Case No. 13-2739

United States Court of Appeals
for the Eighth Circuit

JENNIFER PARRISH, et al.,

Appellants,

v.

GOVERNOR MARK DAYTON, In His Official Capacity As Governor of The State of Minnesota, et al.,

Appellees.

On Appeal from the United States District Court
for the District of Minnesota

APPELLANTS' BRIEF

William L. Messenger
Aaron B. Solem
c/o National Right to Work Legal Defense Foundation
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
wlm@nrtw.org
abs@nrtw.org

Counsel for Appellants

SUMMARY OF THE CASE

The Plaintiff-Appellants own and operate in-home child care businesses that sometimes serve low-income families enrolled in a child care subsidy program administered by the State of Minnesota. On May 24, 2013, the State enacted the Family Child Care Providers Representation Act, Minn. Stat. §§ 179A.50-52, which calls for State certification of an organization to act as the "exclusive representative" of all family child care providers for petitioning the State over its administration of that public-aid program. Plaintiff-Appellants allege the Act is unconstitutional because it compels association for the purpose of "petition[ing] the Government for a redress of grievances" under the First Amendment, and is not supported by a compelling state interest. This issue presented is whether the Plaintiff-Appellants have standing to enjoin enforcement of the Act before they are subjected to exclusive representation under it. Because of the important First Amendment issues presented in this case, oral argument should be heard, with each side granted 20 minutes for their presentations.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Appellants are not a subsidiary or affiliate of a publicly owned corporation. Appellants are unaware of any publicly owned corporation, not a party to this appeal, which has a financial interest in the outcome of this case.

/s/ William L. Messenger
William L. Messenger

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS Cont.

Page

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES Cont.

CASES Page

TABLE OF AUTHORITIES Cont.

CASES Page

TABLE OF AUTHORITIES Cont.

CASES Page

UNITED STATES CONSTITUTION

STATUTES & REGULATIONS

Federal Statutes

TABLE OF AUTHORITIES Cont.

TABLE OF AUTHORITIES Cont.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to both 28 U.S.C. § 1331, because it arises under the First and Fourteenth Amendments to the United States Constitution, and 28 U.S.C. § 1343, because relief is sought under 42 U.S.C. § 1983. Pursuant to 28 U.S.C. § 1291, this Court has appellate jurisdiction over the lower court's final Orders and Judgments of 28 July 2013 (App. 109, 129).

STATEMENT OF THE ISSUES

The Family Child Care Providers Representation Act ("Act"),[1] Minn. Stat. §§ 179A.50-52, calls certifying an "exclusive representative" of family child care providers to petition the State over its administration of a public-aid program that subsidizes the child care expenses of low-income families. The district court dismissed the Plaintiff-Appellants ("Providers") constitutional challenge to the Act on the grounds that their cause of action will not be ripe until they are required to pay compulsory fees to an exclusive representative. The questions presented are:

1. Will certifying an exclusive representative violate the Providers' First Amendment right to choose which advocacy groups they associate

[1] The Act is reproduced in the Addendum.

with to "petition the Government for a redress of grievances?" *See Knox v. SEIU Local 1000,* 132 S. Ct. 2277 (2012).

2. If so, is the Providers' suit to enjoin the Act ripe for adjudication? *See Babbitt v. United Farm Workers*, 442 U.S. 289 (1979).

STATEMENT OF FACTS

In this appeal of an order granting a motion to dismiss, the facts are those stated in the Complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009). These facts must be accepted as true and all reasonable inferences must be drawn in the Providers' favor. *Id.*

The Providers are "licensed" family child care providers who operate child care businesses in their homes. *See* Providers' Declarations ("Decl."), ¶ 1 (App. 52).[2] They and other licensed providers are the proprietors of small businesses, including for federal tax purposes, and sometimes employ one or more employees. *Id*. at ¶¶ 2-4 (App. 53-89); Minn. Department of Humans Services ("DHS"), *Child Care Assistance Program Child Care Provider Guide* ("*CCAP Guide*"), DHS-5260, at 1 (Feb. 2013) (App. 21).

[2] The paragraphs in the declarations of the twelve Providers are each numbered in the same manner. A reference to a particular paragraph refers collectively to that paragraph in all of their declarations.

"Nonlicensed" family child care providers are individuals who provide in-home child care services to: (a) children to whom they are related; and/or (b) unrelated children from a single family. *CCAP Guide*, 3-4 (App. 23-24). In other words, they are generally the grandparents, aunts, or uncles of the children for whom they provide care. *Id.*

Both types of child care providers sometimes serve families enrolled in the State's Child Care Assistance Program ("CCAP"), Minn. Stat. § 119B *et seq.* This public-aid program subsidizes the child care expenses of indigent families. *See generally CCAP Guide* (App. 17-44). Enrolled families may use the private child care service of their choice, Minn. Stat. § 119B.09, and are responsible for paying a designated co-payment, *id.* at § 119B.12, and any difference between their providers' rates and the CCAP reimbursement rate. *Id.* at 119B.13, subd. 1(f).

A child care providers acceptance of CCAP monies as partial payment for their services to a family does not make her an employee or contractor of the State of Minnesota. Minnesota law expressly provides that "[r]eceipt of federal, state, or local funds by a child care provider either directly or through a parent who is a child care assistance recipient does not establish an employee-employer relationship between

the child care provider and the county or state." *Id.* at § 119B.09, subd. 8. Similarly, the *CCAP Guide* states on its first page that "[m]ost child care providers are self-employed," and informs providers that "CCAP makes payments on behalf of the family, but CCAP is not your employer." (App. 21).

Nevertheless, on May 24, 2013, Governor Dayton signed the Act into law. It decrees that solely "[f]or the purposes of the Public Employment Labor Relations Act ["PELRA"], under Chapter 179A, family child care providers shall be considered . . . executive branch state employees employed by the commissioner of management and budget or the commissioner's representative." Minn. Stat. at § 179A.52, subd. 1. However, the "section does not require the treatment of family care providers as public employees for any other purpose." *Id.*

The Act calls for certification of an "exclusive representative" for all licensed and nonlicensed family child care providers who registered with CCAP within the prior twelve months, based on the results of a mail-ballot election. *Id.* at subds. 2, 5-6. An exclusive representative is granted "the right to represent family child care providers in their relations with the state." *Id.* at § 179A.51, subd. 3. This includes the

right to "meet and negotiate" with the Governor or his designee over "grievance issues, child care assistance reimbursement rates under [CCAP], and terms and conditions of service," *id.* at § 179A.52, subd. 6, and the right to enter into contracts with the State on behalf of all providers. *Id.* Family child care providers can also be forced to pay compulsory fees for the "services rendered by the exclusive representative." *Id.* at § 179A.06, subd. 3.

