

No. A22-0611

**State of Minnesota
In the Supreme Court**

STATE OF MINNESOTA

Appellant,

v.

STEPHANIE LOUISE CLARK

Respondent.

**BRIEF OF *AMICI CURIAE*
STANDPOINT and VIOLENCE FREE MINNESOTA
IN SUPPORT OF RESPONDENT**

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INTERESTS OF *AMICI CURIAE*¹

Standpoint

Standpoint (formerly the Battered Women’s Legal Advocacy Project) is a private non-profit organization that provides statewide legal consultation, training, and resources to domestic and sexual violence victims and survivors, along with their advocates, attorneys, and professionals. Standpoint’s mission is to promote justice for domestic and sexual violence victims. The organization works to ensure and improve access to justice for domestic and sexual violence victims in the court system.

Standpoint consults with thousands of victims and survivors of domestic and sexual abuse each year, many of whom are involved in the criminal justice system. Standpoint’s legal program provides legal advice, advocacy, and training focused on the intersection of law and domestic and sexual violence. This case directly impacts Standpoint’s constituency—victims and survivors of domestic and sexual violence in Minnesota.

¹ This brief was authored entirely by counsel for *Amici* Standpoint and Violence Free Minnesota. No other party contributed financially or otherwise to the creation of this brief.

Violence Free Minnesota

Violence Free Minnesota (“VFMN”) is a private non-profit organization and statewide coalition for approximately eighty-five (85) local, regional, and statewide organizations that provide community-based advocacy and shelter services to domestic violence and sexual violence victims, survivors, and their families. VFMN’s mission is to represent victims and survivors of relationship abuse; to challenge systems and institutions; to promote social change; and to support, educate, and connect member programs.

Since 2019, VFMN has explored the experiences and needs of how the justice system involved and criminalized survivors in Minnesota. Through its research, VFMN has gained expertise in the ways abused and exploited women and girls end up in Minnesota’s criminal justice system. On their behalf, VFMN represents a public interest by bringing into consideration the unique circumstances faced by victim and survivors in Minnesota’s legal system.

SUMMARY OF THE ARGUMENT

Minnesota victims of domestic violence face significant obstacles when they try to escape domestic violence or protect themselves from harm. The abuse they suffer is often pervasive, persistent, and insidious;

the violence is mental and emotional, not only physical. The temporal immediacy of the danger may be hard for the victim to pinpoint. And the insidious nature of domestic violence often creates an environment in which the victim lives in constant fear of imminent harm—even when the abuser is not immediately physically attacking them.

The law of self-defense has developed since the early days of the Republic. But because violence in the home was, at the time, legal and often acceptable, self-defense law historically addressed only the concerns of property-owners and violence between men. While strides have certainly been made over the years, it is important that Minnesota today recognizes that the law of self-defense must allow victims of domestic violence to protect themselves from their abusers under circumstances present in real life.

This Court has previously recognized that deadly force used in self-defense is justified when the defendant perceives imminent harm and that belief is reasonable. The district court failed to follow that precedent and incorrectly advised the jury in a supplemental instruction that “imminent” harm had to be an “immediate” attack. But the two words are linguistically different; the former allows for greater context and nuance while the latter is restricted to an overly narrow temporal

scope. The distinction is especially significant in the context of domestic violence where the threat of violence is often not momentary or fleeting, but persistently present.

The district court's supplemental instruction to the jury was reversible error because it barred the jury from considering the particularized circumstances of violence suffered by the defendant. The Court should use this case as an opportunity to clarify that a reasonable fear of "imminent" harm in the context of domestic violence contemplates more than just the temporal scope of the threatened harm. Rather, whether bodily injury is reasonably imminent can involve considerations inherent in the kind of pervasive, persistent, and insidious harm that often accompanies the buildup to the ultimate act of violence necessitating self-defense.

ARGUMENT

I. THE COURT SHOULD REINFORCE THAT MINNESOTA'S SELF-DEFENSE LAW PROVIDES MEANINGFUL PROTECTION FOR VICTIMS OF DOMESTIC VIOLENCE FORCED TO USE VIOLENCE TO SURVIVE.

It is an unfortunate reality that domestic violence was tolerated and ignored for hundreds of years, both in society and in law.

Thus, while the law on self-defense has developed throughout Minnesota's history, it was largely fashioned from the typical experience

of white, property-owning men who held power at the time rather than to protect victims of domestic violence. *See, e.g., State v. Touri*, 101 Minn. 370, 374, 112 N.W. 422, 424 (1907); *see also* Lisa Young Larance et al., *Understanding and Addressing Women’s Use of Force: A Retrospective*, *Violence Against Women*, 25(1), 56–80 at 58 (2019) (discussing how the “Victorian ‘respectable woman’” was the “paradigmatic victim” who “would never fight back against a partner” (citation omitted)). For many years, there was a disconnect between the law and the realities faced by victims of domestic violence. *See* Kent M. Williams, *Using Battered Woman Syndrome Evidence with a Self-Defense Strategy in Minnesota*, 10 *Law & Ineq.* 107, 115 (1992) (“[A] complete explanation of domestic violence must include the socio-historical context in which it occurs—a system wherein men as a group wield substantial control over women.”).

