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' REPLY BRIEF

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INTRODUCTION

The State and AFSCME do not address the principal arguments and cases the Appellant Providers rely upon. Instead, they choose to address strawman arguments of their own creation.

First, the Providers argue at length the imposition of exclusive representation will infringe on their associational rights because it will thrust them into a *fiduciary relationship* with AFSCME in which the union will have the legal right to speak and contract with the State on their behalf. *See* App. Br. 10-13. Neither the State nor AFSCME deny that exclusive representation will create a fiduciary relationship. Nor do they deny the purpose for this relationship will be to "petition the Government for a redress of grievances." U.S. Const. amend I; s*ee* App. 14-17. The State and AFSCME simply ignore this dispositive point.

Second, the Providers argue that no compelling state interest justifies collectivizing family child care providers. *See* App. Br. 19-38. The Supreme Court recently reiterated that "mandatory associations are permissible only when they serve a 'compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms,'" *Knox v. SEIU Local 1000,* 132 S. Ct. 2277,

2289 (2012) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). Yet, reading AFSCME and the State's briefs, one would never know mandatory associations are subject to "exacting First Amendment scrutiny." 132 S. Ct. at 2289. Both parties contend that they do not need a compelling interest to justify exclusive representation, ignoring *Knox's* holding to the contrary.

Third, the Providers submit that, if it is held constitutional for Minnesota to impose an exclusive representative on small business owners and family members merely because they serve children enrolled in a public-aid program, then vast swaths of the population could also be collectivized based on their services to public-aid recipients. *See* App. Br. 34-39. Not only do the State and AFSCME not dispute this, but their argument that government can designate mandatory representatives for citizens without any need to show a compelling interest only supports the Providers' position.

Fourth, the State and AFSCME hardly address the cases the Providers' rely upon, namely: *Knox*, 132 S. Ct. at 2289, which is discussed above; *Babbitt v. United Farm Workers*, 442 U.S. 289, 298-301 (1979), which held a constitutional challenge to union election

procedures ripe for adjudication before the procedures were invoked; and *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279 (11th Cir. 2010), which held that exclusive representation causes an associational injury and that an individual's challenge to a scheme that threatened him with exclusive representation was ripe for adjudication. *Id.* at 1287, 1291-92. The State tersely addresses *Knox* only once, and AFSCME cites *Babbit* only once in passing. The parties otherwise ignore this apposite case law.

Ignoring something does not mean it ceases to exist. The State and AFSCME turning a blind eye does not change the fact that exclusive representation is a mandatory association, *see* App. Br. 10-17; that no compelling state interest justifies imposing this mandatory association on child care providers, *see* App. 19-38; and that the Providers' suit to enjoin the State from collectivizing them is ripe for adjudication. *See* App. Br. 39-46. Accordingly, the district court's decision should be reversed.

ARGUMENT

I. Compelled Association for the Expressive Purpose of Petitioning Government Constitutes An Irreparable First Amendment Injury.

A. The Court Must First Determine When Injury Will Occur to Determine if the Case is Ripe.

AFSCME argues that this Court should consider only whether the case is ripe, and not reach the merits. *See* AFSCME Br. 12-14. But in order to determine if the Providers' claims for injunctive relief are ripe, the Court must first determine *when* they will be harmed. In particular, the Court must determine if: (1) forcing Providers to accept an exclusive representative violates their First Amendment rights; or (2) only exacting compulsory fees from Providers will violate their rights.

The district court's decision dismissing the case is predicated on the second proposition. (App. 122-25). If the Court finds merit to the first proposition—i.e., that exclusive representation will infringe on the Providers' associational rights—then the lower court's decision should be reversed. *See* App. Br. 41-43.

The Court should also reach the merits to determine if the lower court should grant the Providers' motion for a preliminary injunction on remand. The State recognizes that this issue is before the Court, *see*

State Br. 15-22, as the State lists it as an issue presented for review. *Id.* at 1. Whether the Providers have shown a substantial likelihood of success on the merits will control whether a preliminary injunction is warranted, because "'[w]hen a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied.'" *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (citation omitted). Thus, the Court should determine whether the Providers are likely to succeed on the merits, and hence are entitled to a preliminarily injunction on remand.