AFSCME Council 5, which is an Intervenor-Appellee in this action, seeks to become the exclusive representative of providers under the Act. AFSCME informed the district court that it "hopes to be the first employee organization to exercise its rights under the Act and has already conducted substantial organizing efforts and spent a considerable amount of its financial resources in order to make the required thirty percent showing after July 31, 2013." AFSCME Mem. in Supp. of Intervention, at 3-4 (App. 47-48).

The Providers oppose being forced to accept AFSCME as their exclusive representative for petitioning the State over CCAP. Decl. ¶ 7 (App. 53-89). The Providers want to retain their individual right to choose with whom they associate to lobby the State. *Id.* Many Providers

petitioned the State in the past, *id*. at ¶ 8 (App. 53-89), and choose to associate with other advocacy groups, such as the Minnesota Licensed Family Child Care Association ("MLFCCA"). *Id*. at ¶ 9 (App. 53-89).

In fact, there is substantial diversity of association amongst child care providers. A recent survey identified 110 family child care associations in Minnesota.[3] Approximately 74% of licensed providers belonged to one or more of these associations, and 21% of providers are members of the MLFCCA.[4] By contrast, only 3% of providers belonged to a union, like AFSCME. *See* fn. 4, *supra*.

On June 5, 2013, the Providers filed suit under 42 U.S.C. § 1983, alleging that the Act is unconstitutional under the First Amendment because it compels association for the purpose of "petition[ing] the Government for a redress of grievances." Compl., ¶ 28 (App. 13). On June 26, the Providers moved for a preliminary injunction. (App. 3).

On July 28, the district court dismissed the case as not ripe, finding it speculative whether the Providers will be forced to pay

---

[3] Minn. DHS, *Family Child Care Associations in Minnesota: Report of the 2011 Statewide Survey of Local Associations* ("*Association Survey*"), DHS-6522, at 1 (July 2012) (App. 100).

[4] Minn. DHS, *Child Care Workforce in Minnesota, 2011 Statewide Study of Demographics, Training, & Professional Development ("Workforce Study")*, DHS-5115A, at 66 (Aug. 2012) (App. 93).

compulsory fees to an exclusive representative. (App. 122-25). The court reasoned that "even if, as Plaintiffs fear, AFSCME goes through the required steps to be entitled to a vote, wins that vote, and is certified as an exclusive representative, AFSCME may decide that it does not want to impose a fair share fee on nonmembers." (App. 125).

The Providers appealed, and moved this Court for an injunction pending appeal. On September 19, 2013, this Court entered an Order stating that "[t]he motion for injunction pending appeal is granted, pending a ruling by the United States Supreme Court on the petition for writ of certiorari in *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011)."

SUMMARY OF ARGUMENT

The State of Minnesota is attempting to force family child care providers to lobby it for greater reimbursement rates from a public-aid program through an entity designated by the State itself. This is impermissible under the First Amendment, which guarantees individuals the freedom to choose which advocacy groups they associate with to "petition the Government for a redress of grievances." Indeed, the Act turns basic precepts of democracy on their head. Instead of

citizens choosing their representatives in government, here the government seeks to designate a representative for its citizens.

The exclusive representation the Act requires cannot survive "exacting First Amendment scrutiny," because it does not "serve[ ] a 'compelling state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms,'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984)). In particular, the labor-peace rationale justifying exclusive representation for public employees is inapplicable here because family child care providers are not State employees, but independent small-businesses or family members who merely serve individuals enrolled in a public-assistance program. Unlike with its own employees, the State has no cognizable interest in dictating the organization through which family child care providers petition the State.

A contrary conclusion would have vast implications. If it were constitutional for states to designate compulsory advocates to speak for child care providers merely because they provide services to public-aid recipients, then states could impose compulsory advocates to speak for any other person or entity whose services are paid for by a government

program. This result is untenable, as "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United States v. United Foods*, 533 U.S. 405, 414 (2001).

The district court erred in holding the Providers' action to not be ripe until after they are forced to pay compulsory fees to an exclusive representative. The imposition of exclusive representation will itself cause irreparable injury to the Providers' associational rights, as it will thrust the Providers into an involuntary fiduciary relationship with AFSCME in which the organization will have the legal right to speak and contract with the State on the Providers' behalf. The Providers are entitled to have their suit to enjoin the Act heard *before* they are collectivized under it in violation of their First Amendment rights.

ARGUMENT

The district court's dismissal of the Complaint is subject to *de novo* review, and must be reversed unless the Complaint fails to "state a claim to relief that is plausible on its face." *Ashcroft*, 129 S. Ct. at 1949. As established below, reversal is appropriate because (1) the imposition of exclusive representation will violate the Providers' First Amendment

rights to free expressive association; and (2) the threat of exclusive representation is sufficiently imminent to render their claims ripe.

I. Imposing Exclusive Representation on Family Child Care Providers Will Infringe on Their First Amendment Right to Choose with Whom They Associate to Petition Government.

Mandatory associations "are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met." *Knox*, 132 S. Ct. at 2289. First, the mandatory association must "serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (quoting *Roberts*, 468 U.S. at 623). The state interest required to satisfy this threshold is exceedingly high. *See Elrod v. Burns,* 427 U.S. 347, 362-63 (1976); *Republican Party of Minn. v. White,* 416 F.3d 738, 762 (8th Cir. 2005) (en banc). "Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, 132 S. Ct. at 2289 (quoting *United Foods*, 533 U.S. at 414).

The exclusive representation authorized by the Act is a form of mandatory association subject to First Amendment scrutiny. *See*

Section I(A), *infra*. This exclusive representation does not serve a compelling state interest, and thus fails the first *Knox* test. *See* Section II(B), *infra*. Accordingly, the second *Knox* test need not be reached to come to the conclusion that the Act is unconstitutional.