A. Historically, the Law Reflected and Protected the Rights of Male Property Owners.

Although Minnesota’s law on self-defense is now codified, the defense itself existed in common law long before. *Rev. Stat. of Territory of Minn.*, ch. 100, § 5 (1851); *see* *Minn. Stat.* § 609.06; *Gallagher v. State*, 3 Minn. 270, 271–73 (1859) (assessing a male defendant’s self-defense claim and proper jury instructions in assault and battery case); *State v.*

Shippey, 10 Minn. 223, 231–32 (1865) (assessing a male defendant’s claim of self-defense to murder charges).

At its inception—and for years after—the common law on self-defense contemplated physical encounters between equally-matched men. Richard Rosen, *On Self-Defense, Imminence, and Women who Kill Their Batterers*, 71 N.C. L. Rev. 371, 382, 387 (1993) (noting that “the imminence requirement was [historically] implied only in the situation where the law presumed that both parties to the homicidal act were somewhat at fault—the sudden brawl or chance medley” (cleaned up)); see Paris De Soto, *Feminists Negotiate the Judicial Branch: Battered Woman’s Syndrome*, appearing in FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE 59–60 (Univ. Press of Am. 1997) (Cynthia R. Daniels, et al., eds.) (observing that the historical common law right to self-defense “presupposes a one-time adversarial encounter” that “focuses on the circumstances immediately before the incident and does not take into account harm threatened in the past or future”). Many times, it involved interactions with strangers and/or an invasion into one’s home. See Rosen, *supra*, at 387. Thus, much of the jurisprudence on self-defense developed around questions such as whether an individual must try to retreat before acting in self-defense, presuming

that distance would eliminate the threat. *See generally State v. Glowacki*, 630 N.W.2d 392, 399–402 (Minn. 2001).

Domestic violence raises very different dynamics. Women’s experiences—and especially those subject to domestic violence—did not play a role in the development of Minnesota’s early self-defense jurisprudence. Women had few, if any, legal rights until the mid-1900s—especially if they were married. *See Herma Hill Kay, From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 Cal. L. Rev. 2017, 2019–22 (2000). Indeed, Minnesota did not even recognize a woman’s separate legal existence until the 1950s. *See Minn. Stat. § 519* (1953). Women were considered property of their husbands, and violence against women—including abuse and marital rape—were legal. *See Lawrence Stone, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500–1800*, 195, 200–01 (1977); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 Harv. C.R.–C.L. L. Rev. 623, 628 (1980) (“The historic sanction of woman abuse within marriage derives from the husband’s ownership of his wife and his right to chastise her.”); 15 William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 418–21 (4th ed. 1876). Women of color, LGBTQ+

individuals, and other women in underrepresented communities were even further removed from the protections of the law. Larance *et al.*, *supra*, at 59–62; Jon W. Davidson, *A Brief History of the Path to Securing LGBTQ Rights*, Am. Bar Ass’n (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/a-brief-history-of-the-path-to-securing-lgbtq-rights/.

In other words, there was a complete disconnect between the development and applicability of the law of self-defense and the experiences of women and victims of domestic violence. As a result, the concepts and legal requirements of self-defense did not develop to account for the realities of women experiencing domestic violence.

B. Minnesota Law Has Evolved to Recognize and Protect the Rights of Victims/Survivors of Domestic Violence.

Minnesota law has progressed over time. In response to the historical context, researchers studied (and continue to study) the effects of self-defense and domestic violence laws on victims and survivors. *See, e.g.,* Schneider, *supra*, at 639–44. This research has provided key insights to improve how both society and the law respond to the persistent problem of domestic violence. Indeed, over time, Minnesota

has taken strides to improve legal protections for victims/survivors of domestic violence.

For example, in 1979, the Minnesota legislature passed the Domestic Abuse Act, which recognized the unique danger abusers pose in violent relationships and instituted protections for victims of that abuse. Among other things, the Act set up a mechanism for obtaining Orders for Protection (“OFP”). *See generally* 1979 Minn. Laws ch. 214, § 1. As discussed below, this framework explicitly distinguishes between harm that is “imminent” and harm that is “immediate”—and creates different standards for the different types of harm. Part IV, *supra*, at 33–35.

Additionally, the Minnesota Legislature has since:

- Passed a law prohibiting individuals convicted of domestic assault from possessing firearms, *see* 1995 Minn. Laws ch. 259, art. 17 § 15 (codified at Minn. Stat. § 609.2242, subd. 3);
- Amended the criminal assault statutory framework to (1) recognize domestic assault as a distinct and separate form of assault, *see* 1995 Minn. Laws ch. 259, art. 3, § 15 (codified at Minn. Stat. § 609.2242); (2) create a new felony for repeat offenders, *see* 1993 Minn. Laws ch. 326, art. 2 § 12 (codified at Minn. Stat. § 609.224, subd. 4); and (3) create a new, unique, and specific felony for domestic assault involving strangulation, *see* 2005 Minn. Laws ch. 136, art. 17 § 13 (codified at Minn. Stat. § 609.2247); and

- Repealed the marital rape exception that remained for instances in which a victim was incapacitated, 2019 Minn. Laws ch. 16, § 1 (repealing Minn. Stat. § 609.349).

These changes begin to reflect a developing understanding that domestic violence presents complex threats that are not explained by the timing of a single violent act alone. Nonetheless, “[t]he United States has the highest rate of [intimate partner homicide] than any industrialized country,” with approximately 1,200 women and 300 men killed by their partners during each year of the 21st century. Jacquelyn C. Campbell *et al.*, *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. Interpers. Violence 653, 654 (April 2009). This appeal provides the Court with the opportunity to re-affirm that the protections of self-defense extend to the particular circumstances faced by victims of domestic violence.

