Amended Complaint. That is not the purpose of a preliminary injunction. This Court should deny Plaintiffs' motion outright, or at the very least stay consideration of that

motion until this Court rules on the pending dispositive motions and decides whether the motion needs to be resolved at all.

II. FACTUAL BACKGROUND

Through this lawsuit, Plaintiffs challenge the constitutionality of Minn. Stat. § 211B.075, which took effect on June 15, 2023. Plaintiffs waited nearly three months to file a Complaint challenging the constitutionality of that statute, commencing this action on September 11. (ECF 1). County Attorney Johnson filed his Counterclaim against Plaintiffs on October 2. (ECF 12). Upon receiving Johnson's Counterclaim, Plaintiffs filed a notably revised and edited Amended Complaint on October 17. (ECF 13). In response to that Amended Complaint, Johnson filed an Amended Counterclaim on October 30. (ECF 16).

On November 7, elections took place across Minnesota. Also on November 7, County Attorney Johnson filed a motion for judgment on the pleadings that is scheduled to be heard by this Court on February 21. (ECF 17). Attorney General Ellison filed his own motion to dismiss on November 7, also scheduling that motion to be heard on February 21. (ECF 23). Upon receiving those motions, this Court found good cause to delay issuing a pretrial scheduling order. (ECF 28). This Court advised the parties to contact the Court about scheduling a pretrial conference within 30 days of the date on which this Court decides the pending motions.

Rather than file an answer to Johnson's Amended Counterclaim, Plaintiffs asked Johnson for an extension of time to answer or otherwise respond. Johnson agreed, and the parties submitted a stipulation to that effect on November 17. (ECF 29). The parties asked

this Court to extend the time within which Plaintiffs must answer or otherwise respond to the counterclaim as follows:

> 6. The parties thus request that the Court issue an order extending the time for Plaintiffs/Counterclaim Defendants to answer or otherwise respond to the amended counterclaim as follows:
>
> a. After the Court's decision on the forthcoming motions and the exhaustion of any appeal rights as to those motions, the parties shall notify the Court of that occurrence within 7 days.
>
> b. If a response to the amended counterclaim is still required at that point, Plaintiffs/Counterclaim Defendants shall answer or otherwise respond to the amended counterclaim within 21 days of that notice.

This Court accepted the parties' stipulation on November 20, extending Plaintiffs' response date as the parties had agreed. (ECF 31). Because this Court has stayed issuance of a pretrial scheduling order and extended Plaintiffs' time within which to respond to the Amended Counterclaim until this Court rules on the pending dispositive motions, nothing of substance will happen in this case until this Court decides those motions. Nevertheless, Plaintiffs filed their motion for preliminary injunction on November 28, more than five months after Section 211B.075 took effect and exactly three weeks following the November 7 elections. (ECF 33).

III. ARGUMENT

This Court considers a request for preliminary injunctive relief under the well-known *Dataphase* factors. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). "In deciding whether to issue a preliminary injunction, the district court considers four factors: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other

parties litigant; (3) the probability that the movant will succeed on the merits and (4) the public interest." *Minnesota State College Student Assoc., Inc. v. Cowles*, 620 F. Supp. 3d 835, 853 (D. Minn. 2022) (quoting *Sleep No. Corp. v. Young*, 33 F.4th 1012, 1016 (8th Cir. 2022). The party seeking injunctive relief bears the burden of showing that those four factors weigh in its favor. *Id.*

A. Plaintiffs' Motion for Preliminary Injunction is Not Ripe

There is no reason for this Court to consider Plaintiffs' request for injunctive relief until this Court first rules on Attorney General Ellison's pending motion to dismiss and County Attorney Johnson's pending motion for judgment on the pleadings. Plaintiffs are not seeking an injunction because they reasonably fear that County Attorney Johnson may file some sort of motion with this Court before it rules on the pending motions. County Attorney Johnson has already granted Plaintiffs an extension of time to respond to his counterclaim until after this Court rules on the pending dispositive motions. He has also advised Plaintiffs that he does not plan to seek his own interim injunctive relief. In correspondence with Plaintiffs' counsel, undersigned counsel has been clear that County Attorney Johnson would not file his own preliminary motion:

> As you and I have discussed before, the Anoka County Attorney has no present intention of seeking a preliminary injunction or otherwise actively pursuing his counterclaim until the court rules on our pending motion for judgment on the pleadings.

(Stover Decl., Ex. A). County Attorney Johnson also offered to preserve the status quo without the need for Plaintiffs to file a preliminary injunction motion at all:

> If Plaintiffs wish to discuss a stipulation through which they agree to preserve the status quo by not making the types of statements described in the

> Amended Complaint, and the Anoka County Attorney in turn agrees not to take expedited action against Plaintiffs until the Court rules on the pending motions, we are certainly willing to talk that through with you.

(*Id.*). Plaintiffs chose to file the instant motion rather than explore that possibility with the County Attorney. Plaintiffs' refusal to stipulate belies any argument that Plaintiffs are merely interested in preserving the status quo until this case can be heard on the merits.