A. Compelling Providers to Accept an Exclusive Representative to Petition the State Infringes on their First Amendment Right to Free Expressive Association.

1. Exclusive Representation Compels Association Because It Creates an Involuntary Fiduciary Relationship between the Representative and Individuals.

The First Amendment guarantees the right to associate for expressive purposes. *See Knox*, 132 S. Ct. at 2288. Given that "'freedom of association . . . plainly presupposes a freedom not to associate,'" *id*., (quoting *Roberts,* 468 U.S. at 623), a state compelling association for an expressive purpose infringes on First Amendment rights. 132 S.Ct. at 2289; *see e.g., Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712 (1996).

The Act calls for vesting an "exclusive representative" with the legal "*right* to represent family child care providers in their relations with the state." Minn. Stat. § 179A.51, subd. 3 (emphasis added). Exclusive representation "creates a fiduciary relationship, akin to that

between a trustee and beneficiary." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (citing *Teamsters Local 391 v. Terry*, 494 U.S. 558, 567 (1990)). "[J]ust as a beneficiary does not directly control the actions of a trustee . . . an individual employee lacks direct control over a union's actions taken on his behalf." *Terry*, 494 U.S. at 567; *see also id.* at 569. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

The State forcing the Providers into an involuntary fiduciary relationship with AFSCME, in which the organization will have the legal right to speak and enter into contracts on the Providers' behalf, necessarily infringes on the Providers' freedom to associate. Thus, as in *Knox*, exclusive representation must be justified by a compelling state interest to be constitutional. *See* 132 S. Ct. at 2289 (exclusive representation for employees was the "mandatory association" at issue in the first prong of the Court's two-part test).

This associational injury exists irrespective of whether the Providers are also forced to pay compulsory fees to their exclusive representative. *Mulhall* is directly on point. There, the issue was whether exclusive representation by a union (Unite) threatened an employee (Mulhall) with injury, even though he could not be required to pay dues to the union under Florida's Right to Work law. 618 F.3d at 1286. The Eleventh Circuit recognized that "[i]f Unite is certified as the majority representative of . . . employees, Mulhall will have been thrust unwillingly into an agency relationship[.]" *Id.* at 1287. Accordingly, "regardless of whether Mulhall can avoid contributing financial support to or becoming a member of the union . . . its status as his exclusive representative plainly affects his associational rights." *Id.*

The same analysis governs here, except that the associational injury that the Act will inflict on the Providers is far worse. *Mulhall* dealt with subjecting an employee to exclusive representation for dealing with his employer over workplace grievances. Here, the Act calls for imposing exclusive representation on independent providers for lobbying the State over a public-aid program. As discussed below, this is an associational injury of significantly greater magnitude.

2. The Act Compels Association for the Expressive Purpose of Petitioning the Government.

a. The Act imposes exclusive representation on family child care providers for an inherently expressive purpose: "petition[ing] the Government for a redress of grievances." U.S. Const. amend. I. This right "is generally concerned with expression directed to the government," *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011), and is "one of 'the most precious of the liberties safeguarded by the Bill of Rights,'" being "implied by 'the very idea of a government, republican in form.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524-25 (2002) (citations omitted). Here, an exclusive representative's primary function under the Act is to engage in "expression directed to the government" regarding an issue of public policy. *Guarnieri*, 131 S. Ct. at 2495. Specifically, the Act empowers an exclusive representative to "meet and negotiate" with State officials over "grievance issues, child care reimbursement rates under [CCAP], and terms and condition of service." Minn. Stat. § 179A.52, subd. 6. This is "petition[ing] the Government" within the meaning of the First Amendment.

This expressive activity is also commonly known as "lobbying." Indeed, it is the paradigm of lobbying: an interest group speaking to government officials to influence how they administer a public-aid program (CCAP) that affects the group's members (child care providers). For example, if a voluntary association of child care providers, such as the MLFCCA, met and spoke with State officials to convince them to raise CCAP reimbursement rates, this activity would constitute lobbying. What the Act requires is no different, except that the interest group is not voluntary, but compulsory.

Seen for what it is, the Act calls for State designation of a mandatory lobbyist or interest group for family child care providers. It is akin to the State forcing all food vendors in Minnesota who serve customers enrolled in the State's Supplemental Nutrition Assistance Program ("SNAP") to accept the National Grocers Association as their interest group to lobby for greater SNAP benefits, or the State making the National Rifle Association the exclusive representative of all gun owners for petitioning state officials over firearm regulations. A more egregious infringement on the Providers' right to choose with whom they associate to petition government is difficult to envision.

In fact, even unionized public employees cannot be lawfully compelled to support union lobbying over issues that relate to "financial support of the employee's profession or of public employees generally." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991) (plurality opinion); *accord id.* at 559 (Scalia, J.); *see also Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415, 1422 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 86 (1998) (unconstitutional for a pilot's union to require support for "its contacts with government agencies and Congress concerning the union's views as to appropriate federal regulation of airline safety," or "union lobbying for increased minimum wage laws or heightened government regulation of pensions."). If employees cannot be compelled to support union lobbying, then certainly non-employee child care providers cannot be unionized solely for the purpose of lobbying.

b. Forcing Providers to accept an exclusive representative to petition the State not only impairs their associational rights, but their speech rights as well. "Political association is speech in and of itself," as "[i]t allows a person to convey a message about some of his or her basic beliefs." *White*, 416 F.3d at 762. Thus, a state requiring that individuals "affiliate with" a political party infringes on associational rights. *Branti*

v. Finkel, 445 U.S. 507, 516-17 (1980) (quoting *Elrod*, 427 U.S. at 350); *see Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 272-73 (3d Cir. 2007). So does a state requiring that a parade include an unwanted group of marchers. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569-70 (1995).

The Providers will become inextricably affiliated with AFSCME's petitioning and policy positions if the State officially certifies it as their "exclusive representative . . . in their relations with the state." Minn. Stat. § 179A.51, subd. 3. Indeed, that is the *entire point* of the certification—to establish that AFSCME speaks not for itself, but as the proxy of all family child care providers. This constitutes a greater injury to the Providers' speech rights than the State compelling them to openly affiliate with a political party, which would be unconstitutional, *see O'Hare,* 518 U.S. at 725-26. "[A]ssociating with an interest group, which by design is usually more narrowly focused on particular issues, conveys a much *stronger message* of alignment with particular political views and outcomes" than does alignment with a political party. *White*, 416 F.3d at 759-60 (emphasis added).