II. SELF-DEFENSE IN MINNESOTA SHOULD TAKE INTO CONSIDERATION THE TOTALITY OF THE CIRCUMSTANCES FACED BY VICTIMS OF DOMESTIC VIOLENCE.

A. The Legal Standard for Self-Defense in Minnesota.

Minnesota law allows the use of deadly force “when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of a felony in the actor’s place of abode.” Minn. Stat.

§ 609.065. The Minnesota Supreme Court has long interpreted this standard to consist of four elements:

- (1) the absence of aggression or provocation on the part of the defendant;
- (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm;
- (3) the existence of reasonable grounds for that belief; and
- (4) the absence of a reasonable possibility of retreat to avoid the danger.

State v. Johnson, 719 N.W.2d 619, 629 (Minn. 2006) (quotation omitted).

The Court has expressly stated that the non-statutory timing requirement of the defendant's "actual and honest belief" of "imminent danger" is meant to supply flexibility to the law of self-defense and protect individuals in circumstances which justice requires. *State v. Bjork*, 610 N.W.2d 632, 636–37 (Minn. 2000) (citation omitted). Thus, the propriety of self-defense is necessarily "very specific to the person apprehending fear and the very particular circumstances causing fear." *Id.* For this reason, this Court has instructed lower courts to use "analytic precision" when instructing juries on self-defense. *State v. Hare*, 575 N.W.2d 828, 833 (Minn. 1998) (quotation omitted).

The district court's supplemental instruction in Ms. Clark's case failed to apply "analytic precision." When the district court defined

“imminent” danger to mean “immediate,” it erroneously and materially narrowed the right of self-defense. As set forth below, there is a meaningful difference between these two terms. Moreover, a narrower “immediacy” standard is especially erroneous in “the particular circumstances” of domestic violence, which is widely recognized to impact how—and may broaden when—a victim may reasonably perceive an imminent fear of harm.

B. The Meanings of “Imminent” and “Immediate” Are Materially Different.

The distinction between the words “imminent” and “immediate” is well developed, both as a matter of plain language and in terms of legal usage.

1. The ordinary, common understanding of the two terms differ.

Plain language usage of the words “imminent” and “immediate” are different. First, “imminent” is defined by the dictionary as an adjective meaning “about to occur; impending” and comes from roots meaning “to overhang” or to “jut, threaten.” *Imminent*, Am. Heritage Dict. of the English Language, Fifth Edition (2022). The common synonyms for the word “imminent” further demonstrate this same broader contextual understanding—consisting of words such as

“impending,” “looming,” “possible,” “approaching,” and “coming.” *Imminent*, Merriam-Webster Thesaurus, <https://www.merriam-webster.com/thesaurus/imminent>. These terms suggest an emerging, but not instantaneous, event.

By contrast, the dictionary definition of “immediate” assumes a much closer temporal connection, meaning: “occurring at once; happening without delay,” “of or near the present time,” “next in line,” and “acting or occurring without the interposition of another agency or object.” *Immediate*, Am. Heritage Dict. of the English Language, Fifth Ed. (2022). The synonyms for the word “immediate” likewise demonstrate this understanding—including, for example, “instantaneous,” “instant,” “rapid,” and “split second.” *Immediate*, Merriam-Webster Thesaurus, <https://www.merriam-webster.com/thesaurus/immediate>.

Other courts have also recognized the material difference in meaning between these two words when used in a jury instruction for self-defense. For example, in a thoughtful decision on how the law of self-defense should apply in the context of domestic violence, the Kansas Supreme Court recognized that the “time limitations in the use of the word ‘immediate’ are much stricter than those with the use of the word

‘imminent.’” *State v. Hundley*, 693 P.2d 475, 478 (Kan. 1985) (holding that the imminent standard applied). The defendant in that case was similarly a victim of domestic violence. The defendant shot and killed her husband in the back while he was holding a beer bottle—an object the defendant’s husband had used to beat her in the past. *Id.* at 462. The district court instructed that to justify self-defense the defendant had to act in response to an “immediate use of unlawful force,” and the jury convicted the defendant. *Id.* at 464. The Kansas Supreme Court found that instruction was reversible error because “the use of the word ‘immediate’ . . . places undue emphasis on the immediate action of the [abuser], and obliterates the nature of the buildup of terror and fear which had been systematically created over a long period of time.” *Id.* at 467–68.

Juries in Minnesota are instructed to apply the common understanding of language. 10 MINN. PRAC. SERIES, JURY INSTR. GUIDES—CRIMINAL, CRIMJIG 3.02, *Definitions of Words* (7th ed.). The supplemental instruction telling the jury that self-defense required Ms. Clark to prove she feared harm that was “immediate” effectively required that the jurors apply a strict temporal requirement removed from relevant context.

2. Minnesota law already recognizes the difference between “imminent” and “immediate.”

In addition to being a matter of common usage, the distinctions between imminent and immediate are also already recognized in Minnesota law as creating different legal standards requiring different obligations of proof.