It is not clear what further relief this Court could grant today beyond what this Court has already done and County Attorney Johnson has already offered. Plaintiffs want to stay enforcement of the statute against them, but Johnson has already filed a counterclaim and this Court cannot through a preliminary injunction "un-file" that pleading. This Court has stayed discovery on the counterclaim, Johnson has given Plaintiffs an extension of time to respond to it, and Johnson has indicated that he does not plan to seek injunctive relief until this Court first rules on the pending dispositive motions. Plaintiffs' motion is therefore premature because there is nothing for this Court to enjoin.

If this Court grants Johnson's motion for judgment on the pleadings, then Plaintiffs cannot receive an injunction because they would obviously not be likely to succeed on the merits of their claims.[1] If this Court denies that motion because it finds Section 211B.075 unconstitutional, then it goes without saying that Johnson would not continue litigating a counterclaim to enforce an unconstitutional statute. The only scenario under which this

[1] County Attorney Johnson would then proceed with his counterclaim. County Attorney Johnson would be prepared to discuss a potential resolution with Plaintiffs to see whether an agreement could be reached about Plaintiffs' future conduct. If those talks proved unsuccessful, then County Attorney Johnson would pursue discovery and try his claim on the merits.

Court needs to decide whether injunctive relief is appropriate is if this Court denies Johnson's motion for judgment on the pleadings because it requires a more fully-developed record. In that situation, this Court would then need to decide whether to issue some sort of injunction until it could hear the parties' respective claims on the merits. Plaintiffs' request is not currently ripe and should be rejected on that basis alone. *See Engineering and Construction Innovations, Inc. v. Bradshaw Construction Corp.*, Civ. No. 20-0808 (WMW/TNL), 2023 WL 6217994 at * 10 (D. Minn. Sept. 25, 2023) ("A claim is not ripe for adjudication if it rests upon contingent future events that may occur as anticipated, or indeed may not occur at all").

B. A Preliminary Injunction Cannot be Used to Obtain the Ultimate Relief Requested in a Complaint

Even if this Court were inclined to consider Plaintiffs' motion now, that motion would fail because it seeks the same ultimate relief that Plaintiffs seek through their Amended Complaint. It is important to bear in mind the purpose of a preliminary injunction. Pretrial injunctive relief is "an extraordinary and equitable remedy." *Lindell v. United States*, 82 F. 4th 614, 618 (8th Cir. 2023). A preliminary injunction is meant to preserve the status quo pending a ruling on the merits of a party's claims. It is **not** designed as a mechanism to allow a court to award the ultimate relief requested by a party before a true merits hearing can be held. *See Cowles*, 620 F. Supp. 3d at 853. ("The core question is whether the equities so favor the movant that justice requires the court to intervene to preserve the status quo until the merits are determined"). The Eighth Circuit "has

repeatedly recognized that the purpose of injunctive relief is to preserve the status quo; it is not to give the movant the ultimate relief he seeks." *Lindell*, 82 F.4th at 618.

In *Lindell*, plaintiff's cell phone was seized as part of a federal investigation related to the publication of forensic images from election software used in the 2020 election. *Id.* at 617. Plaintiff brought a motion for preliminary injunction seeking the return of his phone and preventing the government from reviewing information on that device. *Id.* The district court denied injunctive relief and the plaintiff appealed. On appeal, the Eighth Circuit found that the plaintiff's request for injunctive relief was really just a request that the court grant him the ultimate relief sought in his complaint:

> Lindell's motion for injunctive relief is a request for the ultimate relief he seeks. While he has at times attempted to assert otherwise, Lindell's objective in this action is apparent—**this litigation is a tactic to, at a minimum, interfere with and, at most, enjoin a criminal investigation and ultimately hamper any potential federal prosecution related to his, or their, involvement** in the public disclosure of forensic images of Mesa County's election management servers. Affording such relief is not only contrary to the purpose of a preliminary injunction but would open the door to a deluge of similar litigation by those under criminal investigation. This type of ultimate relief request is fatal to Lindell's preliminary injunction application.

Id. at 618 (emphasis added); *see also McKinney v. Southern Bakeries, LLC*, 786 F.3d 1119, 1125 (8th Cir. 2015) (vacating preliminary injunction where injunction "did not act to preserve the status quo" but instead "accelerated what at this point only may be the ultimate remedy").

The same is true here. Plaintiffs ask this Court to "preliminarily enjoin the operation of Minn. Stat. § 211B.075 while this case proceeds." (ECF 35, p. 4). But what does that mean? If Plaintiffs are asking this Court to enjoin County Attorney Johnson from

proceeding with his counterclaim until this Court first rules on the constitutionality of Section 211B.075, that request is moot. This Court has already *sua sponte* stayed any further proceedings in this case by notifying the parties that it will not hold a pretrial scheduling conference until this Court first rules on the pending dispositive motions. Under Rule 26(d), parties may not begin the discovery process until they have first conferred and agreed on a discovery plan. The County Attorney has not yet asked Plaintiffs to participate in a discovery conference and, as this Court well knows, typically discovery does not begin until after this Court holds its own Rule 26 conference. By notifying the parties that it will not hold that conference until it first rules on the pending motions, this Court has already *de facto* stayed any further developments in this case, the same remedy Plaintiffs request through their motion for preliminary injunction.