3. *Knight* did Not Address Whether Compelling Association for Petitioning Government Infringes on First Amendment Rights.

In the proceedings below, AFSCME argued at length that *Minnesota State Board v. Knight*, 465 U.S. 271 (1984) establishes that exclusive representation does not infringe on First Amendment rights. *Knight* did no such thing. In fact, the opinion twice states that a claim of compelled association was *not* at issue in the case. *Id.* at 289 n.11 (requirement that employees financially support their exclusive representative "is not at issue in this lawsuit"); *id.* at 291 n.13 ("Of course, this case involves no claim that anyone is being compelled to support [union] activities").

Knight regarded whether *excluding* faculty members from meet and confer sessions between a union and their employer infringed on their First Amendment rights. *Id.* at 273. The "appellees' principal claim [was] that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. The Court rejected this claim, holding that "Appellees' speech and associational rights . . . have not been infringed by Minnesota's *restriction* of participation in 'meet and confer' sessions

to the faculty's exclusive representative." *Id.* at 288 (emphasis added). *Knight* thereby stands for the proposition that "[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Id.* at 283.

Unlike in *Knight*, the Providers do not allege that the Act wrongfully excludes them from negotiation sessions or restricts their ability to petition the State. Nor do they assert a "constitutional right to force the government to listen to their views." *Id.* Rather, the Providers assert their constitutional right not to be forced to associate with an exclusive representative for purposes of petitioning the State. Their claim of *compelled* association is completely different from the alleged *restriction* on speech at issue in *Knight*. Of course, that the State can choose to whom it listens under *Knight* does not mean that the State has the right to dictate who shall speak for the Providers.

B. The Mandatory Association Authorized by the Act Does Not Serve a Compelling State Interest and Is Not Narrowly-Tailored.

Given that the Act mandates association for expressive purposes, it can survive constitutional scrutiny only if it "serves a 'compelling

state interest . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 132 S. Ct. at 2289 (quoting *Roberts,* 468 U.S. at 623); *see also White*, 416 F.3d at 749-52 (discussing the requirements of the compelling interest standard). The State cannot meet this daunting burden.

1. The "Labor Peace" Interest That Justifies Compelled Association in the Employer/Employee Relationship Is Inapplicable to Providers.

The state interest held to justify exclusive representation for public employees is a need to maintain "labor peace" within government workplaces. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 224 (1977).[5] As established below, this interest cannot support the Act because family child care providers are not public employees who work in government workplaces, but small business owners and family members who sometimes provide services to families enrolled in CCAP.

a. As described in *Abood*, labor peace is an interest in avoiding workplace disruptions caused by employee attempts to petition their

[5] In *Knox*, the Supreme Court implicitly questioned "whether the Court's former cases [regarding public employees] have given adequate recognition to the critical First Amendment rights at stake." 132 S. Ct. at 2289. The Providers reserve the right to contest, in any further proceedings, whether the labor peace interest still justifies unionization of public employees.

employer through multiple representatives. 431 U.S. at 220-21. "Peace" is attained by quashing these "conflicting demands" by requiring that all employees deal with their employer about workplace matters only through a single, exclusive representative. *Id.*

For example, in public schools, "the evils that the exclusivity rule . . . was designed to avoid" are the "confusion and conflict that could arise if rival teachers' unions, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement." *Id.* at 224. The "exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools," as it "'serves to prevent the District's schools from becoming a battlefield for inter-union squabbles.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) (citation omitted).

b. Whatever its merits amongst employees in the workplace, the labor peace rationale has no application outside of that narrow context. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v.*

Bd. of Educ., 391 U.S. 563, 568 (1968). "While the government's actions toward its citizenry in general is greatly circumscribed by the individual rights guaranteed by the Constitution, 'the [g]overnment, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.'" *Hinshaw v. Smith*, 436 F.3d 997, 1005 (8th Cir. 2006) (quotation omitted). Thus, the government has greater authority to regulate expressive activity that occurs on its property, such as within its workplaces, than it does in public forums. *See, e.g., Perry Educ. Ass'n*, 460 U.S. at 45-46. Most importantly here, the government has far greater authority to dictate how its employees petition and otherwise deal with management than it has authority to dictate how citizens petition it over issues of public policy. *See Guarnieri*, 131 S. Ct. at 2495-96, 2500-01.

In particular, the government has no legitimate interest in preventing diverse interest groups of citizens or businesses from making conflicting demands on it regarding issues of policy. *Cf. California Motor Transp. Co. v. Trucking Unlimited,* 404 U.S. 508, 510-11 (1972) (unconstitutional to restrict right of businesses to associate for purposes of lobbying government). Indeed, the very essence of

democratic pluralism is that citizens can make competing demands on their government through diverse associations. "The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox*, 132 S. Ct. at 2288 (quotation omitted); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-13 (1983) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (citation omitted). "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976).

This is true even if competing demands from diverse groups of citizens are disruptive. Expressive association to influence public affairs cannot be lawfully suppressed absent extraordinary circumstances. *See e.g., Claiborne Hardware*, 458 U.S. at 908-13 (state lacked authority to sanction a disruptive boycott by an advocacy group whose purpose was to influence government policy). The First Amendment demands tolerance for "verbal tumult, discord, and even offensive utterance," as

"necessary side effects of . . . the process of open debate." *Cohen v. California*, 403 U.S. 15, 24-25 (1971).

Here, a family child care provider's relationship with the State is that of citizen and sovereign, and not that of master and servant. The providers are not employed by the State. *See* Minn. Stat. § 119B.09, subd. 8. They are not even State contractors. Rather, they are independent small businesses and family members who sometimes provide services to children enrolled in a public-aid program. Their relationship to the State is most akin to that of food vendors whose customers include individuals enrolled in SNAP, or health professionals whose patients include individuals enrolled in Medicare or Medicaid. Just as with those persons and entities, the State's interest in dictating how child care providers petition it is far weaker than with respect to its employees. *Cf., Guarnieri*, 131 S. Ct. at 2495-96, 2500-01; *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996).

c. Specifically, the State cannot assert a labor peace "problem" with family child care providers because they work in their own homes and are not managed by the State. As such, the State cannot plausibly claim that providers are disrupting its workplaces or managerial

functions by petitioning the State over CCAP rates through rival representatives.