A key example of this distinction is found in the laws governing OFPs under Minn. Stat. § 518B.01. Minnesota law protects victims of domestic violence, which includes “the infliction of fear of *imminent* physical harm, bodily injury, or assault” committed against a family or household member. *Id.* at subd. 2 (emphasis added). A movant who proves fear of imminent harm may be entitled to the issuance of an OFP. *Id.* at subds. 2, 6. If the victim moves for the OFP *ex parte*, however, the legislature provided for a heightened standard in which the movant is required to show “an *immediate* and present danger” of domestic abuse. *Id.* at subd. 7 (emphasis added). If a movant fails to meet the higher standard of immediacy, a district court lacks authority to issue an *ex parte* OFP. *See id.* at subd. 6(a). In short, the Minnesota legislature understood “imminent” and “immediate” to mean two different things—and used those words to adopt different standards to govern different circumstances.

The same statute similarly distinguishes between a court’s ability to divest an accused abuser of their firearms. If the Court finds “by a preponderance of the evidence” that an abuser “poses *imminent* risk of causing another person substantial bodily harm,” law enforcement is authorized to take “*immediate* possession of all firearms” in their possession. *Id.* at subd. 6(i). Here, too, the statute intends that law enforcement will take possession “at once,” and thus before the “imminent” harm occurs.

This Court’s prior decisions are consistent with these principles. For example, in *State v. Harvey*, an intruder entered the defendant’s home, proceeded to his brother’s bedroom, then tried to escort his brother out of the house. 277 N.W.2d 344, 345 (Minn. 1979). The intruder appeared to have a gun in his pocket, although it was not visible. *Id.* The defendant shot at the intruder thirteen times because the defendant believed the intruder intended to rob his brother, even though no gun had been drawn and no immediate threat of bodily harm had been made. *Id.* This Court overturned the conviction, holding that the State failed to prove beyond a reasonable doubt that the killing was not justified. *Id.* at 345–46. The harm in *Harvey* was not immediate—it was not certainly

occurring. Thus, the facts of *Harvey* demonstrate that an immediate risk of harm is not required to justify self-defense in Minnesota.

C. The Distinction Between “Imminent” and “Immediate” Becomes Especially Poignant in the Context of Domestic Violence.

Evaluating the reasonableness of a perception of imminent harm must always include “the specific person apprehending fear” and “the very particular circumstances” of abuse they have suffered. *Bjork*, 610 N.W.2d at 636–37. Indeed, Courts recognize that domestic violence is not a static concept; rather, it “often escalates in severity over time.” *United States v. Castleman*, 572 U.S. 157, 159–60 (2014). When the defendant is a victim of domestic violence, their particular circumstances are often informed by unique and traumatic experiences, along with commonly recognized risk factors for harm indicating the potential for further violence. See Section III.A.1, *supra*, at 23–28.

Numerous courts around the country recognize that, in the context of domestic violence, self-defense law must evaluate all of the circumstances beyond just the presence of a provable “immediate harm.” See, e.g., *State v. Gallegos*, 719 P.2d 1268, 1271 (N.M. Ct. App. 1986). As a New Mexico appellate court recognized in *Gallegos*, “[t]o require the battered person to await a blatant, deadly assault before she can act in

defense of herself would not only ignore unpleasant reality, but would amount to sentencing her to ‘murder by installment.’” *Id.* at 1271. For a victim of domestic violence, the risk of fatal or serious harm may be both omnipresent and unpredictable. *See Robinson v. State*, 417 S.E.2d 88, 91 (S.C. 1992) (recognizing that domestic violence victims may experience “perpetual terror of physical and mental abuse” that results in a “heightened sense of imminent danger”). Moreover, “[f]or the battered woman, if there is no escape or sense of safety, then the next attack, which could be fatal or cause serious bodily harm, is imminent.” *Bechtel v. State*, 840 P.2d 1, 12 (Okla. Crim. App. 1992); *see also, e.g., State v. Wanrow*, 559 P.2d 548, 555 (Wash. 1977) (en banc) (finding reversible error in instructing the jury only on threats and behavior that immediately preceded the death).

By the time a full-blown life-threatening moment of violence erupts, the victim may no longer be able to protect themselves. This reasoning is what led the Kansas Supreme Court in *Hundley* to find reversible error in an instruction requiring a finding that the defendant had been threatened with an “immediate use of unlawful force” to justify the killing. 693 P.2d at 477.

While this Court has previously recognized the relevance of domestic violence to a determination of self-defense, *see State v. Hennum*, 441 N.W.2d 793, 798 (Minn. 1997), *abrogated on other grounds* by *State v. Glowacki*, 630 N.W.2d 392 (Minn. 2001), this case provides the Court an opportunity to embrace the sound reasoning shared by courts around the country and pronounce that circumstances which often accompany domestic violence may be relevant to determining whether a victim’s self-defense was justified.

To that end, *Amici* respectfully request that this Court affirm that when evaluating a claim of self-defense, the factfinder must consider whether harm was reasonably imminent based on the totality of the particular circumstances faced by the victim of domestic violence—not simply temporal immediacy. *Amici* explore several—but not all—relevant factors below.

III. THE DOCUMENTED REALITIES OF DOMESTIC VIOLENCE DEMONSTRATE WHY THE RIGHT TO SELF-DEFENSE MUST INCLUDE THE “PARTICULAR CIRCUMSTANCES” OF ABUSE SUFFERED BY VICTIMS.

The nature of domestic violence demands that the law of self-defense contemplate a holistic, totality of the circumstances view of what it means for victims of domestic violence to experience “imminent” threats of serious bodily harm. Many victims experience domestic

violence not as a sudden, acute event, but as a slow burn of increasingly dangerous behavior. Only a totality of the circumstances approach sufficiently addresses this reality.