What Plaintiffs really seek is not an injunction against the County Attorney but a judicial stamp of approval to violate the law until this Court decides whether the law is constitutional. When Plaintiffs ask this Court to "enjoin the operation" of Section 211B.075, what they are really asking is permission to make false statements intended to interfere with convicted felons' right to vote. That is exactly the ultimate relief that Plaintiffs seek through their Amended Complaint. If Plaintiffs prevail on the merits of their Amended Complaint, then they will be able to make their false statement that felons are not allowed to vote in Minnesota. Asking this Court to grant that relief on an interim basis is precisely the type of ultimate relief that this Court and the Eighth Circuit have said repeatedly cannot be granted on a motion for preliminary injunction.

It would be extraordinary for a federal court to issue a preliminary order prohibiting a Minnesota County Attorney from protecting his or her community, the state's elections process, and the integrity of Minnesota state law. That is especially true now that a Minnesota state court judge on December 14 dismissed Plaintiffs' complaint alleging that the felon re-enfranchisement law itself is unconstitutional. (Stover Decl., Ex. B). Plaintiffs ask this Court to grant them a license to tell felons that they cannot vote, even though both the legislature and the state court system say that they can.

It is also important to note that this is not merely an academic question. Minnesota's 2024 presidential primary will be held in March. If this Court grants Plaintiffs' requested injunction, then Plaintiffs will be able to falsely tell convicted felons that they cannot vote in that election even though the Minnesota legislature has passed a law expressly giving them that right. Plaintiffs are using their request for a preliminary injunction as a vehicle to nullify the legislature's duly-enacted law before this Court has even considered the merits of Plaintiffs' Amended Complaint. If this Court eventually holds that Section 211B.075 is constitutional, then the injunction Plaintiffs request would allow them to violate with impunity a constitutional law duly enacted by the legislature during a major statewide election. That remedy far exceeds the scope of a permissible injunction under Rule 65.

C. Plaintiffs Must Show More than Just a Likelihood of Success on the Merits

Plaintiffs claim that when considering a motion for preliminary injunction in a case implicating the First Amendment, this Court need only consider whether Plaintiffs are likely to succeed on the merits of their claim, disregarding the other three *Dataphase*

factors. (ECF 35, p. 3). Not so. "[E]ven in the First Amendment context, the Supreme Court has stated that a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Let Them Play MN v. Walz*, 517 F. Supp. 3d 870, 887 (D. Minn. 2021). That court cited the Supreme Court's decision in *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018), in which the Supreme Court held "as a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits. Rather, a court must also consider whether the movant has shown that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." This Court has previously explained that a challenge to a statute restricting speech "does not obviate the requirement of a movant to show a threat of irreparable harm. Where a duly enacted statute is involved, a likelihood of success on the merits may be characterized as one, but not the only, threshold showing that must be met by a movant for a preliminary injunction." *Goyette v. City of Minneapolis*, Civ. No. 20-1302 (WMW/DTS), 2020 WL 3056705 at * 3, fn. 3 (D. Minn. June 9, 2020). That is because "equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Id.* (quoting *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973)).

As will be discussed below, Plaintiffs are not likely to succeed on the merits of their claim that Section 211B.075 is unconstitutional. But even if Plaintiffs could show a likelihood of success, they offer this Court almost no analysis of the three additional factors that must be considered, limiting their discussion of those factors to a single paragraph

consisting primarily of quotations from various cases.[2] All three of those other factors weigh against Plaintiffs.

D. Plaintiffs Cannot Show Irreparable Harm if this Court Refuses to Enjoin Section 211B.075 Pending a Hearing on the Merits

The biggest impediment to Plaintiffs' motion for preliminary injunction is the complete absence of any irreparable harm should this Court deny it. Irreparable harm "occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages. The harm must be *likely* in the absence of an injunction, great, and of such imminence that there is a clear and present need for equitable relief." *Let Them Play MN*, 517 F. Supp. 3d at 887. It is not sufficient to show a mere risk of irreparable harm. "There must be a clear showing of immediate irreparable injury." *Berkley Risk Adm'rs. Co. v. Accident Fund Holdings, Inc.*, Civ. No. 16-2671 (DSD/KMM), 2016 WL 4472943 at * 4 (D. Minn. Aug. 24, 2016) (citation omitted). Stated another way, "the movant must show that irreparable injury is *likely* in the absence of an injunction, not merely a possibility of irreparable harm before a decision on the merits

[2] Plaintiffs have failed to carry their burden of production and persuasion in their preliminary injunction motion and brief. Plaintiffs filed just a four-page brief in support of their request for sweeping injunctive relief. This Court should not allow Plaintiffs to turn around and file a dramatically longer reply brief that addresses the other three factors they previously chose to ignore. Because Plaintiffs barely mentioned the other three *Dataphase* factors in their initial brief, Johnson cannot be expected to guess in advance the new arguments Plaintiffs might include in their reply brief. This Court should hold Plaintiffs to the arguments made in their initial brief and not consider entirely new arguments made in their reply. There has already been too much revising and editing by Plaintiffs in this case.

can be rendered." *Cowles*, 620 F. Supp. 3d at 854 (quoting *Tumey v. Mycroft AI, Inc.*, 27 F. 4th 657, 665 (8th Cir. 2022)). As this Court has said before:

> Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with the Supreme Court's characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.

