No. 13-2739

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JENNIFER PARRISH *et al.*,
Plaintiffs-Appellants,

v.

GOVERNOR MARK DAYTON, in his official capacity as the Governor of the State of Minnesota, *et al.*,
Defendants-Appellees;

AFSCME COUNCIL 5, ANGELA ANDERSON, SHARON O'BOYLE, and MARILYN GELLER,
Intervenors-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
Hon. Michael J. Davis, Chief Judge

BRIEF OF INTERVENORS-APPELLEES AFSCME COUNCIL 5, ANGELA ANDERSON, SHARON O'BOYLE, AND MARILYN GELLER

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SUMMARY OF THE CASE

Plaintiffs brought this case as a facial challenge to the constitutionality of Minnesota's Family Child Care Providers Representation Act, Minn. Stat. §§ 179A.50-.53, which permits home-based child-care providers who are compensated by the State for services provided to low-income families under Minnesota's Child Care Assistance Program, to organize in a union and bargain collectively with the State over those terms and conditions of their service that are within the State's control. Plaintiffs claim that the State's recognition of and bargaining with a union as exclusive representative of the providers violates their rights of freedom of association under the First Amendment.

Without reaching the merits, the district court dismissed the complaint for lack of jurisdiction, holding that Plaintiffs' alleged First Amendment injuries were dependent on a series of contingencies that might or might not occur, and that their claim therefore was not ripe for adjudication. The sole issue properly before this Court on appeal is the correctness of that ripeness holding.

Particularly in view of the fact that a motions panel of this Court has enjoined implementation of the Act pending resolution of this appeal, oral argument should be held. As both the State Defendants and the Intervenors will appear as Appellees, Intervenors request that a minimum of 20 minutes for each side be allotted for argument.

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JURISDICTIONAL STATEMENT

1. Plaintiffs brought this suit under 42 U.S.C. § 1983, alleging violations of the First Amendment to the United States Constitution. The district court held that it lacked jurisdiction because Plaintiffs' claims were not ripe for adjudication. The correctness of that holding is the issue presented on appeal.

2. The appeal is from a final judgment of the district court that disposed of all claims of all parties. This Court has jurisdiction to consider the appeal under 28 U.S.C. § 1291. The district court's judgment was entered on July 29, 2013, and the notice of appeal was timely filed on August 6, 2013.

STATEMENT OF THE ISSUES

Whether, as the district court held, Plaintiffs' claim that their First Amendment associational rights would be violated by the State's recognition of an exclusive bargaining representative was not ripe for adjudication, where the alleged injury was contingent on events that might or might not occur, *i.e.*, the success of a union in demonstrating the necessary 30% support among the providers' bargaining unit to obtain a representation election, and the union's further success in winning majority support among the providers in an ensuing election. *Texas v. United States*, 523 U.S. 296 (1998); *Public Water Supply Dist. No. 10 v. City of Peculiar*, 345 F.3d 570 (8th Cir. 2003); *Nebraska Pub. Power Dist. v. Midamerican Energy Co.*, 234 F.3d 1032 (8th Cir. 2000).

STATEMENT OF THE CASE

Plaintiffs' complaint challenges the constitutionality, on its face, of Minnesota's newly enacted Family Child Care Providers Representation Act ("the Act"), Minn. Stat. §§ 179A.50-53, which permits home-based child-care providers who are compensated by the State for providing care to children of low-income families under Minnesota's Child Care Assistance Program ("CCAP") to bargain collectively over those terms and conditions of their work that are fixed by the State.

The Plaintiffs are twelve home-based child-care providers, eight of whom currently care for CCAP children, for which they receive compensation from the State. *See* Appellants' Appendix ("App.") 52-89. In their complaint, Plaintiffs contended that their First Amendment rights to freedom of speech and association would be violated if a union were certified as exclusive bargaining representative for the providers' bargaining unit, of which they were (or might in the future be) a part. Plaintiffs also claimed, as an additional injury, that they might be required to pay a "fair share" fee to a union certified as their bargaining representative, and that this would constitute a further violation of their First Amendment rights. App. 7-16.

Plaintiffs moved for a preliminary injunction, and Defendants moved to dismiss on ripeness grounds. Intervenors AFSCME Council 5, Angela Anderson,

Sharon O'Boyle, and Marilyn Geller were permitted, under Fed. R. Civ. P. 24, to intervene in support of Defendants. App. 3 (DE #30). Ms. Anderson, O'Boyle and Geller are family child-care providers and members of the providers' bargaining unit who wish to vote for union representation and collective bargaining with the State, as permitted under the Act. Their union, AFSCME Council 5, is actively working to organize the providers in order to obtain a representation election under the terms of the Act. App. 49-51. Intervenors filed briefs supporting the State's motion to dismiss and opposing Plaintiffs' motion for preliminary injunction. App. 3-4 (DE #31, 43).

Following briefing and argument of both motions, Chief Judge Davis granted the motion to dismiss and denied the motion for preliminary injunction, ruling that Plaintiffs' claims were "based on contingency upon contingency," Memorandum of Law & Order (7/28/13) (hereinafter "Memorandum & Order") at 2 (App. 110), and that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 13-14 (App. 121-22) (quoting *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 582 (8th Cir. 2007)). The court recognized that "plaintiffs do not need to wait for actual 'consummation of threatened injury to obtain preventive relief,'" and that "'[i]f the injury is certainly impending, that is enough.'" *Id.* at 15-16 (App. 123-24) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S.

289, 298 (1979)). But the court found "a myriad of contingencies that must occur," *id.* at 16 (App. 124), before Plaintiffs would suffer the injury they claimed. The court explained as follows:

> First, the union has to make a showing to the BMS Commissioner that at least 500 family child care providers support union representation. If that occurs, then the DHS Commissioner will provide the union with the most recent list of eligible family child care providers…. [T]he union can then seek exclusive representation of the family child care providers by filing a petition with the BMS Commissioner establishing that "at least 30 percent of the [providers] wish[] to be represented by the [union]."… If the petition is filed, then BMS will issue an order to conduct an election by eligible family child care providers. Then the union must receive a majority of the votes to be certified by BMS as the exclusive representative of the providers.

Id. (brackets in original). Furthermore, the court observed, the additional injury of which Plaintiffs complained – being required to pay a "fair share" fee to a union certified as their exclusive representative – depended on further contingencies and therefore was even less ripe. *Id.* at 17 (App. 125).