This Court should recognize the law of self-defense encompasses more than just the moment leading up to an immediate act of violence and should permit factfinders to consider the realities of the abuse suffered by victims of domestic violence. As such, jury instructions on self-defense in the context of domestic violence should permit a jury to consider whether a reasonable person experiencing domestic violence would fear imminent serious bodily harm considering the totality of abuse and trauma inflicted on the victim and the circumstances specific to that person.

A. Evaluating A Victim’s Reasonable Belief of Imminent Harm Should Consider Relevant Non-Temporal Circumstances.

Conflating “imminence” with “immediacy,” as the district court did, ignores the realities of domestic violence and prioritizes the temporal scope of the threatened harm over all other aspects of the abuse. “One hallmark of domestic violence is that it grows out of, and serves to perpetuate, a dynamic of power and control between intimate partners.” Br. *Amici Curiae* of the Nat’l Network to End Domestic

Violence *et al.*, *United States v. Castleman*, No. 12-1371, 2013 WL 6228470, at *9–10 (Nov. 22, 2013) (“Domestic violence [] cannot and should not be identified by any one discrete incident, as generic ‘violence’ may be viewed; rather, domestic violence is a variety of abusive acts, occurring in multiple episodes over the course of the relationship, each of which is connected to the others and builds upon them.” (cleaned up)). Indeed, while domestic violence is “frequently [] marked (or comes to be marked) by a high degree of physical violence, it is by no means limited to such behavior.” *Id.* at *8. Domestic violence takes many shapes and forms, and juries should be allowed to consider the particular facts of a defendant’s circumstances when determining whether a victim acted reasonably in using lethal force against their abuser.

“At its core, relationship abuse is rooted in power, control, and oppression.” *2022 Homicide Report: Relationship Abuse in Minnesota*, Violence Free Minnesota, at 23 (2023) (“VFMN 2022 Rep.”); see *Intimate Partner Homicide in Minnesota: A Retrospective*, Violence Free Minnesota, at 10 (2019) (“VFMN 30-Year Rep.”) (noting the “larger pattern of power and control” underlying domestic violence).² Domestic

² Both reports—as well as archived reports—can be found at: <https://www.vfmn.org/reports>.

violence is a pattern of coercive behavior designed to exert power and control over a person in an intimate relationship through use of intimidating, threatening, harmful, or harassing behavior. Domestic violence includes multiple forms of abuse: physical, sexual, emotional or psychological, and financial. It “is *not* about someone losing their temper, or ‘snapping’ and lashing out at their partner(s).” VFMN 2022 Rep. 23 (emphasis added).

More than one-third of cases of intimate partner homicide in Minnesota have involved histories of controlling behavior—and those are only the *documented* accounts. VFMN 30-Year Rep. 10 (collecting data since 1989). Indeed, research demonstrates that the “total restriction of freedom and systematic destruction of well-being” experienced by victims of domestic violence is as damaging and threatening as physical violence. *See* VFMN 30-Year Rep. 10 (recounting “tactics are used to instill fear in victims, increase compliance, and cause psychological injury”). The law of self-defense in Minnesota should permit factfinders to consider these conditions and how they may impact a victim’s reasonable perception of the risk of harm.

1. Domestic violence often threatens pervasive, persistent, and insidious abuse—not immediate acts.

Domestic violence often threatens pervasive, persistent, and insidious abuse in which the temporal immediacy of the danger is unclear. As the United States Supreme Court has recognized:

Minor uses of force may not constitute ‘violence’ in the generic sense. . . . But an act of this nature [a squeeze of the arm that causes a bruise] is easy to describe as ‘domestic violence,’ when the accumulation of such acts over time can subject one intimate partner to the other’s control.

Castleman, 572 U.S. at 165–66. This persistent nature is critical to understanding the full experience of victims of domestic violence. VFMN 2022 Report 23–24. The knowledge of impending violence can be ever-present, but the actual moment of violence can be sudden or unexpected. *Cf. De Soto, supra*, at 55–57 (providing an overview of the three phases of domestic violence: the “tension-building phase”; the “explosion or acute battering incident”; and the “calm, loving respite”). Thus, in situations of pervasive abuse, victims may reasonably believe the risk of great bodily harm and/or death is imminent based on prior experience. *See Williams, supra*, at 123 (“‘Imminent’ does not necessarily mean ‘immediate’: customary abuse can create an honest fear of imminent injury, even if the abuser was not immediately attacking the [victim].”).

Statistics from fatal instances of domestic violence in Minnesota bear out the reasonableness of victims' perceptions. Reviewing cases in which the violence was fatal provides examples of the types of patterns that may precipitate an abuser's escalation of violence. While what follows is a non-exhaustive list,³ these risk factors shed light on how certain circumstances may reasonably signal danger to a domestic violence victim well in advance of an attack:

a. Threats of future violence

Deadly force is commonly used by abusers after threatening future deadly violence. *See* VFMN 30-Year Rep. 15. In fact, it is among the most reliable indicators of victim lethality: at least 25% of women killed by domestic partners in 2022 received threats of deadly force before they were killed. VFMN 2022 Rep. 18. While such threats may be dismissed as mere words, the statistics show that fear following such a threat may be reasonable.