Goyette, 2020 WL 3056705 at * 3 (quoting *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008)). Failure to demonstrate irreparable harm is alone sufficient to deny a preliminary injunction. *Independence-Alliance Party of Minnesota v. Simon*, 603 F. Supp. 3d 684, 694 (D. Minn. 2022).

Plaintiffs cannot articulate any actual irreparable harm that will befall them in the absence of injunctive relief. The County Attorney realizes that this Court has said before that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Human Rights Defense Center v. Sherburne County*, Civ. No. 20-1817 (ADM/HB), 2020 WL 7027840 at * 6 (D. Minn. Nov. 30, 2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). That truism does not, however, mean that a party is entitled to issuance of injunctive relief without articulating the specific irreparable harm that it will experience in its absence. Conjecture is insufficient. Even in cases involving alleged deprivations of First Amendment freedoms, the moving party still must "show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Goyette*, 2020 WL 3056705 at * 3 (quoting *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013). Plaintiffs cannot make that showing for three reasons.

First, Plaintiffs cannot show that they are currently suffering irreparable harm because this Court has already effectively stayed discovery in this matter until it rules on the merits of the dispositive motions pending before it. Johnson has further agreed not to seek injunctive relief against Plaintiffs while those motions are pending. Plaintiffs therefore know that no action will be taken against them under the statute until this Court has at least a preliminary opportunity to consider its constitutionality. With that hearing scheduled to take place in February, Plaintiffs cannot articulate any irreparable harm that they will suffer between now and the date this Court rules on those motions.[3]

Second, Johnson's counterclaim is obviously not interfering with Plaintiffs' speech because Plaintiffs allege in their Amended Complaint that they "intend to continue to speak" their materially false statement that "felons who have not served their full sentences, or otherwise had their sentences discharged, cannot legally vote." (ECF 13, ¶ 5). Plaintiffs acknowledge in their Amended Complaint that County Attorney Johnson has brought a counterclaim against them (*id.*, ¶ 19), but nevertheless allege that "with some trepidation, MVA intends to continue speaking as it has…." (*Id.*, ¶¶ 24, 27, 29, 31). There is no need to enjoin Section 211B.075 because Plaintiffs already face the consequence they seek to

[3] County Attorney Johnson did advise Plaintiffs that he reserves the right to seek injunctive relief in the future if the facts of this case change. For example, if Plaintiffs engage in widespread efforts to single out those Anoka County residents with felony convictions and attempt to interfere with their ability to cast a ballot, the County Attorney may need to ask this Court to stop that practice before this Court reaches the merits of the parties' claims. But that is all purely speculative and depends entirely on Plaintiffs' own conduct. Plaintiffs cannot establish the requisite irreparable harm merely by speculating about what may happen in the future, especially when it is Plaintiffs' own conduct that will determine the need for the County Attorney to seek injunctive relief.

avoid through an injunction—claims against them under the statute. A preliminary injunction will not put that horse back in the barn. The County Attorney's counterclaim has by Plaintiffs' own admission not stopped them from engaging in their desired speech. Plaintiffs will obviously not be irreparably harmed without an injunction because they continue to speak freely even in the face of Johnson's counterclaim.

What Plaintiffs really seek through their motion is a continuing license to engage in speech that this Court might later find violates a constitutional statute. As discussed above, however, that request does not seek to preserve the status quo as it exists today; it seeks an order granting Plaintiffs the ultimate relief they seek through this lawsuit. Before this Court ever considers the merits of the parties' claims, Plaintiffs ask for permission to make false statements that impede the ability of eligible voters to vote in elections taking place as early as March 2024. This is not a case in which Plaintiffs have agreed to refrain from making false statements until this Court reaches the merits of the parties' dispute and asks for an injunction requiring Johnson to hold off on pursuing his counterclaim in return. Plaintiffs seek much more than that; they want to prevent Johnson from pursuing his counterclaim while simultaneously making statements that violate Section 211B.075. If this Court eventually decides that statute is constitutional, then Plaintiffs will have received a several-month period in which they were able to make statements that violate Minnesota law. Plaintiffs are not trying to preserve the status quo, they are using the preliminary injunction process as a vehicle to upend the status quo and obtain their ultimate relief without the necessity of a hearing on the merits.

Third, Plaintiffs' delay in seeking injunctive relief also seriously undercuts any suggestion that they will suffer irreparable harm without it. "It has long been recognized that delay in seeking relief vitiates much of the force of allegations of irreparable harm." *Independence-Alliance Party of MN*, 603 F. Supp. 3d at 694; *accord Human Rights Defense Center*, 2020 WL 7027840 at * 6 ("The delay by HRDC in seeking relief undermines its argument that it will suffer irreparable injury without a preliminary injunction"). That concern is especially pronounced when a party seeks an injunction that is inherently time-sensitive. *Eggers v. Evnen*, 48 F.4th 561, 567 (8th Cir. 2022) ("The fact that the plaintiffs waited until the eleventh hour to raise their time-sensitive election-law claim only tilts the scales further").