Pointing out that, "[a]s of today, *none* of the foregoing events have occurred," *id.* at 3 (App. 111) (emphasis in original), the court held that Plaintiffs' claims were unripe and dismissed the complaint without prejudice.

In so doing, the district court did not reach, or discuss, the merits of Plaintiffs' claims, or the merits of their motion for preliminary injunction. Rather, it simply denied the preliminary injunction motion as a consequence of having dismissed the case on ripeness grounds. *See id.* at 19-20 (App. 127-28).

Plaintiffs then filed a notice of appeal and moved in the district court for an injunction pending appeal. The court denied that motion after full briefing. Noting its earlier ruling that Plaintiffs' claims were unripe and the likelihood of irreparable injury was "speculative and remote," the court held that "[i]mposition of an injunction based on an unripe claim and the speculative threat of injury will thwart the public interest in enforcement of a law enacted by the people's elected officials." Memorandum of Law & Order (8/27/13) (DE #62) at 3.

This Court apparently disagreed, granting Plaintiffs' renewed motion for injunction pending appeal on September 19, 2013, and denying Intervenors' motion for reconsideration by order of October 15, 2013 – both in one-sentence orders signed only by the Clerk and offering no reasoning with respect to either the ripeness or merits issues. Accordingly, implementation of the Act is enjoined pending resolution of this appeal.

STATEMENT OF FACTS

Under its Child Care Assistance Program ("CCAP"), the State of Minnesota makes available child care for low-income families, many of whom otherwise would be unable to participate in the workforce. It does so in substantial part by subsidizing the care provided by approximately 12,700 home-based child-care providers. For these providers, the State establishes many of the terms and conditions of their work, including fixing reimbursement rates (both base rates and

special rates), determining the hours for which care can be compensated, establishing how and when the provider will paid, setting job qualifications and training requirements, prescribing reporting and recordkeeping requirements, and establishing complaint and disqualification procedures. *See generally* CCAP Child Care Provider Guide (App. 17-44).

The Family Child Care Providers Representation Act ("the Act"), adopted by the Minnesota legislature and signed into law by Governor Dayton on May 24, 2013, allows these state-compensated providers to organize in a union and to bargain collectively with the State over those terms and conditions of their service that are within the State's control.[1] It does so by treating the providers as state employees for the limited purpose of applying Minnesota's Public Employment Labor Relations Act ("PELRA"), Minn. Stat. §§ 179A.01-.25; *see id.*, § 179A.52, subd. 1.

With the enactment of this legislation, Minnesota became one of at least ten states that, through such legislative enactments, have allowed home-based child-care providers who are compensated in whole or in part by the State to bargain collectively, under the provisions of public sector labor law, over those terms and

[1] "Terms and conditions of service" is a term of art under Minnesota labor law that is defined by statute. *See* Minn. Stat. §§ 179A.03, subd. 19, 179A.52, subd. 8.

conditions of their work that are fixed by the State.[2] In so doing, these jurisdictions have recognized that the state's interest in making available affordable child care to low-income families to permit their participation in the labor market requires the availability of a stable, high-quality, professional workforce of home-based child-care providers – and that, in an industry typically marked by low wages and high turnover, that objective can be served by allowing state-compensated providers to organize and bargain collectively.[3]

Under the Act and the applicable provisions of PELRA, a union seeking to represent the providers must first provide evidence of support from at least 500 members of the bargaining unit, in order to obtain access to a list of bargaining unit members. *Id.*, § 179A.52, subd. 4. If a union thereafter can make a showing that it has the support of at least 30% of the providers, it may petition the state Bureau of

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[2] *See* Conn. Gen. Stat. Ann. § 17b-705a (West 2012); 5 Ill. Comp. Stat. § 315/3 (2005); Mass. Gen. Laws Ann. 15D § 17 (West 2012); Md. Code Ann. §§ 5-595-5-595.6 (West 2011); N.J. Stat. Ann. 30:5B-22-30:5B-22.4 (West 2010); N.M. Stat. § 50-4-33 (2010); N.Y. Labor Law Art. 19-c, §§ 695a- 695g (McKinney 2010); Or. Rev. Stat. § 657A.430 (2009); Wash. Rev. Code §§ 41.04.810, 41.56, 41.56.030, 41.56.113, 43.01.047, 74.15, 74.15.020, 74.15.030 (2006). A number of other states similarly allow collective bargaining by state-compensated providers of home care for the elderly and disabled.

[3] *See*, *e.g.*, Ryan J. Lamare, *New Research Highlights the Value of Unions to Child Care Providers*, American Rights at Work Education Fund (May 23, 2012), http://www.americanrightsatwork.org/dmdocuments/ARAWReports/childcare.pdf ("When child care providers have the right to form unions, it helps to stabilize conditions, improve job satisfaction, and raise wages to appropriate levels – all of which are vital to providing the best possible care for children.").

Mediation Services for a representation election under the procedures of PELRA. *Id.*, § 179A.12, subd. 3. If such an election is held, a union obtaining majority support would be certified as exclusive representative of the providers' bargaining unit. *Id.*, §§ 179A.52, subd. 5, 179A.12., subd. 10.

If a union is so certified, the State is required to "meet and negotiate in good faith with the exclusive representative of the family child care provider unit regarding grievance issues, child care assistance reimbursement rates under chapter 119B, and terms and conditions of service." *Id.*, § 179A.52, subd. 6. Any agreement must be submitted to the state legislature to be accepted or rejected. *Id.* The State is also required to "meet and confer under chapter 179A with family child care providers to discuss policies and other matters relating to their service that are not terms and conditions of service." *Id.*, § 179A.52, subd. 7.

The legislation provides that the Act will automatically expire if no union has been certified as exclusive representative of the providers' bargaining unit by June 30, 2017. S.F. No. 778, § 6.

While the record shows that AFSCME Council 5 is working actively toward organizing the providers with a view to making the showing of interest necessary to obtain a representation election, App. 49-51, no such election has yet been requested or held. Memorandum & Order at 3 (App. 111).

SUMMARY OF THE ARGUMENT

1. Notwithstanding Plaintiffs' lengthy discussion of the merits of their First Amendment claim, the only issue properly before the Court on this appeal is the district court's ruling that Plaintiffs' claim was not ripe for adjudication. The merits issues to which Plaintiffs devote most of their brief were neither discussed nor decided by the court below, nor was any motion by Plaintiffs for judgment in their favor ever placed before the district court.