³ *Amici* provide the following as *examples* of facts that should be considered when assessing the totality of the circumstances faced by a victim of domestic violence asserting self-defense for killing their abuser. They by no means constitute an exhaustive list and should not be used to exclude other relevant factors that may apply on a case-by-case basis. For this reason, *Amici* oppose the creation of a new, strictly-applied multi-factor test as suggested by the State.

b. Abuser history of violence and aggression

Deadly force is also common in the case where an abuser has a violent and aggressive history. VFMN 2022 Rep. 17; VFMN 30-Year Rep. 19.

Those who use abuse do not just ‘snap’ and kill their partners; instead, they choose to engage in the ultimate act of power and control. *It is a hallmark of abusive relationships that the violence and abuse escalates over time, increasing in frequency and severity, and thus the risk of homicide also increases.*

VFMN 2022 Rep. 17 (emphasis added). Similarly, an abuser’s history of abuse against past partners is also a strong indicator of future violence: 49% of domestic homicides in Minnesota throughout the past 30 years involved an abuser with a history of physical violence. VFMN 30-Year Rep. 19–20. In 2021 and 2022, that number was at least 70%. VFMN 2022 Rep. 9, 17. This demonstrates that a victim may reasonably perceive an inevitable escalation of abuse that may cause serious injury or death, even if the abuse has not yet reached that level of severity.

c. Abuser access to firearms

The risk of deadly force is further heightened when the abuser has access to firearms. The number of intimate violent partner occurrences involving a firearm is staggering: “Over thirty years, 251 of 523 women murdered by their current or former intimate partners were killed with

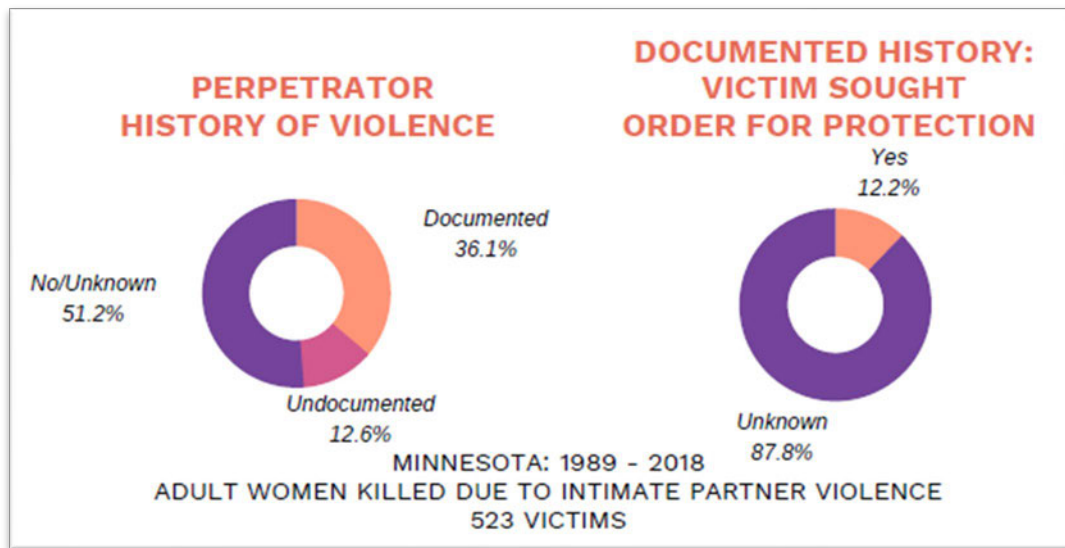
a firearm.” VFMN 30-Year Rep. 17. Firearms are overwhelmingly used by abusers to murder their partners in a final, ultimate act of violence and are present in almost half of all documented intimate partner homicides in Minnesota. *See id.* “All too often . . . the only difference between a battered woman and a dead woman is the presence of a gun.” *Castleman*, 572 U.S. at 160 (quoting 142 Cong. Rec. 22986 (1996)).

d. The presence of children in the home

Deadly force against domestic partners is also more likely when violence is used in front of children. VFMN 30-Year Rep. 26. Over the last 30 years, “151 cases of domestic violence homicide occurred with a child witnessing the murder.” *Id.* At least 52 children lost a parent due to domestic violence in 2022, and 16 of these children witnessed their parent murdered or found their parent’s body in cases of fatal domestic violence in 2022. VFMN 2022 Rep. 11.

e. Victims' attempts to leave

Abusers' need for power and control “does not disappear” when their victims resist the conditions of their abuse—deadly force is often used in retaliation after victims attempt to leave or defend themselves. VFMN 30-Year Rep. 14, 19. In fact, “[l]eaving an abusive relationship



(Graphic: VFMN 30-Year Rep. 20.)

greatly **increases** the risk of further violence and homicide. Abusive partners often view any attempts by the victim to leave the relationship as a loss of the abuser’s power and control” and may “go to great lengths” to preserve their domination. See VFMN 2022 Rep. 13 (emphasis added). Of the 20 Minnesota victims in 2022, 30% were separated or attempting to leave their abuser. VFMN 2022 Rep. 8.

* * * * *

These are just a few examples of common—yet important—factors juries should consider when assessing the totality of the circumstances of a claim of self-defense by a domestic violence victim. Minnesota law on the right to self-defense should reflect these realities.

2. Victims of abuse reasonably fear retaliation for defending themselves from their abusers.

As indicated above, attempts to leave an abusive relationship often result in retaliation and, ultimately, the death of the victim. Indeed, most victim-survivors kill their abusers “to stop the abuse, not to kill the [abuser].” De Soto, *supra*, at 53 (cleaned up). To put it bluntly, they know: *it’s him or me*.