Section 211B.075 became effective on June 15, 2023, yet Plaintiffs waited nearly three months (until September 11) to file their original Complaint. (ECF 1). Johnson filed his counterclaim on October 2, making clear that Johnson believed Plaintiffs' past and intended future speech violated the new statute. (ECF 12). Plaintiffs obviously knew much earlier than October that there was a risk that they would be found in violation of Section 211B.075 because their original Complaint expressed that exact concern. (ECF 1, ¶ 51) ("Plaintiffs fear prosecution by Defendants or by a third party for engaging in this protected speech"). In fact, Plaintiffs' potential liability under the statute is the entire premise of their Complaint. Yet Plaintiffs waited until November 28 to bring their motion for injunctive relief, more than **five months** after Section 211B.075 became effective. Even once the County Attorney's counterclaim left no doubt that Plaintiffs faced liability under that statute, they still waited nearly two additional months to ask for an injunction. That

delay is telling, and even more significant when this Court considers the nature of the statute Plaintiffs seek to enjoin.

Section 211B.075 regulates false speech made with the intent to interfere with the exercise of another's right to vote. The primary statutory provision that Plaintiffs challenge is Subdivision 2, which regulates information transmitted within 60 days of an election. As an organization and individuals who "advocate[] for election integrity and provide[] research and voter education to Minnesotans" (ECF 13, ¶ 23), Plaintiffs obviously knew that Minnesota would hold statewide elections on November 7, 2023. The primary subdivision that Plaintiffs challenge would thus regulate Plaintiffs' speech as of September 7, with the other subdivisions taking effect even earlier. If Plaintiffs truly suffered irreparable harm from the regulations imposed by Section 211B.075, they surely would have moved to enjoin its effect long before the scheduled November 7 election. Plaintiffs instead waited until November 28, three weeks **after** that election, to first request injunctive relief. It is difficult to understand how Plaintiffs can argue they will truly be irreparably harmed absent an immediate injunction when Plaintiffs stood by and allowed an entire election cycle to play out without requesting that relief. Plaintiffs have not even tried to explain what makes the 2023 election cycle different from any elections that will take place in 2024 before this Court decides this case on the merits.

The analysis offered by this Court in *Cowles* is instructive. There, the Minnesota State College Student Association (known as "LeadMN") sought a preliminary injunction against trustees serving on the board of the Minnesota State Colleges and Universities system for allegedly violating the Student Association's First Amendment rights. This

Court denied that motion in part because this Court concluded that the Student Association was not likely to succeed on the merits of its claim. *Cowles*, 620 F. Supp. 3d at 853. But this Court also noted that an injunction could not be issued in the absence of likely irreparable harm:

> Here, LeadMN argues that its asserted loss of First Amendment freedoms is enough to show that it will suffer irreparable harm. This contention is not enough to justify granting LeadMN's preliminary injunction motion. To the extent LeadMN's asserted loss of First Amendment freedoms concerns its public advocacy, the Complaint's allegations to the effect that LeadMN continues to engage in the same advocacy today as it did before the Board refused to approve the fee increase negate—or at least seriously undermine—this assertion. LeadMN's delay in bringing this motion also undermines its claim of irreparable harm. The Finance Committee considered and rejected LeadMN's proposal in May 2021, and the Board refused to approve the proposal the following month. But LeadMN did not file this case until March 31, 2022, and it did not move for an injunction for roughly another month (and only after Defendants filed their motion to dismiss).

Id. at 854-55. Plaintiffs here find themselves in a similar position. Plaintiffs admit in their Amended Complaint that they continue to make the same statements they made before Section 211B.075 went into effect. This Court was concerned that LeadMN took a month to file for an injunction after commencing its lawsuit. Here, Plaintiffs waited nearly three months from the time they filed their Complaint. This Court was also concerned that LeadMN filed its motion for preliminary injunction only after the defendants filed their own motion to dismiss. The same goes for Plaintiffs here, who did not suggest they needed injunctive relief until almost two months after the County Attorney filed a counterclaim against them. Plaintiffs have not even tried to explain how they suffer irreparable harm while the parties' respective claims are pending. But even had Plaintiffs bothered to address that point, those facts would weigh heavily against them.

E. The Balance of Harms and Public Interest Greatly Favor Johnson

Because County Attorney Johnson is a government official with independent constitutional and statutory duties and responsibilities, the balance of harms and public interest factors merge into one when considering Plaintiffs' request for injunctive relief. *See Eggers*, 48 F.4th at 564-65 ("The balance-of-harms and public-interest factors merge when the Government…is the nonmoving party.") (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). While the loss of First Amendment freedoms may constitute irreparable harm, it is important to consider the irreparable harm that Minnesota's government and citizens will suffer if Plaintiffs are granted a preliminary injunction. The public has a strong interest in the enforcement of duly-enacted laws. *See Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 909 (8th Cir. 2020) ("[I]t is in the public interest to uphold the will of the people, as expressed by acts of the state legislature, when such acts appear harmonious with the Constitution"). In fact, "any 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, 1303 (2012).