If and when child care providers petition the State for changes to CCAP, they necessarily do so in their capacity as citizens. The State has no lawful interest in quelling conflicting demands from them. An example proves the point. In the past, some Providers and other family child care providers have petitioned the State for changes to CCAP individually and through multiple associations. *See* Pls. Decl., ¶¶ 8-9 (App.53-89). Is this diverse expression a "problem" that the State may fix through the imposition of one exclusive representative to speak for all providers? Of course not. Such diversity of association to influence State policy represents a proper functioning of the democratic process. The First Amendment guarantees citizens the freedom to associate to petition government precisely to encourage such pluralism. Unlike with its employees in the workplace, the State has no labor peace interest in preventing child care providers from petitioning it through multiple organizations through the imposition of an exclusive representative.

d. Even if a labor peace "problem" could exist here, the Act does not provide the "solution" to it. In the workplace, the disruptions caused by competing demands from rival unions are quelled by giving one union the sole power to deal with the employer, to the exclusion of rival unions and individual employees, who are prohibited from dealing with management. *See Abood*, 430 U.S. at 224; s*ee also Perry Educ. Ass'n,* 460 U.S. at 52 ("exclusion of the rival union [is] . . . a means of insuring labor-peace within the schools"). Here, the Act does not prevent the State from "communicat[ing] or meet[ing] with any citizen or organizing concerning family child care legislation, regulation, or policy." Minn. Stat. § 179A.52 subd. 9(2). Thus, even if the State had a legitimate interest in not being petitioned by diverse groups of providers over CCAP, the Act does not address this ostensible problem.

In fact, labor peace is unattainable outside the narrow context of an employment relationship and the workplace. It may be possible for a government employer to only deal with one exclusive representative in its workplaces, as it can exclude all rivals from its private property and control how its employees interact with management. *Cf. Perry Educ. Ass'n,* 460 U.S. at 52. But states lack the lawful power to exclude rival

groups from public forums or control how citizens petition it. *See City of Madison*, 429 U.S. at 174-76. For example here, the State could not lawfully stop the Providers from petitioning the State individually and through organizations other than AFSCME even if it tried.

In *Lehnert*, the Supreme Court held that the labor peace rationale does not justify compelling even public employees to support union efforts to lobby government about public programs for a similar reason.

> Labor peace is not especially served by allowing [unions to charge employees for its lobbying expenses] because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace.

500 U.S. at 521 (plurality opinion); *accord id.* at 559 (Scalia, J.). If the labor peace interest cannot justify compelling even unionized public employees to support union efforts to lobby government over public programs that may affect them, then the interest is certainly inapplicable to independent business owners and family members who are not employed by the State.

In short, to justify forcing family child care providers to accept an *exclusive* representative to petition the State, the State must have a compelling reason for preventing them from petitioning it through *multiple* representatives. Unlike with public employees in government workplaces, the State has no cognizable interest in preventing child care providers from petitioning it through diverse associations. Even if it did, the State has not prevented providers from doing so in the Act. Accordingly, the labor peace rationale cannot support the Act.

2. The State Cannot Compel Child Care Providers to Petition It Through an Exclusive Representative on the Grounds That This Petitioning May Improve its CCAP Program.

The State has attempted to justify the Act on the grounds that certifying an exclusive representative to negotiate with State officials will assist those officials with improving the State's child care policies. This ostensible interest is incognizable, not compelling, and not narrowly tailored.

First, the rationale is not cognizable as a matter of law because the Supreme Court has made clear that association cannot be compelled for the purpose of generating speech. *See United Foods*, 533 U.S. at 415 (federal program requiring business owners to support an advertising

campaign unconstitutional because the program's principal purpose was to require subsidization of speech). Courts have never "upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 405. Thus the State cannot compel providers to petition it through an exclusive representative because the State believes that this petitioning may be useful to it.[6]

Second, even if the justification were cognizable, the State does not have a "compelling" need to confer with AFSCME over its child care policies. As with other public-assistance program, the State can competently address how to administer CCAP through normal administrative and legislative procedures. It defies credulity that the State has such a desperate need for AFSCME's advice on how to run a child care program that it could justify forcing thousands of child care providers to accept and support AFSCME as their mandatory representative for speaking to the State.

---

[6] Stated conversely, an ostensible lack of sufficient input from family child care providers is not a lawful justification for compelling them to petition the State through a designated representative. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 790-91 (1988).

Third, imposing an exclusive representative on providers is not a narrowly tailored means to receive their input regarding CCAP. If State officials want to meet and confer with AFSCME or any other group over CCAP, *they can simply do so*. The State does not need to force providers into AFSCME's ranks just to speak with it about matters of public policy. Similarly, the State can solicit input from family child care providers through a variety of *voluntary* means, such as requesting their comments, holding public meetings, and polling them. In fact, the State already uses all three methods.[7] There are certainly means to obtain provider input on CCAP that are "significantly less restrictive of associational freedoms" than forcing the providers to accept compulsory representation. *Knox*, 132 S. Ct. at 2289.

---

[7] Rulemaking for CCAP and child care licensing is subject to Minnesota's Administrative Procedures Act ("APA"), Minn. Stat. § 14 *et seq*. *See id*. at §§ 119B.02 subd. 1; 119B.06 subd. 2; 245A.09 subd. 1. The APA generally requires that DHS provide notice of proposed rule changes to affected parties and solicit their comments, Minn. Stat. § 14.22, or that DHS conduct a public hearing, *id*. at §§ 14.14, 14.25. DHS recently conducted meetings to obtain feedback from licensed providers on how to reduce child mortality, s*ee* DHS, *Themes from Stakeholders about Recommendations in Child Deaths in Licensed Family Child Care Homes*, DHS-4189, at 1 (Jan. 2012) (App. 107), and commissioned two large surveys of providers. *See Workforce Study* (App. 90); *Association Survey* (App. 96). These meetings and surveys make clear that the State has means to solicit input from providers other than designating an exclusive representative to speak for them.