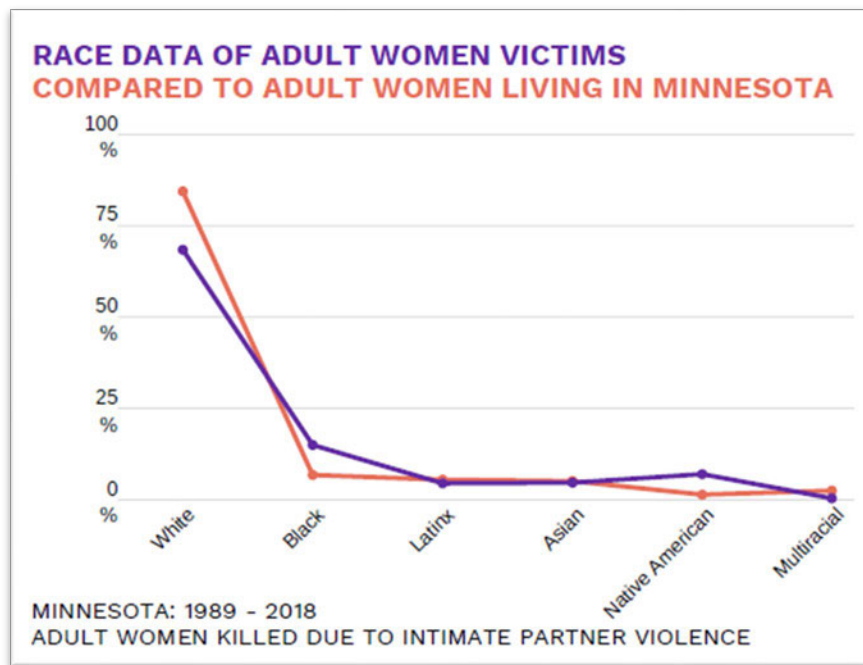
Victims also understand that attempts to leave through other methods are often dangerous and unsuccessful. And reasonably so. Law enforcement responses to domestic violence routinely criminalize the victim, dissuading pleas for intervention. See Melissa Scaia & Rhonda Martinson, *An Institutional Analysis of the Minneapolis Police Response to Domestic Violence: Identifying and Addressing Gaps between Survivor Safety and the Police Response*, Global Rights for Women, at 17, 26, 76, 78, 80. Institutional bias still pervades authorities’ response to complaints of domestic violence. Survivors from domestic violence

experiences in 2021 and 2022 have described waiting for police assistance from *1.5 to several hours*. *Id.* at 53.

Moreover, domestic violence charges are rare in Minnesota because convictions are difficult to obtain. Indeed, one group analysis has observed that “[o]fficers appear to be screening cases based on the perception of likely prosecution rather than probable cause.” *Id.* at 64; *see also* Loraine Patricia Ebner, *The Battered Wife’s Dilemma: To Kill or to Be Killed*, 32 *Hastings L.J.* 895, 905 (1981) (“[M]any police officers believe that family disputes are private matters that should not involve the police.”). Victims commonly fear that leaving the relationship or reporting abuse to authorities will cause them to lose custody or entangle them with child protection workers. *See* Marna Anderson et al., *Reasonable Efforts or Unrealistic Expectations: A Look at Hennepin County Child Protection Cases*, WATCH, at 9–10 (May 4, 2010). As a result, abusers often receive favorable plea deals and reduced sentences, exacerbating their lack of accountability and enabling their future abuse.

3. A holistic standard is also more inclusive of the experiences of historically marginalized communities.

Culturally/ethnically diverse communities, individuals with disabilities, youth, seniors, the houseless, and LGBTQ+ communities may face even more stark realities. *See* VFMN 2022 Rep. 31–33; VFMN 30-Year Rep. 29–35. In particular, outsized proportions of the Black and Native communities have suffered intimate partner homicides in the past 30 years relative to statewide demographics. VFMN 30-Year Rep. 30.



(Graphic: VFMN 30-Year Rep. 29.)

“[C]ompounded systematic oppression results in marginalized communities experiencing disproportionately high rates of domestic violence, more barriers in accessing advocacy services, and disproportionately high rates of criminalization and penalization” of victims. VFMN 30-Year Rep. 29.

These statistics are troubling as it is; but they are likely to be significantly underreported. A persistent theme among marginalized communities is “the lack of reporting on [domestic] violence.” VFMN 2022 Rep. 33 (“Domestic violence within Black, brown, Native, LGBTQ+ communities and those with disabilities are not reported on with the quality nor the frequency that abuse against white women is reported.”).

Minnesota self-defense law should allow a factfinder to consider how a cultural and systemic oppression may impact a victim’s ability to leave or escape abuse and affect her reasonable fear of harm.

B. Preventing a Factfinder from Considering the Totality of the Circumstances When Deciding Self-Defense Is Not Harmless.

While the State generally does not try to defend the instruction on immediacy given by the district court in Ms. Clark’s case, the State does argue that the instruction was “harmless error.” (Appellant Br. 24–28, 28 n.34).

This is incorrect. The requirement that a factfinder consider the totality of the circumstances in adjudicating self-defense claims, and not just temporal immediacy, is not a nominal or disposable requirement. Rather, it has an impact on the substantial rights of the defendant. See Minn. R. Crim. P. 31.01 (only those errors that “do[] not affect substantial rights” are to be “disregarded”); *State v. Mahkuk*, 736 N.W.2d 675, 683 (Minn. 2007) (requiring instructional error to be “harmless beyond a reasonable doubt”).