That is especially true when it comes to statutes governing a state's election procedures. *See Organization for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) ("If we do not grant a stay, the State will, in effect, be precluded from applying its duly enacted legislation regarding election procedures. Prohibiting the State from enforcing a statute properly passed as part of its broad authority to regulate elections, particularly where the State has shown a strong likelihood that the statute is not

constitutionally infirm, would irreparably harm the State."). That harm increases when the statute to be enjoined is one enforced by a county prosecutor.

The State of Minnesota and its citizens will be irreparably harmed if this Court enjoins Section 211B.075 before it has an opportunity to fully address the merits of Plaintiffs' challenge to that statute. There is no dispute that Section 211B.075 was duly enacted by the Minnesota legislature. Plaintiffs' bare disagreement with the legislature's policy decision does not mean that they are entitled to an injunction restraining its operation while this Court considers the merits of Plaintiffs' claims.

Not only will the state suffer irreparable harm if its duly-enacted law is not enforced, but Minnesota voters will also suffer their own brand of irreparable harm. This Court should not lose sight of exactly what it is Plaintiffs are trying to do here. Plaintiffs want an injunction to give them legal cover to tell convicted felons that they cannot vote in Minnesota elections. That is not County Attorney Johnson's spin on Plaintiffs' intentions, that is what Plaintiffs flatly allege in their pleadings that they intend to do. In Plaintiffs' original Complaint (which each Plaintiff verified under oath), Plaintiffs stated that they intend to tell prospective voters that "felons still serving their sentences do not have a right to vote in Minnesota" and "felons who have not served their full sentences, or otherwise had their sentences discharged, cannot legally vote." (ECF 1, ¶¶ 3, 12). Even in their softened Amended Complaint, Plaintiffs still maintain their intention to keep saying that "felons still serving their sentences do not have a right to vote in Minnesota because the Minnesota Constitution preempts the Felon Voting Law…." (ECF 13, ¶ 18). Convicted felons who are out of custody and preparing to vote will suffer obvious and irreparable

harm if Plaintiffs tell them that they cannot vote in an election, including the March primary in a hotly-contested 2024 presidential election. As this Court balances the harms at stake on this motion, it should not forget the interests of those third-party voters and the fundamental right of every out-of-custody citizen to participate in their government even after conviction.

Plaintiffs' motion for preliminary injunction presents this Court with a zero-sum choice. If Plaintiffs prevail, they avoid the irreparable harm that supposedly flows from their inability not to engage in false speech. But that victory comes at the expense of newly enfranchised voters who will be subjected to false statements that they are not actually allowed to vote even though the legislature says that they are. If this Court accepts the idea that Plaintiffs suffer irreparable harm without an injunction (even in the face of Plaintiffs' long delay in seeking injunctive relief and their continued speech even without that injunction), then it must decide which irreparable harm is worse—Plaintiffs' inability to express false statements of fact in the pursuit of voter suppression, or the state's loss of the ability to regulate its own elections process and protect its citizens from false statements designed to discourage them from participating in that process. This Court must choose between protecting Plaintiffs' ephemeral right to engage in false speech (if such a right even exists), and enforcing a law duly enacted by Minnesota's elected representatives that regulates Minnesota's election process.

There is no reason why this Court should favor Plaintiffs' interest over the State's before the merits of this case are heard. It is not more important that Plaintiffs be able to make false statements about convicted felons' right to vote than it is for the state to protect

newly enfranchised citizens against receiving those false statements. Even if both sides could truly articulate irreparable harm, the balance of harms and public interest strongly favor the County Attorney.

F. Plaintiffs are Not Likely to Succeed on the Merits of Their Claims

Plaintiffs argue that they should be deemed likely to prevail on the merits of their Amended Complaint "unless the Government has shown that the plaintiffs' proposed less restrictive alternatives are less effective than the law." (ECF 35, p. 2). Plaintiffs ignore, however, the burden they face when seeking injunctive relief. "The burden of establishing the four factors lies with the party seeking injunctive relief." *Cowles*, 620 F. Supp. 3d at 853 (citation omitted). That maxim applies equally to claims arising under the First Amendment. *Id.* Not only must Plaintiffs carry the burden of showing they are likely to succeed on the merits; that burden is heightened because Plaintiffs challenge a duly-enacted statute. A plaintiff seeking injunctive relief normally must demonstrate only a "fair chance of prevailing" on the merits. *Id.* When a party challenges a duly enacted law, however, it faces a higher burden. "Where a preliminary injunction is sought to enjoin government action based on presumptively reasoned democratic processes, the movant must show that he is **likely** to prevail on the merits." *Eggers*, 48 F. 4th at 565 (emphasis added). That higher standard is "reserved for injunctions against the enforcement of statutes and regulations, which are entitled to a higher degree of deference and should not be enjoined lightly." *Independence-Alliance Party of Minnesota*, 603 F. Supp. 3d at 690-91; *see also Dakotans for Health v. Noem*, 52 F.4th 381, 388 (8th Cir. 2022) (noting that a party seeking to enjoin duly-enacted statute "must show more than a 'fair chance of

prevailing' on the merits"); *accord Brandt v. Rutledge*, 47 F. 4th 661, 669 (8th Cir. 2022) ("A party challenging a state statute must show that she is likely to prevail on the merits.").