In any event, Plaintiffs' contention that the Act violates their speech and associational rights is misplaced. The Act requires no one to join, associate with, or refrain from joining or associating with, any organization. Nor does it restrict anyone's right to speak or to refrain from speaking. Rather, it provides that if a majority of the providers' bargaining unit so chooses, the State will set the terms and conditions of the providers' service that are within its control by bargaining with a representative chosen by the providers, instead of fixing those terms unilaterally. In committing itself by statute to this course, the State has permissibly exercised its discretion to determine what persons or groups it will listen to in administering a governmental program, and in so doing has raised no First Amendment issue. Acting in its capacity as proprietor of a state program, the State has far broader powers to make such determinations than it does when acting as sovereign and regulating citizens in general. And for First Amendment purposes it

is immaterial that this is a program that the State implements by contracting for services with persons who are not state "employees" within the common-law definition of that term.

2. The district court's holding that Plaintiffs' First Amendment claim was not ripe for adjudication was grounded firmly in the central principle of ripeness analysis that a claim is not ripe if it depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Although a litigant need not wait to sue until an injury has actually occurred, the threatened injury must, at a minimum, be "certainly impending." Here, the alleged constitutional injury depends entirely on whether a union will be able to demonstrate sufficient support among the providers to obtain a representation election, and ultimately whether a majority will vote in favor of union representation. These events, as the district court correctly held, might or might not ever occur. These facts are on all-fours with this Court's holding in *Public Water Supply District No. 10 v. City of Peculiar*, 345 F.3d 570 (8th Cir. 2003), where the plaintiff's claim was not ripe for adjudication because the injury on which it was based similarly was contingent upon unknowable decisions to be made by the applicable electorate.

Plaintiffs' contention that they need only demonstrate a "substantial risk" of harm to have standing to sue is not only inapposite – because the issue here is

ripeness, not standing – but also misplaced on its own terms. Even in the context of standing, harm based on a future event that is not "certainly impending" is insufficient to establish the requisite injury-in-fact.

Plaintiffs also fail to establish ripeness for the additional reason that they cannot show any cognizable "hardship" if adjudication of their First Amendment claim is postponed until the injury they claim actually occurs or is certainly impending. Their contention that they will incur the costs of campaigning against union representation if the Act is not immediately enjoined does not identify "adverse effects of a strictly legal kind," *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 809 (2003), sufficient to create a ripe controversy. What Plaintiffs cite as hardship, much like engaging in legislative lobbying, is nothing more than the cost all citizens incur if they wish to participate in influencing political and social decisions that may affect them.

Particularly in light of the sweeping and unprecedented constitutional claim Plaintiffs asked the district court to decide, invocation of the ripeness doctrine is called for to "avoid passing upon constitutional questions in advance of the strictest necessity for deciding them." *Bergstrom v. Bergstrom*, 623 F.2d 517, 519 (8th Cir. 1980).

ARGUMENT

Plaintiffs' brief consists principally of an extended argument on the merits of the First Amendment claim Plaintiffs brought in the district court – an issue the court below neither decided nor even discussed in dismissing the complaint on ripeness grounds. Only in the last eight pages of their brief do Plaintiffs say anything about the only issue that is properly before this Court on appeal – whether Plaintiffs' claim is ripe for adjudication. On that point – which is reviewed *de novo*, *Kennedy v. Ferguson*, 679 F.3d 998, 1001 (8th Cir. 2012) – the district court clearly was correct in dismissing the complaint for lack of jurisdiction, and its judgment should be affirmed.

III. THE MERITS OF PLAINTIFFS' CLAIMS WERE NOT ADDRESSED OR DECIDED BY THE DISTRICT COURT AND ARE NOT BEFORE THIS COURT ON APPEAL

A. Devoting more than three-fourths of their argument to the merits of their First Amendment claims, Plaintiffs ask this Court not only to reverse the district court's ripeness decision but also to "remand[] with instructions to enjoin enforcement of the Act." Appellants' Br. at 48. In so doing, Plaintiffs appear to have lost sight of the limits of an appeal, which by its nature consists of review of decisions made by the lower court.

Indeed, the merits issue in this case which Plaintiffs ask this Court to decide not only was not discussed or decided below, but it was never even before the

district court – other than as part of the preliminary injunction motion, which the court also did not address but rather simply denied as a consequence of its resolution of the ripeness issue. Plaintiffs did not move for summary judgment, or for judgment on the pleadings (which were not closed), nor did they in any other way place before the district court the request for judgment on the merits in their favor that they ask this Court to direct.

This Court has long recognized that it is an "appellate court sitting to review alleged errors of law, and not to try … action[s] de novo," *Empire Dist. Elec. Co. v. Rupert*, 199 F.2d 941, 945 (8th Cir. 1952), and that it therefore is "appropriate to allow … district court[s] to address … issue[s] in the first instance" so as to "permit adequate vetting through the adversarial process." *Montin v. Estate of Johnson*, 636 F.3d 409, 416 (8th Cir. 2011).

Accordingly, even if – contrary to what we show below – this Court were to conclude that the district court erred in dismissing the complaint as unripe, the appropriate remedy would be limited to remanding to that court for further proceedings on the merits. *See Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1275 (8th Cir. 1994) ("Because the district court dismissed the Partnership's complaint [as unripe] without reaching the merits of these issues, we reverse and remand the Partnership's as applied claims."); *281 Care Comm. v. Arneson*, 638 F.3d 621, 636 (8th Cir. 2011) (declining to consider, and remanding

to district court for determination of, merits of plaintiffs' summary judgment motion that had been dismissed by district court in light of holding that plaintiffs' claims were not ripe), *cert. denied*, 133 S. Ct. 61 (2012); *Bob's Home Serv., Inc. v. Warren County*, 755 F.2d 625, 627 (8th Cir. 1985) (holding that the plaintiff's taking claim was ripe for adjudication but that question of whether a taking occurred "goes to the merits of the case and should be decided by the District Court on remand if necessary").

In short, the only issue properly before this Court on appeal is the district court's determination that Plaintiffs' claims should be dismissed on ripeness grounds. As we show below in Part II, the district court's judgment in that regard should be affirmed. The merits issues that are the focus of Plaintiffs' brief are not before the Court, and should not be considered.