Lastly, an "input" rationale for compelled representation cannot be accepted because it is limitless. If government can designate mandatory representatives for citizens based on the mere assertion that conferring with it will aid government officials with formulating public policy, then almost any citizen could be forced to accept a compulsory representative. The State could force all doctors in Minnesota to accept the American Medical Association as their mandatory lobbyist on the grounds that conferring with the AMA could aid State officials with improving public health policies. A governmental desire for input on policy issues cannot be recognized as a justification for the imposition of exclusive representation vis-à-vis government.

3. The "Free-Rider" Rationale Cannot Support the Act.

a. The State has also asserted that an interest in preventing providers from "free riding" on their future representative's activities justifies the mandatory association required under the Act. *See* State Opp. to Mot. For Inj. Pending Appeal, 16-19. To the contrary, the "free rider" rationale is not a compelling state interest for mandatory association, but is relevant only to *Knox's* second test.

Again, *Knox* sets out a two-part test for compelled association. First, the "mandatory association," which here and in *Knox* is exclusive representation, must be justified by a "'compelling state interest.'" 132 S. Ct. at 2289 (citation omitted). "Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.* (citation omitted). The free rider rationale relates only to the second test. *Id.* at 2290. Given that this is not "the rare case where a mandatory association can be justified," *id.* at 2289, the second test is never reached here.

Indeed, the free rider rationale logically *cannot* be a compelling state interest for mandatory association because the rationale would be self-fulfilling. A state's act of appointing a mandatory representative to speak or act for individuals would itself justify forcing those individuals to associate with that organization, so as to avoid free riding on its mandatory representation. Such circular logic is untenable.

b. Even if *Knox's* second test were reached, the free rider rationale would not justify forcing providers to financially support AFSCME. *Knox* held that "free-rider arguments . . . are generally insufficient to

overcome First Amendment objections," and gave as an example: "if a medical association lobbies against regulation of fees, not all doctors who share in the benefits share in the cost." *Id*. at 2289-90. Similarly here, that AFSCME may lobby the State over its CCAP rates is not reason for forcing all child care providers to support this ideological activity. *See Lehnert*, 500 U.S. at 521-22 (free rider rationale does not justify compelling public employees to support union lobbying over government programs that affect their profession).

This is particularly true with respect to family child care providers who, like the Providers, do not want to be exclusively represented by AFSCME in the first place. Recipients of unrequested services generally have no obligation to pay for those unwanted services. Indeed, compelling the Providers to accept AFSCME's exclusive representative will itself constitute a significant impingement on their First Amendment rights. To compound this injury by forcing them to also pay compulsory fees to AFSCME for its unwanted services as a lobbyist would be to use one constitutional injury to justify another.

4. First Amendment Interests Outweigh Any State Policy Interests That May Exist.

Even if the State could identify an interest served by the Act, the "state's purported interest" must be "important enough to justify the restriction it places on the speech in question." *White*, 416 F.3d at 750. In other words, to survive constitutional scrutiny, "[t]he gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights." *Elrod*, 427 U.S. at 363. The harm that will be inflicted on First Amendment interests if the Act is upheld far outweigh any ostensible benefits the State can derive from it.

a. If this Court holds that the State can lawfully designate exclusive representatives for individuals who operate child care businesses, or who care for related children in their homes, then mandatory representatives could be imposed on a broad range of citizens and businesses. The only significant connections that family child care providers have with the State are that they sometimes serve customers on public assistance (which is true of many professions and businesses) and that they are regulated by states to a certain degree

(also true of many professions and businesses).[8] If one or both factors is sufficient to justify exclusive representation for petitioning government, then vast swaths of the population are also susceptible to this imposition on their associational rights.

This would include, by way of example, most of the medical profession, who are subject to extensive government regulation and often serve individuals whose care is paid for by government programs, such as Medicaid or Medicare. It would also include government contractors, as their economic relationship with government is far closer than that of family child care providers who are merely indirect, third-party recipients of public-aid benefits provided by the State to indigent families. To uphold the Act would require recognizing a broad government power to designate compulsory advocates for almost any occupation, trade, or industry.

This threat is not hypothetical. Over the past decade or so, seventeen (17) states have authorized mandatory representation for

[8] While licensed providers are subject to a nontrivial degree of regulation, nonlicensed providers are lightly regulated. They generally need only pass a criminal background study and have first-aid training to receive CCAP monies for caring for the children of their relatives or neighbors. *See CCAP Guide*, at 4-5 (App. 24-25).

child care providers who serve public-aid recipients.[9] In addition, fourteen (14) states have authorized mandatory representation for individuals who provide home-based care to disabled persons enrolled in Medicaid programs.[10] Two states even force individuals who operate foster homes for persons with disabilities to accept an exclusive representative.[11] Unless the First Amendment's associational guarantees are enforced, this will be only the beginning.

---

[9] Conn. Pub. Act 12-33 (14 May 2012); 5 Ill. Comp. Stat. 315/3, 315/7; Iowa Exec. Order 45 (16 Jan. 2006); Kan. Exec. Order 07-21 (18 July 2007); Me. Rev. Stat. Ann. Title 22, § 8308(2)(C) (repealed); Md. Code Ann. art. 5, §§ 5-595 et seq.; 2012 Mass. Acts Ch. 189 (1 Aug. 2012); Interlocal Agreement Between Mich. Dep't of Human Serv. and Mott Comm. College, (27 July 2006) (repealed); N.M. Stat. Ann. § 50-4-33; N.J. Exec. Order 23 (2 Aug. 2006); N.Y. Lab. Law § 695; Ohio H.R. 1, §§741.01-.06 (17 July 2009) (expired); Or. Rev. Stat. § 657A.430; Pa. Exec. Order 2007-06 (14 June 2007); Wash. Rev. Code § 41.56.028; Exec. Budget Act, 2009 Wis. Act 28, § 2216j (codified at Wis. Stat. §§ 111.02 et seq.) (repealed).