B. The Exclusive Representation Authorized by the Act Will Force Providers into a Fiduciary Relationship with AFSCME Whose Purpose is Petitioning the State.

The Act calls for granting an "exclusive representative" the legal "right to represent family child care providers in their relations with the state." Minn. Stat. § 179A.51, subd. 3. The Providers submit this will infringe on their First Amendment associational rights because it forces them into an unwanted fiduciary relationship with AFSCME whose purpose is to "petition the Government for a redress of grievances" under the First Amendment. *See* App. Br. 10-17.

The State and AFSCME do not dispute that exclusive representation "creates a fiduciary relationship, akin to that between a trustee and beneficiary." *Mulhall*, 618 F.3d at 1287. They offer no rebuttal to *Mulhall's* holding that exclusive representation inflicts an associational injury for this reason, even absent a compulsory fee requirement. *Id*. at 1286-87. Nor do the State and AFSCME dispute that the Act imposes exclusive representation for "petition[ing] the Government," as they cannot. *See* App. 14-17; *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (right to petition "is generally concerned with expression directed to the government").

Rather than addressing the Providers' position, the State and AFSCME choose to refute arguments of their own invention. *First*, they assert the Act does not require that child care providers become full union members. *See* State Br. 17-18; AFSCME Br. 14-15. The Providers never said that it did. It is irrelevant that full union membership is not required because exclusive representation alone compels association.

Second, the State and AFSCME aver the Act will not restrict the Providers from petitioning the State individually or through organizations other than AFSCME. *See* State Br. 17; AFSCME Br. 16-18. The Providers do not argue to the contrary. Indeed, they rely on this fact as a reason why the labor peace rationale is inapplicable here. *See* App. Br. 26-27. The Providers seek to enjoin the Act not because it restricts their ability to petition the State, but because it calls for compelling them to associate with AFSCME for the purpose of petitioning the State.[1]

Third, AFSCME argues that State officials have the right to choose which organization they confer with under *Minnesota State Board v. Knight*, 465 U.S. 271 (1984). *See* AFSCME Br. 16-18. The Providers acknowledged as much. *See* App. Br. 18-19. But *Knight* did not involve claims of compelled association. *Id.*; *see Knight*, 465 U.S. at 289 n.11, 291 n.13. And the mere fact "that the State can choose to

[1] The injury caused by government-compelled association is not ameliorated by a residual ability of victims to associate with others. For example, it was unconstitutional for a state to compel parade organizers to associate with a particular group, even though the organizers were not restricted from associating with many other groups. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 560 (1995) (parade included multiple groups and up to 20,000 marchers).

whom it listens under *Knight* does not mean that the State has the right to dictate who shall speak for the Providers." App. Br. 19.

An example proves the point. If the Act provided only that the Governor negotiate with AFSCME over child care policies, no constitutional violation would occur because the Governor can speak with whomever he wants under *Knight*. But the Act is not so limited. It dictates not only to whom the Governor must listen, but also *who shall speak and contract* for child care providers by calling for granting an "exclusive representative" the legal "right to represent family child care providers in their relations with the state." Minn. Stat. § 179A.51, subd. 3. This designation will create an agency relationship between AFSCME and child care providers that the Supreme Court has likened to "that between attorney and client," *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74 (1991), and inextricably affiliate the providers with AFSCME's speech, policy positions, and contracts. Indeed, that is the *entire point* of the "exclusive representative" designation—to establish that AFSCME speaks not for itself, but as the proxy of all providers. This clearly constitutes a mandatory association.

II. The Mandatory Association Authorized by the Act Does Not Serve a Compelling State Interest.

A. The State and AFSCME Have Failed to Prove that a Compelling Interest Justifies the Act.

Given the Act compels association for an expressive purpose, it is subject to "exacting scrutiny" and can be upheld 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). "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion).