B. Notwithstanding that the merits issue is not before the Court, we believe it necessary to respond briefly, if only by way of providing background for the ripeness issue, to Plaintiffs' contention that the Act involves a "mandatory association" that violates their First Amendment rights of free speech and association.

1. It is important to be clear about what the Act does, and what it does not do, in allowing for the certification of an exclusive bargaining representative. The Act does not require any provider to join, or otherwise to

associate with, any organization whatever – including a union certified as exclusive representative of the providers' bargaining unit. *See* Minn. Stat. § 179A.52, subd. 10 ("Membership status in an employee organization shall not affect the eligibility of a family child care provider to receive payments under, or serve a child who receives payments under, chapter 119B."). Nor does it in any way infringe the providers' right to join or associate with any other organization of their choosing, or impair their ability to speak freely about any subject.

Rather, the Act establishes a process through which the members of the providers' bargaining unit can decide, by majority vote, whether an employee organization of their choice should be certified as their exclusive bargaining representative. The consequences of such certification of an exclusive representative are twofold: (1) the State is required to negotiate in good faith with the representative over the terms and conditions of the providers' service, rather than fixing those terms unilaterally, as it otherwise would have done; and (2) the State is prohibited from negotiating over those terms and conditions with any organization other than the certified representative.[4]

[4] The Act also requires the State to "meet and confer … with family child care providers to discuss policies and other matters relating to their service that are not terms and conditions of service," Minn. Stat. § 179A.52, subd. 7, but this obligation, by its terms, runs to "family child care providers" generally and is not limited to the exclusive representative. *See also id*., § 179A.52, subd. 9(2) (Act does not interfere with "the right or obligation of any state agency to communicate

That is the meaning of "exclusive representation" under the Act. The only "mandate" it imposes on anyone is the requirement the State has imposed on itself through this legislation – the commitment to bargain with the providers' representative over terms and conditions of service *rather than imposing those terms unilaterally*.

This system of collective bargaining through an exclusive representative chosen democratically by a majority of the bargaining unit has been the foundation of labor relations law in the United States – in both the public and private sectors – at least since Congress enacted the National Labor Relations Act in 1935. *See* 29 U.S.C. § 159(a); Minn. Stat. § 179A.06, subd. 2.

And this requirement that the employer – including public-sector employers – bargain exclusively with a representative chosen by the members of the bargaining unit has been explicitly upheld by the Supreme Court as consistent with the First Amendment. The Court has done so on the basis of the principle that, although everyone has a First Amendment right to speak to the government, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984); *see also Smith v. Arkansas State Highway Employees*,

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or meet with any citizen or organization concerning family child care legislation, regulation, or policy").

441 U.S. 463 (1979); *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Emp't Relations Comm'n*, 429 U.S. 167, 178 (1976) (Brennan, J., concurring).[5]

It is, in short, within the government's discretion to determine, as it has done here, that it will listen only to one representative of the providers in fixing the terms and conditions of the providers' service. And it follows that the government also has the discretion to agree that it will listen only to a representative democratically selected by a majority of the bargaining unit. As the Court held in *Knight*, by dealing exclusively with a single representative chosen by majority vote, "[t]he State has in no way restrained appellees' freedom to speak on any [work]-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative." 465 U.S. at 288-89.[6]

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[5] In the *Knight* litigation, several community college faculty challenged on First Amendment grounds provisions of PELRA that required the public employer to "meet and negotiate" with the exclusive representative over terms and conditions of service and to "meet and confer" with the union over broader policy issues. A three-judge district court rejected the attack on the "meet and negotiate" authority in a decision that was summarily affirmed by the Supreme Court, *Knight v. Minnesota Cmty. Coll. Faculty Ass'n*, 571 F. Supp. 1, 5-7 (D. Minn. 1982), *aff'd*, 460 U.S. 1048 (1983) – a disposition that is binding precedent in the lower courts, *see Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976). The district court held the "meet and confer" requirement unconstitutional, however, and that decision was reversed by the Supreme Court in the decision cited in text.

[6] Plaintiffs' brief attempts to distinguish *Knight* on the ground that it did not involve any requirement of financial support of the union through payment of agency fees. *See* Appellants' Br. at 18 (citing 465 U.S. at 289 n.11, 291 n.13). But, as Plaintiffs expressly acknowledge, their challenge is to the constitutionality of the Act's provisions for collective bargaining through an exclusive representative "irrespective of whether the Providers are also forced to pay

Plaintiffs' characterization of the Act as "call[ing] for State designation of a mandatory lobbyist," Appellants' Br. at 15, thus is misplaced in multiple respects. Under the Act the State does not "designate" any representative; rather, the providers themselves determine by majority vote whether they wish union representation, and a state agency certifies the result of that election. The "lobbyi[ng]," *id.*, or "petition[ing] the Government for a redress of grievances," *id.* at 14 (quoting U.S. Const. amend. I), in which the exclusive representative allegedly engages is in no way different from the collective bargaining over terms and conditions of service in which every public-sector union in the country engages with the governmental employer.[7] And the only thing "mandatory" about the process is that *if* the providers opt by majority vote for union representation then *the State* is required to bargain collectively with their representative.

2. The collective-bargaining relationship allowed by the Act differs from the run-of-the-mill public-sector collective-bargaining relationship not with respect to the nature of the bargaining between the parties, nor with respect to

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compulsory fees to their exclusive representative." Appellants' Br. at 13. To the extent Plaintiffs want the courts to decide *that* issue – rather than simply the permissibility of an agency fee under these circumstances – *Knight* is directly on point.

[7] In this regard, as the district court pointed out in *Knight*, "the 'political' character of public bargaining" is not dispositive; rather, "[t]he crucial distinction is [between collective bargaining and] union political activity *unrelated* to collective bargaining." 571 F. Supp. at 6 (emphasis in original).

the issues that are subject to bargaining, but only in that the providers whom the Act permits to engage in collective bargaining through an exclusive representative are not "employees" of the State, but rather "independent contractors," in the common-law sense of those terms. But there is no reason why such common-law categories should set the boundaries of a state's interest in the use of collective bargaining as a means of managing a workforce that implements an important state program. To the contrary, the State of Minnesota is entitled to make the judgment, as have at least ten states, that the reality of the economic relationship between the providers and the State is such that the providers should be treated as public employees for the limited purpose of collective bargaining over the compensation they receive from the State and other terms and conditions of their work that are fixed by the State.