[10] Cal. Welf. & Inst. Code, § 12301.6(c)(1); Conn. Pub. Act 12-33 (14 May 2012); 20 Ill. Comp. Stat. 2405/3(f); Md. Code Ann. Art. 9, §§ 15-901 et seq.; Mass. Gen. Laws ch. 118G, § 31(b); Interlocal Agreement between Mich. Dep't of Cmty' Services & the Tri-County Aging Consortium (10 June 2004); Minn. Stat. §§ 179A.50-52; Mo. Rev. Stat. § 208.862(3); Ohio H.B. 1, §§741.01-.06 (17 July 2009) (expired); Or. Const. art. XV, § 11(f); Or. Rev. Stat. § 410.612; Pa. Exec. Order 2010-04 (14 Sept. 2010) (rescinded); Wash. Rev. Code § 74.39A.270; Wis. Stat. §§ 111.81 et seq. (repealed); Vt. Pub. Act 13-48 (24 May 2013).

[11] Or. Rev. Stat. § 443.733; Wash. Rev. Code § 41.56.029.

b. This result is unconscionable, as "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors." *United Foods*, 533 U.S. at 411. This compulsion not only diminishes each individual's personal liberty to choose with whom he or she associates to petition government, but also undermines the democratic process that the First Amendment protects.

At its basest level, the Act is a revised form of an old type of corruption long barred for being unconstitutional—political patronage. *See Elrod*, 427 U.S. 347; *O'Hare,* 518 U.S. at 725-26. Here, instead of compelling individuals to associate with a political party, the State seeks to compel individuals to associate with an advocacy group. This result is just as "inimical to the process which undergirds our system of government." *Elrod*, 427 U.S. at 357. If anything, it is worse because "associating with an interest group . . . conveys a much stronger message of alignment with particular political views and outcomes" than does association with a political party. *White*, 416 F.3d at 759-60.

Advocacy groups that individuals are conscripted to accept and support, and that have exclusive privileges enjoyed by no others, will necessarily have resources exceeding the true and voluntary degree of support that exists for the group and its agenda. For example here, in 2011 only 3% of family child care providers belonged to a union, such as AFSCME. *Workforce Study*, at 66 (App. 93). Yet, if certified under the Act, every family child care provider in Minnesota who accepts CCAP money will be compelled to accept and financially support AFSCME as their exclusive representative for petitioning the State over CCAP.

To permit states to create artificially powerful interest groups will necessarily skew the marketplace of competing ideas that the First Amendment protects. *See Knox*, 132 S. Ct. at 2288. As Judge Learned Hand aptly stated, "[t]he First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" *New York Times v. Sullivan,* 376 U.S. 254, 270 (1964) (quoting *United States v. Associated Press,* 52 F.Supp. 362, 372 (S.D.N.Y. 1943)).

In short, recognizing a state power to designate mandatory representatives to petition government on behalf of citizens will upset

basic constitutional principles. Indeed, it will turn the democratic process on its head. The political collectivism authorized by the Act is antithetical to our system of government, and this harm far outweighs any countervailing policy interest the State could possibly proffer.

* * *

For these reasons, no compelling state interest justifies the exclusive representation authorized by the Act. Accordingly, the Act cannot satisfy the "exacting First Amendment scrutiny" that *Knox* requires, 132 S. Ct. at 2289, and is unconstitutional.

II. The Providers' Constitutional Challenge to the Act Is Ripe for Adjudication.

A case is ripe for adjudication if it presents "'a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (citation omitted). "[T]he ripeness inquiry requires examination of both the 'fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Nebraska Public Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000) (citation omitted).

With respect to the fitness inquiry, "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt*, 442 U.S. at 298. Importantly here, the Providers need not to wait until after the "consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Id.* (citation omitted). As the Supreme Court clarified last term in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), its "cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Id.* at 1150 n.5. Standing 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." *Id.* (citing cases).

To evaluate the risk of a prospective injury, a court must first determine *what* the injury is and *when* that injury will occur. Thus, the proposition that exclusive representation will violate the Providers' constitutional rights is critical to the ripeness inquiry. It establishes that Providers do not have to wait until after they are forced to pay compulsory fees to an exclusive representative to bring their sut, as the

district court erroneously held, because the Providers will suffer irreparable injury before those exactions occur. *See* Section II(A), *infra*. It also establishes that their claim to enjoin enforcement of the Act is ripe because there is a substantial risk that the Providers will be forced to accept AFSCME's exclusive representation. *See* Section II(B), *infra*.

A. The District Court Erred Because the Imposition of Exclusive Representation, and Not Just the Exaction of Compulsory Fees, Will Infringe on Providers' Rights to Free Expressive Association.

Given that the imposition of exclusive representation will infringe on the Providers' associational rights, the district court erred in holding that their claims will not be ripe until after they are required to pay compulsory fees. (*See* App.122-25). By that point, the Providers will have already been harmed twice over: first by the imposition of exclusive representation, and then by the exaction of compulsory fees. The district court's holding thereby violates the maxim that plaintiffs do "'not have to await consummation of threatened injury to obtain preventive relief,'" *Babbitt*, 442 U.S. at 298 (citation omitted), and must be reversed. The Providers are entitled to have their claim to enjoin the Act heard *before* they are collectivized under it.

Harris v. Quinn, 656 F.3d 692, 695 (7th Cir. 2011), *writ of cert. pending*, No. 11-681 (Nov. 29, 2011), is inapposite for a similar reason. The relevant portion of *Harris* regards a challenge by personal assistants to an executive order that authorizes their unionization. *Id.* at 695. The court held that the plaintiffs' "constitutional claim . . . is confined to the payment or potential payment of the fair share requirement." *Id.* at 695 n.2. The court found that the possibility of this injury, i.e., payment of compulsory fees, was too speculative because the personal assistants may never be unionized. *Id.* at 695. Indeed, the personal assistants in *Harris* had already once rejected exclusive representation in an election. *Id. Harris* is distinguishable because, here, the Providers' claim is not "confined to the payment or potential payment" of compulsory fees, *id.* at 695 n2, but extends to the imposition of exclusive representation. As established below, there is a substantial risk that this harm will befall the Providers.

Moreover, even on its own merits, *Harris* is unpersuasive because the court held that "the plaintiffs will have a ripe claim" only if the "personal assistants ever do vote to unionize and enter an agreement with the State mandating fair share fees." *Id.* at 695. The court thereby

required the plaintiffs to wait until *after* their First Amendment rights are infringed upon by the exaction of compulsory to seek injunctive relief, in direct conflict with *Babbit's* holding. 442 U.S. at 298.

B. The Case Is Ripe for Adjudication Because the Providers are Under Imminent Threat of Being Subjected to Exclusive Representation under the Act.