1. The State has not met its burden. Indeed, the State's only attempt to show a compelling interest is to point to an affidavit from a State official, Charles Johnson, in which he argues that designating a representative for child care providers will help State policymakers improve the Child Care Assistance Program ("CCAP"). *See* State Br. 22. This affidavit should be disregarded because "[a]n affidavit must contain only factual information, not legal argument." Federal Rule of

Appellate Procedure 27(a)(2)(B)(ii).[2] Even if the argument made in the Johnson affidavit is considered, it is untenable for the three reasons stated on pages 28-31 of the Providers' opening brief (which the State never attempts to address).[3] Government cannot force individuals into a mandatory advocacy group just to get their input on how to run a government program. *See United States v. United Foods*, 533 U.S. 405, 415 (2001) (holding that association cannot be compelled for the purpose of generating speech).

Notably, the State and AFSCME do not argue that the "labor peace" rationale found to justify exclusive representation for public employees in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), applies to child care businesses that serve children enrolled in CCAP. Nor could they rely on this interest for the reasons stated on pages 19-

[2] While Rule 27(a)(2)(B)(ii) applies to motions, it reflects the general principle that a party must make legal arguments in its briefs, and not through the submission of affidavits drafted by counsel.

[3] Specifically, the State's interest is: (1) not cognizable, because association cannot be compelled for the purpose of generating speech; (2) not compelling, because the State does not need AFSCME's advice on how to run CCAP; and (3) not narrowly-tailored, because the State can receive input from providers through voluntary means that are "significantly less restrictive of associational freedoms," *Knox*, 132 S. Ct. at 2289, than forcing providers to accept mandatory representation.

28 of the Providers' opening brief. The State has failed to meet its burden under *Knox* of proving that the mandatory association called for in the Act serves a compelling interest. 132 S. Ct. at 2289.[4]

2. The State, however, contends that it does not have to show the Act serves a compelling interest because mandatory associations and compulsory fees are lawful *per se* under *Abood* and other cases. *See* State Br. 18-21. In so doing, the State ignores *Knox's* plain language:

> We made it clear that compulsory subsidies for private speech are subject to exacting First Amendment scrutiny and cannot be sustained unless two criteria are met. First, there must be a comprehensive regulatory scheme involving a "mandated association" among those who are required to pay the subsidy. [*United Foods*, 533 U.S. at 414]. Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, [468 U.S. at 623]. Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a

[4] The State appears to not understand the Providers' position regarding *Abood*. The State argues that because the Providers reserved the right to contest whether *Abood* was wrongly decided in footnote five of their brief, they somehow "acknowledge that *Abood* controls this case." State Br., 18 n.6. To the contrary, the Providers' position is that *Abood* is *distinguishable* because the "labor peace" interest relied on in that case is not present here. *See* App. Br., 20-28. The footnote simply reserves the Providers' right to challenge *Abood* as wrongly decided should this case reach the Supreme Court, which is the only court that could overturn *Abood*.

> "necessary incident" of the "larger regulatory purpose which justified the required association." *United Foods*, [533 U.S. at 414].

Knox, 132 S. Ct. at 2289; *see also id.* at 2291 and n.3.

In the rare cases where mandatory associations have been upheld, they were deemed justified by what the courts found to be compelling state interests. *See Abood*, 431 U.S. at 221-24 (exclusive representation for public employees justified by a labor peace interest); *Keller v. State Bar of Cal.*, 496 U.S. 1, 7-8 (1990) (mandatory bar associations for lawyers justified by state interest in controlling the practice of law in its courts).[5] By contrast, mandatory associations that were not supported by compelling state interests were struck down as unconstitutional. *See, e.g.*, *Elrod*, 427 U.S. at 364-66 (unconstitutional to require most public employees to associate with political party because state interest in operating efficiently did not justify the mandatory association); *Hurley*

[5] The State's citation to *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), is inapposite because the federal order governing the marketing of tree fruit in that case was upheld as an "economic regulation" *not* subject to First Amendment scrutiny. *Id.* at 477. The *Glickman* Court itself distinguished the situation before it from the constitutional violation caused by compelling support for unions. *Id.* at 469, 473 n.16; *see also United Foods,* 533 U.S. at 411-16 (discussing *Glickman*).

v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 572-73 (1995) (unconstitutional to force parade organizers to associate with advocacy group because state anti-discrimination interest did not did not justify the action); *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 658-59 (2000) (unconstitutional to require Boy Scouts to admit certain members because state anti-discrimination interest did not did not justify the mandatory association). Here, no compelling state interest justifies forcing private child care providers to accept a representative to petition the State over CCAP.