Indeed, that is the same judgment Congress made in originally enacting the National Labor Relations Act, which – until its amendment in 1947 – was construed by the Supreme Court as "not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.'" *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 126 (1944) (holding that a newspaper was required to bargain collectively with its vendors, notwithstanding that they were "independent contractors" rather than "employees" under common-law definitions). State courts have reached similar conclusions in

applying public-sector labor laws, concluding that "adherence to common-law definitions would not further the purpose of [the state's] labor law framework." *AFSCME, Mich. Council 7 v. Michigan Dep't of Health*, 260 N.W.2d 115, 120 (Mich. Ct. App. 1977).

As in these cases, the fact that the family child-care providers are not common-law employees does not mean that there are not substantial issues, common to all of the providers, that lend themselves to negotiation through a collective-bargaining relationship with the State. The providers are paid by the State, at compensation levels set by it, for providing services that implement a state program, and they are subject to a variety of other terms and conditions of service determined by the State. To be sure, the State does not control all aspects of the providers' work, but that is not a prerequisite for meaningful collective bargaining over those terms the State *does* control.[8]

[8] Any number of decisions establish the principle that meaningful collective-bargaining relationships can exist even when the employer does not control certain significant terms of employment. For example, the NLRB has held that an employer can be required to engage in collective bargaining even if it controls only non-economic terms of employment. *Management Training Corp.*, 317 N.L.R.B. 1355, 1357 (1995) (overruling previous decision "that bargaining is meaningless unless it includes the entire range of economic issues"); *see also*, *e.g.*, *NLRB v. Western Temp. Servs., Inc.*, 821 F.2d 1258, 1266 (7th Cir. 1987) (temporary employment agency was "employer" of workers it referred, even though client could request or refuse referrals and exercised "exclusive control over the day-to-day activities" of employees).

In fixing those terms and conditions of the providers' service that are within its control – whether unilaterally or through collective bargaining – the State is administering a governmental program, one that provides child care to low-income families. When it acts in that capacity as proprietor of a state program, the Supreme Court has recognized, the government "has far broader powers" than it does when acting as sovereign and regulating citizens in general. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). That is because "[t]here is a crucial difference [with respect to constitutional analysis] between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 598-99 (2008) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)). Accordingly, in assessing First Amendment claims growing out of the state's actions as proprietor of a governmental program, "[d]eference is … due to the government's reasonable assessments of its interests." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996).

Plaintiffs' contention that, because they are not common-law employees, their "relationship with the State is that of citizen and sovereign," Appellants' Br. at 24, has no support in the law. To the contrary, the Supreme Court has recognized that, in assessing the extent of the government's interests as proprietor, whether "a government service provider's contract [is] a contract of employment

or a contract for services … is at best a very poor proxy for the interests at stake." *Umbehr*, 518 U.S. at 679 (holding that First Amendment retaliation claims of government's independent contractors should be evaluated under the same framework as applies to government employees). In *Umbehr*, the Court specifically rejected the contention that, for First Amendment purposes, everything outside the common-law employment relationship was necessarily a matter of citizen and sovereign:

> Umbehr is correct that if the Board had exercised sovereign power against him as a citizen in response to his political speech, it would be required to demonstrate that its action was narrowly tailored to serve a compelling governmental interest. But in this case, *as in government employment cases*, the Board exercised contractual power, and its interests as a public service provider … are potentially implicated.

Id. at 678 (emphasis added); *see also*, *e.g.*, *NASA v. Nelson*, 131 S. Ct. 746, 758-59 (2011) (rejecting First Amendment challenge to government background checks of workers who were not government employees, and holding that "the Government's interest as 'proprietor' in managing its operations … does not turn on such formalities").

The State's agreement to bargain exclusively with a representative chosen by the majority of the providers is, in short, action of government in its capacity as proprietor. Contrary to Plaintiffs' contention, therefore, *see*, *e.g.*, Appellants' Br. at 12, it is not an action of the kind that would require justification by a "compelling state interest" even if in the government thereby had restricted the

speech or associational rights of members of the bargaining unit – which it assuredly has not done. Rather than restricting any provider's speech or associational rights, the State has simply decided, in the interest of the efficient operation of a government program, whom it will listen to in setting the compensation and other terms of service of those who carry out that program.

In so doing, the State is entitled to the same deference that would be accorded to it as a public employer managing a workforce of common-law "employees" carrying out a similar governmental program. In neither case does the State's decision to recognize and bargain with a representative chosen by the providers over the terms and conditions of their service raise any substantial First Amendment question.

3. The merits issues just discussed are, as explained above, not before the Court on this appeal – and that is true *a fortiori* with respect to any argument based on the possibility that, if a union were to be certified as exclusive representative under the Act, Plaintiffs might at some point thereafter be required to pay an agency fee (or "fair share" fee) to help defray the union's costs of its collective bargaining efforts. The Act does not require payment of an agency fee, and Plaintiffs themselves recognize that their argument that the Act should be held unconstitutional does not turn on "whether the Providers are also forced to pay compulsory fees to their exclusive representative." Appellants' Br. at 13.

The Act does, to be sure, bring the providers' bargaining unit within the scope of PELRA's provisions applicable generally to public-sector labor relations in Minnesota, which *inter alia* allow a union certified as exclusive bargaining representative to assess an agency fee. *See* Minn. Stat. § 179A.06, subd. 3 ("An exclusive representative may require employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative," in an amount not to exceed 85% of regular membership dues.). But whether such an agency fee would be constitutional if it were ever assessed not only is even less ripe for adjudication than is the question of the Act's constitutionality, *see infra* note 10, but it is a separate question from Plaintiffs' argument that the mere fact of collective bargaining over terms and conditions of service through an exclusive representative chosen by majority vote of the providers violates their First Amendment rights.[9]

Because Plaintiffs are challenging the constitutionality of the Act on its face, they must "establish that no set of circumstances exists under which the Act would be valid." *Barrett v. Claycomb*, 705 F.3d 315, 321 (8th Cir. 2013) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Accordingly, the possibility that at some future time an exclusive representative might assess an agency fee provides

[9] It bears noting in this regard that Plaintiffs' Complaint does not seek relief with regard to any hypothetical agency fee requirement, but rather asks only that the Act be struck down as unconstitutional on its face. *See* App. 13-16 (Complaint, Claims for Relief, Prayer for Relief).

no basis for enjoining implementation of the Act itself or the collective bargaining it authorizes. As Chief Judge Davis noted in his opinion below, collective bargaining – as is authorized by the Act – can take place even where, by statute, unions are not permitted to assess an agency fee. Memorandum & Order at 15 n.1 (App. 123). Indeed, everything provided for by the Act could be fully implemented regardless of whether an agency fee was ever assessed. The operation of the Act thus is in no way dependent on whether a union certified as exclusive representative can assess an agency fee under PELRA, and Plaintiffs' agency-fee argument thus provides no basis for holding the Act unconstitutional.