An instruction requiring “immediacy” precludes a factfinder from considering the numerous factors that heighten the risk of abuse becoming lethal for domestic violence victims. These risk factors, which are borne out by both the lived experience of domestic violence victims and statistically verified by research, can have a reasonable and substantial impact on the actions taken by the domestic violence victim. The district court’s supplemental instruction instead systematically excluded these factors from the jury’s consideration by compelling it to focus exclusively on the temporal relationship of the perceived harm to the ultimate act of self-defense. Because the jury was prohibited from evaluating those factors, many facts material to the “particular circumstances” of Ms. Clark were not even considered. In these

circumstances, this Court cannot presuppose an outcome. *See Glowacki*, 630 N.W.2d at 403 (“Generally, a reasonableness determination is properly made by . . . the jury.”).

As in *State v. Baird*, 654 N.W.2d 105 (Minn. 2003), “it is simply impossible to determine” in such circumstances whether the jurors rejected a defendant’s version of the facts or accepted her version but simply found they didn’t meet the erroneous legal standard they had been given. *See id.* at 114; *see also State v. Valdez*, --- N.W.2d ---, No. A22--1424, 2023 WL 6799150, at *7 (Minn. Ct. App. Oct. 16, 2023) (finding instructional error to be reversible; citing *Baird*). As such, this Court should hold that the use of the incorrect self-defense standard by a factfinder is reversible error.

IV. AN “IMMEDIACY” STANDARD COULD UNDERMINE CRITICAL EXISTING PROTECTIONS FOR VICTIMS AND SURVIVORS.

OFPs are an imperfect but important tool for victims trying to escape domestic violence without having to resort to self-defense. By statute, OFPs can be granted in circumstances of domestic violence provided the applicant can show their abuser has a “[p]resent intent to inflict fear of imminent physical harm.” If this Court were to issue a ruling rendering “imminence” functionally synonymous with

“immediacy,” district courts may interpret such a holding to apply to the OFP standard and restrict the availability of OFP protections to victims. Such an outcome must be avoided.

Under current law, “[a] district court may issue an OFP upon a finding of domestic abuse.” *Butler v. Jakes*, 977 N.W.2d 867, 871 (Minn. Ct. App. 2022) (citing Minn. Stat. § 518B.01, subds. 4, 6 (2020)). Domestic abuse occurs where the abuser conveys a “[p]resent intent to inflict fear of imminent physical harm,” and “can be inferred from the totality of the circumstances, including a history of past abusive behavior.” *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. Ct. App. 2009).

The circumstances of an abuser’s past violence against the victim can be—and as experience has shown, often are—demonstrated through mere words and threats. *Id.* (citing *Hall v. Hall*, 408 N.W.2d 626, 629 (Minn. Ct. App. 1987)) (noting that an overt physical act is not necessary to support the issuance of an OFP); *see also, e.g., Kahler v. Lange*, No. A10-2009, 2011 WL 2648881, at *4 (Minn. Ct. App. July 5, 2011) (imminent fear may be caused by verbal abuse and need not be caused by physical aggression); *Karasek v. Karasek*, No. A08-0643, 2009 WL 749571, at *2 (Minn. Ct. App. Mar. 24, 2009) (threatening confrontation

satisfies requirement of fear of imminent physical harm, bodily injury, or assault); *Bernhagen v. Bernhagen*, No. A07-1791, 2008 WL 4006916, at *3 (Minn. Ct. App. Sept. 2, 2008) (court’s finding that wife proved that domestic abuse occurred encompasses an implicit finding of intent, imminent harm, and reasonable fear).

In short, OFPs are currently available to victims of domestic abuse where the harm is recognized to be “imminent” based on the entire context of the abusive relationship—even if bodily injury is not clearly “immediate.” As discussed above, OFP law is fully consistent with the plain language of Minn. Stat. § 518B.01, which has a separate “immediacy” standard to be used in *other* circumstances. As a matter of public policy, this standard is critical to the safety of domestic violence victims who seek protection based on past conduct in hopes of avoiding situations of imminent physical harm.

A ruling from this Court that equates “imminent” with “immediate” would pose a significant risk to these victims, as it likely would be interpreted by lower courts to affect the manner in which district courts should interpret and apply “imminence” in the context of Minn. Stat. § 518B.01. *Amici* urge this Court to avoid such an outcome.

CONCLUSION

Victims of domestic violence face serious and persistent danger. Given the known and statistical realities of domestic violence and intimate partner homicide, a just self-defense law must consider more than just pure temporal immediacy. Rather, a factfinder must be allowed to consider the particular circumstances of the pervasive and insidious abuse suffered by victims of domestic violence when determining whether the victim's perception of "imminent" bodily harm was reasonable, sufficient to justify the use of deadly force against their abuser. *Amici* Standpoint f/k/a Battered Women's Legal Advocacy Project and Violence Free Minnesota f/k/a Minnesota Coalition for Battered Women respectfully request that this Court continue to move Minnesota law towards greater recognition of, and protection for, those who are victims of such abuse.

Dated: December 8, 2023

Respectfully submitted,

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CERTIFICATE OF DOCUMENT LENGTH

I hereby certify that this brief for leave conforms to the requirements of Minn. R. Civ. App. P. 132.01. The brief has 6,864 words, exclusive of the caption, table of contents, table of authorities, and signature block.

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