The State contends that the "free rider" concept will allow an exclusive representative certified under the Act to collect compulsory fees from child care providers. *See* State Br. 19-21. The State is getting ahead of itself, as *Knox* first requires that a mandatory association be justified by a compelling state interest. 132 S. Ct. at 2289. Only if a mandatory association satisfies this requirement is the second *Knox* test reached—i.e., are compulsory fees are a "necessary incident" of the mandatory association? *Id*. The "free rider" issue relates only to the second test. Given that the Act fails the first *Knox* test, because the mandatory representation it authorizes serves no compelling interest,

the second *Knox* test is never reached here. *See* App. 31-33.[6]

3. AFSCME also contends that the Act need not be justified by a compelling interest, but for a different reason. *See* AFSCME Br. 22. The union argues that collective bargaining under the Act is no different from that permitted amongst government employees, except that child care providers are independent contractors rather than employees at common law, and that this is a distinction without a difference. *Id*. at 18-22. AFSCME's argument fails on several fronts.

First, the argument fails on its own terms because forcing employees to accept a collective bargaining representative infringes on their First Amendment rights, *see Mulhall*, 618 F.3d at 1286-87, and must be justified by compelling government interests. *Knox*, 132 S. Ct. at 2289-90. AFSCME's theory, even if accepted, gets it nowhere.

Second, the bargaining authorized by the Act differs from that which occurs in employment relationships because it does not regard wages or terms of employment, but the operation of a public-aid

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[6] Even if the second *Knox* test were reached in this case, "free-rider arguments . . . are generally insufficient to overcome First Amendment objections," *Knox*, 132 S. Ct. at 2289, and would not justify the compulsory fees authorized under the Act. *See* App. Br. 32-33.

program (CCAP). Child care providers are under threat of being forced to accept an exclusive representative to petition, or "lobby," the State over matters of public concern. Even employees cannot be forced to support union petitioning of government over policy issues that affect their profession. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521-22 (1991) (plurality opinion); *Miller v. ALPA*, 108 F.3d 1415, 1422-23 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 86 (1998).

Third, the Providers never claimed the legality of compulsory representation hinges on common law distinctions between employees and contractors. The phrase "common-law" does not even appear in the Providers' brief. It does appear nine times in AFSCME's brief, however. The Union is arguing against a position of its own invention.

The Provider's actual position is that a government employer's "labor peace" interest in dictating how its employees petition it under *Abood* is inapplicable to individuals who petition the government (1) outside of a managerial relationship and government workplace (2) over matters of public concern. *See* App. Br. 20-28. The labor peace interest thereby does not justify collectivizing licensed providers (who are small businesses owners) and nonlicensed providers (who are family

members) because they work for themselves in their own homes and because CCAP's operation is a matter of public concern. The State thereby cannot claim (and does not claim) that the interest that justifies unionization of public employees under *Abood* justifies the unionization of home-based child care providers. *Id*.

B. It Is Undisputed that Upholding the Act will Permit the Collectivization of Many Other Individuals and Entities.

The State and AFSCME do not dispute the Providers' point that "if 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." App. Br. 34-39. This includes government contractors, those serving Medicaid or Medicare beneficiaries, or anyone else whose services are paid for by a government program. *Id*. In fact, far from disputing this proposition, the State and AFSCME's arguments actually support it.

The State contends "collective action, such as collective bargaining, does not violate First Amendment associational rights," State Br. 18, and that the "free rider" concept justifies the exaction of

compulsory fees from those subject to a collective action. *Id.* at 19-20. This self-fulfilling logic is limitless. If exclusive representation does not implicate the First Amendment at all, as the State argues, then government can designate an exclusive representative for anyone based on a mere rational basis. And if the free rider rationale automatically justifies the payment of compulsory fees to an exclusive representative, then anyone the government decides to collectivize can be forced to financially support their state-appointed representative.