IV. THE COMPLAINT WAS PROPERLY DISMISSED AS NOT RIPE FOR ADJUDICATION

In dismissing the complaint without prejudice, the district court held that Plaintiffs' claims were not ripe for adjudication because they were based on "contingent future events that may not occur as anticipated, or indeed may not occur at all." Memorandum & Order at 13-14 (App. 121-22) (quoting *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 582 (8th Cir. 2007)). The court's holding on this point was unassailable and should be affirmed.

A. The ripeness doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nebraska Pub. Power Dist. v. Midamerican Energy Co.*,

234 F.3d 1032, 1037 (8th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

In holding that Plaintiffs' claims were not ripe, the district court relied squarely on the central principle of ripeness analysis, repeatedly articulated by the Supreme Court and this Court, that "[a] claim is not ripe for adjudication if it rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all."'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985)); *see also Minnesota Pub. Utils. Comm'n*, 583 F.3d at 582; *Missouri Roundtable for Life v. Carnahan*, 676 F.3d 665, 674 (8th Cir. 2012) ("In assessing ripeness, we focus on whether the case involves 'contingent future events that may not occur as anticipated, or indeed may not occur at all.") (quoting *281 Care Comm.*, 638 F.3d at 631); *Public Water Supply Dist. No. 10 v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003) ("a case is not ripe if the plaintiff makes no showing that the injury is direct, immediate, or certain to occur").

Thus, while a litigant seeking to establish ripeness on the basis of an injury that is threatened but has not actually occurred "does not have to await the consummation of threatened injury to obtain preventive relief," the threatened injury must be "certainly impending." *Union Carbide*, 473 U.S. at 581 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)); *Iowa League of Cities v.*

EPA, 711 F.3d 844, 867 (8th Cir. 2013) ("We do not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them, but the injury must be 'certainly impending.'"); *Paraquad, Inc. v. St. Louis Housing Auth.*, 259 F.3d 956, 958-59 (8th Cir. 2001) (same).

Here, Plaintiffs' alleged injury depended entirely on a union being certified as exclusive representative of the providers' bargaining unit after demonstrating majority support in a secret-ballot election conducted by the Bureau of Mediation Services ("BMS"). But that was something that might or might not ever happen. In particular, in order to obtain an election, a union (after showing the support of 500 providers required to obtain access to the list of bargaining-unit members necessary for an organizing campaign) would have to establish "that at least 30 percent of the appropriate unit wishes to be represented by the [union]." Minn. Stat. § 179A.52, subd. 5. If a union made that showing, the BMS would conduct a certification election by mail ballot, at which the union would have to win a majority in order to be eligible for certification by BMS as exclusive bargaining representative.

These are events that may or may not occur. Although it is surely true that the many providers who want union representation, together with AFSCME Council 5, are actively engaged in organizing efforts to meet the Act's requirements for conducting a representation election, Appellants' Br. at 43,

whether or not they will be successful in obtaining the 30% showing of interest, and if so in winning the ensuing election, remains to be seen. For better or worse, the fact is that union organizing campaigns often do not meet with success. Nationally, considering only organizing efforts in which the required showing of interest had been achieved and an election actually held, unions won less than two-thirds (63%) of NLRB-administered representation elections in 2012. *See* Bloomberg BNA, *Daily Labor Report* (May 21, 2013), at C-1; *see also Harris v. Quinn*, 656 F.3d 692, 695 (7th Cir. 2011) (bargaining unit of home-based providers rejected union representation in state-conducted election), *cert. granted* (U.S. Oct. 1, 2013) (No. 11-681). Thus, as the district court observed, "there are a myriad of contingencies that must occur before a union can represent subsidized family child care providers." Memorandum & Order at 16 (App. 124).[10]

The ripeness issue presented here is, in fact, on all-fours with this Court's decision in *Public Water Supply District No. 10 v. City of Peculiar*, 345 F.3d 570

[10] Any issue of whether Plaintiffs constitutionally could be required to pay an agency fee – a question that is not before the Court, *see supra* pp. 23-25 & note 9 – would depend on the further contingency that a union certified as exclusive bargaining representative subsequently would elect, under Minn. Stat. § 179A.06, subd. 3, to assess an agency fee. As the district court pointed out, Memorandum & Order at 14-15 & n.1, 17 (App. 122-23, 125), a union certified as exclusive representative is in no way required to assess an agency fee; and even if the union ultimately did so, that might not happen for some time. (As a general matter, it is unlikely that a newly certified union would seek to assess an agency fee before it had successfully negotiated an initial collective bargaining agreement.) Thus, any agency fee claim rests on even more contingencies that render it unripe for adjudication.

(8th Cir. 2003). In that case, the Water District sought a declaratory judgment that the City was illegally acting to dissolve the District. State law provided for a dissolution election upon petition of one-fifth of the District's voters from each of several subdistricts (as well as approval of a court). *Id.* at 572. This Court held that the case was not ripe for adjudication because any injury to the District was speculative:

> There is no contention that the District is suffering an injury now. The only possible injury to the district is dissolution under [Missouri law]. Yet no petition for dissolution has been filed, and it is not clear that a petition will ever be filed.

Id. at 573. The Court pointed out that the District had "offered no evidence … that the petition has received enough signatures to be submitted to the state circuit court." *Id.* And, in response to the District's argument that the City was "threatening dissolution," the Court observed that "by the express terms of [state law], dissolution *is not primarily in the control of the City, but is instead in the hands of the citizens of the district*." *Id.* (emphasis added). The Court added that "[t]here is no indication in the record of what the citizens want," and that accordingly there was no showing that the injury complained of was "certainly impending." *Id.* (quoting *Paraquad*, 259 F.3d at 959).