Plaintiffs cannot make that heightened showing. Johnson has already explained that he is entitled to judgment on the pleadings because (1) Section 211B.075 regulates speech that falls outside the First Amendment and (2) even if that statute is found to regulate speech subject to the First Amendment, the statute receives only intermediate scrutiny and passes that test. For all the reasons set forth in County Attorney Johnson's briefs in support of his pending motion, Plaintiffs are not likely to succeed on the merits of their claims. Johnson will not repeat all that discussion here, but instead incorporates it by reference.

To summarize, however, Plaintiffs are not trying to educate the public about their opinion that felons **should not** be allowed to vote; that would be political speech and it would unquestionably fall outside the ambit of Section 211B.075. Plaintiffs instead want to directly tell convicted felons that they **cannot** vote under Minnesota law. And if a felon cannot vote legally, then what Plaintiffs are really doing is threatening those individuals that they will be committing a crime if they do vote.[4] That is an absolutely untrue statement of fact that has no purpose other than to impede the exercise of the franchise by voters whom Plaintiffs do not want to vote.

[4] Minn. Stat. § 609.27, subd. 5 prohibits a person from making "a threat to make or cause to be made a criminal charge, whether true or false" when that threat "causes another against the other's will to do any act or forbear doing a lawful act." Telling eligible voters that they are not eligible to vote is exactly the type of threat that Minnesota has long held to be actionable.

Five days ago, on December 14, the Anoka County District Court dismissed with prejudice Plaintiffs' lawsuit challenging the constitutionality of the felon re-enfranchisement law. (Stover Decl., Ex. B). If there was previously any doubt whether Plaintiffs know the statements contained in their Amended Complaint are false, that doubt has now been removed. Plaintiffs are not likely to succeed on the merits of their as-applied challenge because Minnesota can constitutionally prohibit false statements about Minnesota's election procedures and the statements in Plaintiffs' Amended Complaint are undoubtedly false.

Section 211B.075 regulates three types of statements that fall outside traditional First Amendment protection—fraud, false statements leading to identifiable harm, and true threats. (ECF 21, pp. 27-33). Falsely informing convicted felons that they cannot vote falls within all three exceptions. Plaintiffs piously represent that they have not threatened to report anyone to law enforcement, but that is scant comfort to a felon preparing to legally vote for the first time. One need not have a law degree to understand that the message "felons cannot legally vote in Minnesota" necessarily means that casting a vote as a felon is an illegal act that might expose one to criminal charges. A true threat is not limited solely to the potential for physical harm. A true threat has been defined as a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." *United States v. Mabie*, 663 F.3d 322, 330 (8th Cir. 2011). Future prosecution is just such a harm. Section 211B.075 regulates exactly the types of statements that the Supreme Court in *Alvarez* explained fall outside of traditional First Amendment protection.

Even if that were not true, Section 211B.075 is subject to only intermediate scrutiny under *Alvarez*, as both the *Mackey* and *Wohl* courts explain. *United States v. Mackey*, Crim. No. 21-80, 2023 WL 363595 (E.D.N.Y. 2023); *National Coalition on Black Civic Participation v. Wohl*, Civ. No. 20-8668, 2023 WL 2403012 (S.D.N.Y. 2023). Plaintiffs do not even try to explain how *Alvarez* can be read to support the application of strict scrutiny to this statute. Nor do they try to distinguish the reasoning of the *Mackey* and *Wohl* courts, both of which carefully analyzed *Alvarez* and concluded that only intermediate scrutiny applies to laws targeting false speech related to election procedures. Plaintiffs simply assume strict scrutiny applies without even bothering to analyze what the *Alvarez* court actually said.

Plaintiffs rely entirely on the idea that the First Amendment protects their false speech because it is "political." Plaintiffs cite a number of Supreme Court cases to support that idea, but those cases actually do the opposite. The political speech at issue in each of those cases is easily distinguishable from the non-political speech here. In *Snyder v. Phelps*, the Westboro Baptist Church picketed military burials by congregating with signs and singing hymns. 562 U.S. 443 (2011). In *Cox v. State of Louisiana*, a group of students protested racial segregation by assembling, marching, singing, praying, and listening to a speech. 379 U.S. 536 (1965). In *Stromberg v. People of State of California*, the defendant held a daily ceremony at a camp where they raised a red flag, saluted it, and recited a pledge to uphold the principles of communism. 283 U.S. 359 (1931). Similarly, in *Whitney v. California*, the defendant was prosecuted for assisting in organizing the Communist Labor

Party of California and of being a member and assembling within it. 274 U.S. 357 (1927), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In each of those cases, the speakers communicated ideas about things that, by definition, cannot be labeled "true" or "false." For instance, saying "racial segregation is bad" is not a true or false statement. Claiming that a soldier died in Iraq as divine punishment for homosexuality is not a "true" or "false" statement about reality. Expressing an opinion or belief about how the world ought to be is the *sine qua non* of political speech. The speech here is devoid of that quality. Plaintiffs do not want to communicate an opinion or belief; they want to lie about verifiable facts. They want to communicate an objectively false statement about the electoral process in Minnesota, and Plaintiffs' citation to those cases only shows the immense divide between what constitutes actual political speech and the statements alleged in their Amended Complaint.