Absent this Court's injunction pending appeal, AFSCME can request a certification election at any time under the Act. *See* Minn. Stat. § 179A.52, subd. 5. AFSCME admits that it "has already conducted substantial organizing efforts and spent a considerable amount of its financial resources in order to make the required thirty percent showing" to petition for an election. AFSCME Mem. in Supp. of Intervention, at 3-4 (App. 47-48); *see also* Kern Aff., ¶¶ 4-6 (discussing AFSCME organizing efforts) (App. 50-51). If AFSCME gains a majority of the votes cast in an election, it will be certified as the Providers' exclusive representative. *See* Minn. Stat. § 179A.12, subd. 10. Given that the Providers are only two short steps away from being forced to accept AFSCME as their exclusive representative, their cause of action to enjoin enforcement of the Act is ripe for adjudication.

Babbit is instructive. There, a union challenged a state labor statute on constitutional grounds, including provisions governing elections. 442 U.S. at 299-301. Notwithstanding the fact that the union never invoked those election procedures, the Supreme Court held that the union's challenge was ripe for adjudication because "awaiting . . . an election would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment." *Id.* at 300-01. Similarly here, the Providers' claim that it is unconstitutional for the State to impose exclusive representation on them based on the results of an election should be heard now.

The Providers should not be required to endure the crucible of an election whose purpose is unconstitutional. The First Amendment exists to protect individual rights from the tyranny of the majority. *See Sullivan*, 376 U.S. at 270. For the State to put to a vote each Provider's individual right to choose with whom she associates to petition government is antithetical to constitutional guarantees. *Cf. Dale*, 530 U.S. at 657-58 ("right [to associate] is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"). The Providers should not have to spend

time, talent, and treasure campaigning in an election to protect themselves from an outcome—the certification of an exclusive representative—that is unconstitutional on its face.

This is exactly the type of situation described in *Clapper* where a claim is ripe for review: where there is "a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." 133 S. Ct. at 1150 n.5. There is a "substantial risk" that Providers will be collectivized under the Act, and many of the Providers will "incur costs to mitigate or avoid that harm" by campaigning against AFSCME in an election. *Id*. Accordingly, the Providers' challenge to the Act should be heard.

C. The Case Is Ripe for Adjudication Because There Is No Better Time to Consider the Providers' Claims.

That this case is ripe for adjudication becomes particularly apparent by approaching the question from the other direction: if the Providers' claims are not ripe now, then when will they be ripe? Under *Babbit*, it must be before they are injured. 442 U.S. at 298. Here, the Providers will be injured if the State certifies AFSCME as their exclusive representative. This constitutional injury will befall the

Providers when two events occur: (1) AFSCME petitions for a certification election; and (2) it wins that election.

The Providers cannot be required to wait until the second event occurs before they can file suit to protect their rights, because certification will occur instantaneously upon an AFSCME victory in an election. *See* Minn. Stat. § 179A.12, subd. 10. There would be no time to adjudicate the Providers' claim and enjoin the State from imposing AFSCME's exclusive representation upon them.

The Providers should not be required to wait until the first event occurs before they can file suit, because doing so would be burdensome for both the court and parties. An election will likely be over within a month or so after AFSCME requests one.[12] This is a very short time frame for the Providers to re-file their lawsuit, for the parties to brief the issues presented, and for the court to issue a ruling. Moreover, while these legal claims are being briefed and considered, the parties

[12] Under Executive Order 11-31, which ordered that a mail-ballot election be conducted amongst child care providers, ballots were scheduled to be mailed out a mere 22 days after the Order was issued. *See* Order for Judgment in *Swanson v. Dayton*, 62-cv-11-9535, at ¶¶ 2, 18 (Minn. Dist. Ct., Apr. 6, 2012).

would have to incur costs of administrating (the State) or campaigning in an election (the Providers and AFSCME) that is legally invalid.

Overall, "ripeness is peculiarly a question of timing." *Blanchette v. Connecticut Gen. Ins. Co.*, 419 U.S. 102 (1974). As discussed above, there is no better time than now to adjudicate whether the State can lawfully compel the Providers and other home child care businesses to accept an exclusive representative for petitioning the State.

CONCLUSION

The Supreme Court recently held that compelling even public employees to support an exclusive representative is an "extraordinary" and "unusual" exercise of governmental power, *Knox*, 132 S. Ct. at 2291 (quoting *Davenport v. Wash. Education Ass'n.*, 551 U.S. 177, 184 (2007)), that "imposes a 'significant impingement on First Amendment rights,'" 132 S. Ct. at 2289 (quoting *Ellis v. BRAC*, 466 U.S. 435, 455 (1984)). The Court deemed its tolerance for this practice to be "something of an anomaly," 132 S. Ct. at 2290, and implicitly questioned "whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." *Id.* at 2289.

Here, the State seeks to extend exclusive representation far beyond public employees, to private business owners and family members who merely provide in-home services to government-aid recipients. It is difficult to envision a policy more inimical to a citizen's right to choose with whom she associates "to petition the Government for a redress of grievances." No Court has ever held that such a scheme can satisfy First Amendment scrutiny.

The district court's decision should be reversed, and the case remanded with instructions to enjoin enforcement of the Act.

Dated: 26 September 2013

By: /s/ William L. Messenger

William Messenger (Va. Bar # 47179)
Aaron B. Solem (#0392920)
c/o National Right to Work Legal Defense Foundation
8001 Braddock Rd., Suite 600
Springfield, Virginia 22160
703.321.8510
wlm@nrtw.org
abs@nrtw.org

Counsel for Appellants

CERTIFICATES OF COMPLIANCE

I hereby certify that this brief complies with the type limitations provided in Federal Rule App. Procedure 32(a)(7). The foregoing brief was prepared using Microsoft Word 2010 and contains 9,645 words in 14-point proportionately-spaced Century Schoolbook font.

I further certify that the foregoing brief and its addendum are virus free according to a scan conducted with Sophos Endpoint Security and Control, v.10.

Dated: September 26, 2013.

/s/ William L. Messenger
William Messenger (Va. Bar # 47179)

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on 26 September 2013, I electronically filed the foregoing Brief on the Merits and its Addendum 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/ William L. Messenger
William Messenger (Va. Bar # 47179)

Counsel for Appellants