So too here. Plaintiffs rest their argument on the fact that AFSCME is engaged in an organizing effort to make the required showing of interest, and they contend that "the Providers are only two short steps away from being forced to

accept AFSCME as their exclusive representative." Appellants' Br. at 43. As in *City of Peculiar*, however, such assertions are insufficient to create a ripe controversy. That AFSCME is working toward obtaining a certification election is no more probative than that the City was "threatening dissolution." Here, as in *City of Peculiar*, certification of an exclusive representative "is not primarily in the control of the [union], but is instead in the hands of the [providers in the bargaining unit]." 345 F.3d at 573. And "[t]here is no indication in the record of what the [providers] want." *Id.* Under these circumstances, whether or not AFSCME Council 5 – or any other union – will be certified as exclusive representative under the Act is uncertain and speculative, and Plaintiffs have not shown, as they must, that the injury of which they complain "is direct, immediate, or certain to occur." *Id.*[11]

B. Plaintiffs make no attempt in their brief to respond to the district court's determination that their First Amendment claim rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all."

[11] It is not our contention, as Plaintiffs appear to believe, that Plaintiffs would "have to wait until after they are *forced to pay compulsory fees* to an exclusive representative to bring their su[i]t." Appellants' Br. at 40 (emphasis added). The permissibility of an agency fee is, as discussed above, a separate issue from the facial challenge to the Act that is before the Court. But Plaintiffs do have to wait until they can demonstrate that the injury of which they complain – recognition by the State of an exclusive bargaining representative – either has occurred or is "certainly impending." That would presumably occur upon BMS certification of an exclusive representative, or perhaps upon a union winning majority support at a representation election.

Memorandum & Order at 13-14 (App. 121-22). Rather, they contend that they need not actually show that the threat of being subject to exclusive representation by a union is "certainly impending," because "[s]tanding can be 'based on a "substantial risk" that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm.'" Appellants' Br. at 40 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013)).

But whether or not Plaintiffs have standing to sue is beside the point. The issue here is not standing but ripeness. While the two doctrines "are sometimes closely related," *Missouri Roundtable*, 676 F.3d at 674, they raise different issues, and the mere fact that a plaintiff may have standing to raise a claim does not mean that the claim necessarily is ripe. *See*, *e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 6-11 (1988) (holding that plaintiff landlords had standing to bring constitutional challenges to rent control ordinance, but that their Takings Clause claim was not ripe for adjudication); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 131 (8th Cir. 1997) ("Even though MCCL has standing to challenge [the statute], we must also consider whether its dispute with FEC is ripe for adjudication ….").

Thus, the short and sufficient answer to Plaintiffs' contention that their First Amendment challenge to the Act should be heard now because of the "'substantial risk' that Providers will be collectivized under the Act," together with the "costs to

mitigate or avoid that harm" that "many of the Providers" would incur "by campaigning against AFSCME in an election," Appellants' Br. at 45, is that even if the legal and factual premises of this argument were accepted, it would do no more than establish Plaintiffs' standing to sue – which is not at issue in this litigation.

Even on its own terms, moreover, Plaintiffs' "substantial risk" argument is misplaced. Plaintiffs draw that argument from a footnote in the Supreme Court's recent *Clapper* decision – a case in which the Court rejected the plaintiffs' standing to sue precisely for failure to meet the requirement that the "threatened injury must be *certainly impending* to constitute injury in fact." 133 S. Ct. at 1147 (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990), and citing additional cases). Disregarding the bulk of the Court's analysis, Plaintiffs point to a footnote in which the Court acknowledged the use, in *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010), and several earlier standing cases of the term "substantial risk," without finding it necessary to address those cases further. *See* 133 S. Ct. at 1150 n.5. In fact, *Monsanto* addressed a different issue – not whether a contingent event was or was not certain to occur, but rather whether *an event that had already occurred* impacted the plaintiffs in such a way that they had standing to sue.[12]

[12] In *Monsanto*, alfalfa farmers sought to enjoin further implementation of an agency action allowing the use of genetically modified seeds. The agency's decision had been promulgated eight months earlier, so the case presented no issue

Contrary to Plaintiffs' suggestion, *Monsanto* does not hold that standing – let alone ripeness – can be predicated on nothing more than a "substantial risk" that the event that would result in the alleged injury might occur. And *Clapper* makes clear that a party cannot "manufacture standing" by "incur[ing] … costs as a reasonable reaction to a risk of harm" when "the harm respondents seek to avoid is not certainly impending." 133 S. Ct. at 1151. Accordingly, while some of the Plaintiffs may elect to spend time and resources in attempting to influence whether or not the event that would result in the injury they allege – a vote by the providers in favor of union representation – in fact occurs, that does not suffice to establish that the constitutional injury Plaintiffs allege is "certainly impending."[13]

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of whether a contingent future event was "certainly impending." Rather, the question before the Court was whether the plaintiffs had suffered any cognizable injury as a result of that action, such that they had standing to seek the injunction. Answering that question in the affirmative, the Court pointed to the "substantial risk of gene flow" from genetically modified seeds to the farmers' crops, and explained that this "substantial risk" inflicted actual injury on the farmers, because of the measures they would have to take to ensure the purity of their crops. This actual injury was "sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis." 130 S. Ct. at 2754-55.

[13] Nor in any event, as the Seventh Circuit explained in *Harris v. Quinn*, could the Plaintiffs' decision to expend money on attempting to influence the outcome of a representation election be considered an "injury" for purposes of standing analysis. *See infra* p. 36 (quoting 656 F.3d at 700-01). Otherwise, for example, the *Monsanto* farmers would have had standing to challenge the agency regulation, even before it was adopted, if they had devoted their resources to lobbying the agency against it. Such an "injury" is not sufficient to confer standing, and certainly not to create a ripe controversy. *Cf. Kennedy v. Ferguson*, 679 F.3d 998, 1002-03 (8th Cir. 2012) (holding that litigation-related costs plaintiff

C. Even if it were less clear than it is that Plaintiffs' First Amendment claim rests on contingencies that might or might not ever occur, Plaintiffs still would fail the ripeness inquiry because of their inability to establish "hardship to the parties of withholding court consideration." *Union Carbide*, 473 U.S. at 581 (quoting *Abbott Labs.*, 387 U.S. at 149).[14]

Plaintiffs offer no argument that they will suffer any cognizable hardship if adjudication of their First Amendment claim is put off until the injury they claim

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elected to incur to avoid injury "are not injuries for purposes of assessing the presence of Article III standing").