Because they simply assume their speech is political (which they claim automatically triggers strict scrutiny), Plaintiffs have nothing to say about whether Section 211B.075 passes intermediate scrutiny. Plaintiffs have not responded to Johnson's argument that Plaintiffs' alleged speech falls outside the First Amendment entirely, or his argument that Section 211B.075 survives intermediate scrutiny. (ECF 21, pp. 19-23). Instead, Plaintiffs sidestep those questions with no analysis whatsoever of the *Alvarez* opinions. Plaintiffs cannot just assume away the primary legal issues to be resolved by this Court. A preliminary injunction requires Plaintiffs to prove that they are **likely** to succeed on the merits of their claims. Plaintiffs have fallen far short of that burden.

Plaintiffs' attempt to distinguish their speech from the speech at issue in *Mackey* and *Wohl* is equally unavailing. The *Mackey* court considered tweets designed to mislead voters about the process by which they could cast a legal vote. The *Wohl* court considered robocalls containing false information designed to discourage voters from voting by mail. Plaintiffs want to tell eligible voters that they cannot legally vote. Plaintiffs' speech is functionally the same as the speech considered by the *Mackey* and *Wohl* courts, and the law regulating such speech is entitled to the same scrutiny.

The best Plaintiffs can do is argue that their speech is permissible because "no reasonable person would believe that Plaintiffs are the arbiters of who can vote in Minnesota, or that Plaintiffs or anyone else will take action against voters for following the Felon Voting Law and not the Constitution." (ECF 32, p. 41). Read that again--Plaintiffs ask this Court to allow them to falsely tell eligible voters that they cannot vote because those voters should know better than to believe what Plaintiffs say. The *Wohl* court dismissed the same argument out of hand. *Wohl*, 2023 WL 2403012 at * 28 (disparaging defendants' attempt to "paint themselves as goofballs and political hucksters with an irreverent sense of humor"). The need to rely on the implausibility of their false statements says much about the strength of Plaintiffs' position.

IV. CONCLUSION

Plaintiffs' motion for preliminary injunction is not ripe, seeks a remedy that this Court cannot grant, and also fails on the merits. Plaintiffs' motion is not ripe because this Court has already stayed discovery in this case and County Attorney Johnson has granted Plaintiffs an extension of time to respond to his counterclaim until after this Court rules on

the pending dispositive motions. Until this Court resolves those motions, it is premature to consider whether injunctive relief might be warranted. Even if Plaintiffs' motion were ripe, however, it would still fail because Plaintiffs seek the same ultimate relief they seek through their Amended Complaint. Plaintiffs' Amended Complaint asks this Court to declare Section 211B.075 unconstitutional and prevent Defendants from enforcing that statute against them. Plaintiffs' request for preliminary injunction requests precisely the same relief on an interim basis. Plaintiffs are asking this Court to grant them ultimate relief before this Court ever hears the merits of Plaintiffs' claims.

Even leaving aside those two serious impediments, Plaintiffs' request fails because they cannot articulate any irreparable harm they will suffer if their motion is denied. Plaintiffs obviously have not been deterred by passage of Section 211B.075 or by Johnson's counterclaim because they allege their intention to continue making the same false statements. If Plaintiffs truly suffered irreparable harm that could only be addressed through issuance of injunctive relief, they would have sought that relief well in advance of Minnesota's November 7, 2023 elections. Plaintiffs' decision to allow that entire election cycle to play out without challenge seriously undermines any suggestion that they will suffer irreparable harm between now and the date this Court decides the merits of this case.

Even if Plaintiffs could demonstrate irreparable harm, that harm pales in comparison to the harm that would be inflicted on Minnesota's citizens if this Court grants the requested injunction. Plaintiffs do not seek to maintain the status quo; they seek a license to violate a duly-enacted law intended to protect Minnesota voters from false information about their ability to participate in the electoral process. If this Court denies Plaintiffs' requested

injunction, then Plaintiffs can either (1) continue to make false statements and face the potential legal consequences of that decision or (2) stop making false statements designed to impede eligible voters' ability to vote. At worst then, Plaintiffs might not be able to discourage some eligible voters from participating in Minnesota's elections. On the other hand, if this Court grants Plaintiffs' injunction, Plaintiffs will be able to actively discourage individuals from voting, individuals whom the elected members of the Minnesota legislature made the policy decision to re-enfranchise. The risk that Plaintiffs will successfully use false information to convince an eligible voter not to vote far outweighs any ephemeral harm Plaintiffs might suffer to their ability to broadcast false statements.

County Attorney Johnson submits that on these facts issuance of injunctive relief would be not only unwarranted, but also unjust. This Court should either deny Plaintiffs' motion outright or, at the absolute most, continue this motion until this Court has first ruled on Defendants' pending dispositive motions.

BRAD JOHNSON
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Dated: December 19, 2023

By: *s/ Jason J. Stover*

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