[14] The "hardship" test is part of a two-prong inquiry into "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration," *Abbott Labs.*, 387 U.S. at 149, that is often applied in ripeness analysis. To the extent it is necessary to undertake this fitness/hardship inquiry, this Court has made clear that *both* prongs must be satisfied in order to render a claim ripe for adjudication. *See Nebraska Pub. Power*, 234 F.3d at 1039; *Iowa League of Cities*, 711 F.3d at 867. As the Court noted in *Nebraska Public Power*, "[j]udicial resolution of a legal question fit for judicial review yet portending no immediate hardship would constitute little more than a law review article." 234 F.3d at 1039. The cases are not uniform in how they apply the fitness/hardship inquiry in the context of claims resting on contingent and uncertain events. Many cases find it unnecessary to address fitness and hardship separately after determining that the plaintiff's claim rests on contingent events uncertain of occurrence. *E.g.*, *Missouri Roundtable*, 676 F.3d at 674; *Kennedy v. Ferguson*, 679 F.3d at 1001-02. Others treat the fitness/hardship question as an additional hurdle to establishing ripeness, beyond the certainty or immediacy of the alleged injury. *E.g.*, *Texas v. United States*, 523 U.S. at 300-01 ("Even if there were greater certainty regarding ultimate implementation of paragraphs (a)(7) and (a)(8) of the statute, we do not think Texas's claim would be ripe. Ripeness 'requir[es] us to evaluate [the issues of fitness and hardship].'"). Still other cases evaluate the immediacy of the threatened injury as part of the "hardship" inquiry. *E.g.*, *City of Peculiar*, 345 F.3d at 573. Regardless of which approach is used, the result here is the same.

actually occurs or is certainly impending. To the extent they say anything at all on the hardship prong of the analysis, it consists of no more than the assertion that, if the Act is not enjoined, they will incur the costs of "campaigning against AFSCME in an election." Appellants' Br. at 45. But that kind of self-inflicted cost is not the kind of "hardship" that the Supreme Court has found sufficient to create a ripe controversy.

Rather, postponement of adjudication constitutes "hardship" only when it "create[s] 'adverse effects of a strictly legal kind,'" *National Park Hospitality Ass'n v. Department of the Interior*, 538 U.S. 803, 809 (2003), which "affect a [party's] primary conduct." *Id.* at 810. As the Court explained in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), withholding court consideration would not "cause the parties significant 'hardship' as this Court has come to use that term," where

> the provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm…. [T]hey do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.… Nor have we found that the Plan now inflicts significant practical harm upon the interests that the Sierra Club advances ….

Id. at 733. And, in particular, the Court noted that the plaintiff had not "pointed to any other way in which the Plan could now force it to modify its behavior in order

to avoid future adverse consequences, as for example, agency regulations can sometimes force immediate compliance through fear of future sanctions." *Id.* at 734.

Nor does this case present the kind of hardship that this Court confronted in *Nebraska Public Power*, in which the "legal uncertainty" that would result from postponement of judicial consideration would have had the practical result of "plac[ing] millions of dollars in investment at risk." 234 F.3d at 1039. As the Court held in that case, "[w]here the uncertainty resulting from [delayed judicial resolution] creates a sufficiently substantial financial risk, or will force parties to modify their behavior significantly, an issue may be ripe." *Id.*

Rather, what Plaintiffs claim as "hardship" in this case is nothing more than the cost all citizens incur if they wish to participate in influencing political and social decisions that may affect them. That, as Judge Manion noted for the Seventh Circuit in *Harris v. Quinn*, is not the kind of "hardship" that makes for a ripe legal controversy:

> The plaintiffs feel burdened fighting to prevent what they view as an unconstitutional collective bargaining agreement. But many individuals and organizations spend considerable resources fighting to prevent Congress or the state legislatures from adopting legislation that might violate the Constitution. The courts cannot judge a hypothetical future violation in this case any more than they can judge the validity of a not-yet-enacted law, no matter how likely its passage.

656 F.3d at 700-01.

Nor are Plaintiffs on firmer ground in suggesting that requiring them to "re-file their lawsuit" after their claim ripens (if it does) "would be burdensome for both the court and the parties." Appellants' Br. at 46. Apart from the fact that the added cost stems entirely from Plaintiffs' action in bringing this litigation before it was ripe, the Supreme Court "has not considered this kind of litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe." *Ohio Forestry Ass'n*, 523 U.S. at 735.

Plaintiffs also assert that their claim must be ripe now, because if they were required to wait until an exclusive representative was certified it would be too late to prevent the injury of which they complain. Appellants' Br. at 45-46. Not only would that theory eviscerate the ripeness doctrine, but even on its own terms it is insufficient to establish the requisite hardship from postponing adjudication. As this Court has made clear, "both the immediacy and the size of the threatened harm impact the ripeness calculus – they must be significant." *Nebraska Pub. Power*, 234 F.3d at 1038. Whatever injury would befall the Plaintiffs immediately upon certification of an exclusive bargaining representative would be abstract at best; it is difficult to conceive how any more concrete injury could occur (if at all) until, at a minimum, the exclusive representative had negotiated a collective bargaining agreement with the State. In the interim, Plaintiffs would have time enough to litigate their First Amendment claim.

D. The ripeness doctrine "embodies a policy under which courts avoid passing upon constitutional questions in advance of the strictest necessity for deciding them." *Bergstrom v. Bergstrom*, 623 F.2d 517, 519 (8th Cir. 1980); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). In this case, Plaintiffs ask the Court to hold that a statute enacted by the State of Minnesota is constitutionally invalid on its face, on the ground that the First Amendment prohibits collective bargaining through a union recognized as exclusive representative of the bargaining unit – something that no court has ever held, in any context, and that could call into question the foundational principle of the law of labor relations in this country. The breadth of Plaintiffs' constitutional argument, and its affront to the policy judgment made by the state legislature, call for the strictest application of the principle of constitutional avoidance. As Justice Brandeis admonished many years ago:

> The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions.

Ashwander v. TVA, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring).

The district court demonstrated appropriate respect for the State of Minnesota and for the principles of constitutional avoidance in dismissing Plaintiffs' claim as not ripe for adjudication, and its judgment should be affirmed.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Intervenors-Appellees complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief has been prepared in Times New Roman 14-point typeface. With the exception of those portions excluded by Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 10,152 words.

/s/ John M. West

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John M. West