AFSCME's position is almost as expansive. It argues that exclusive representation does not impinge on First Amendment rights, and need not be supported by any compelling interest, when a state acts as a proprietor. AFSCME Br. 22. A state as a "proprietor," according to the union, when the "State is administering a governmental program." *Id.* at 21.[7] This broad theory would allow government to impose a

[7] AFSCME's contention that the State is merely managing its internal proprietary affairs when it dictates how providers petition it over CCAP is untenable. *See* App. Br., 15-16, 21-24 "[D]iscussion of governmental affairs . . . is at the core of our First Amendment freedoms." *Lehnert*, 500 U.S. at 522. Indeed, even unionized public employees cannot be compelled to support union lobbying over governmental programs that may affect their profession. *Id.*

mandatory representative on anyone who participates in a government program. The entire medical profession could be collectivized by the federal government pursuant to its administration of Medicare and Medicaid programs under the union's position.

These boundless theories for when government can designate representatives to speak for its citizens cannot be accepted. Thankfully, they do not reflect the law. Under *Knox*, mandatory associations are constitutional only if justified by compelling interests. 132 S. Ct. at 2289. The State's decision to grant an "exclusive representative" the legal "right to represent family child care providers in their relations with the state," Minn. Stat. § 179A.51, subd. 3, is not justified by a compelling state interest. Accordingly, the Act is unconstitutional.

III. This Case Is Ripe For Adjudication.

A. The Case Is Ripe Because Forced Representation Is a Certainly Impending Injury.

Given that the imposition of exclusive representation will violate the Providers' rights, the district court erred in holding that their claims will not be ripe until after they are forced to pay compulsory fees to an exclusive representative. *See* App. Br. 41-43. The Providers do not have "to await consummation of threatened injury to obtain

preventative relief." *Babbit*, 442 U.S. at 298. Indeed, even AFSCME concedes the Providers do not have to wait until they are forced to pay compulsory fees for their case to be ripe. *See* AFSCME Br. 30 n. 11.

The Providers are in imminent danger of being forced to accept AFSCME as their exclusive representative. The union needs only (1) file a petition for an election and (2) win that election to become their representative under the Act. *See* App. Br. 43.[8] Given that the Providers are only two short steps away of being collectivized against their will, their constitutional challenge to the Act should be heard now. As this Court said in *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013), as long as an "injury . . . [is] certainly impending," the Court will "not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them."

In response, the State relies on *Orchard Corp. of America v. NLRB*, 408 F.2d 341 (8th Cir. 1969). But *Orchard* deals with the

[8] AFSCME and the State incorrectly assert that, to petition for an election, AFSCME must request a list of eligible providers from the State. *See* State Br. 10; AFSCME Br. 27. This is not a necessary step for an election, but a voluntary one that the union can skip if it chooses. *See* Minn. Stat. § 179A.52, subd. 4. AFSCME has an incentive to skip this step because requesting a list would make "the list . . . publically available," *id.*, and thus available to its opponents.

peculiar *statutory* process under which employers can challenge election results under the National Labor Relations Act ("NLRA").[9] *Orchard* has nothing to do with the Article III ripeness question presented here.

AFSCME, for its part, erects yet another strawman to burn to the ground. The union avers that the Providers rely on *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2013)—which they never cited in their brief—because the Providers quoted from a footnote in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), that cited *Monsanto* and three other cases for the proposition that "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.* at 1150 n.5. The union then proceeds to argue at length why *Monsanto* is distinguishable, s*ee* AFSCME Br. 32-33, n. 12 & 13, even though the Providers never relied on the case.

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[9] Because the NLRA permits judicial review of only NLRB unfair labor practice decisions, and not election decisions, employers can obtain judicial review of the agency's electoral decisions only by refusing to comply with election results and drawing an unfair labor practice. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964). *Orchard* held that an employer could not obtain judicial review of a NLRB decision directing a new election until this statutory procedure was followed. 408 F.3d at 341 n.1. The case has no relevance here.

The Providers cited *Clapper* for the quoted holding, *see* App. Br. 40, and not as an indirect, *sub silentio* reference to *Monsanto* as AFSCME imagines. Of the four cases *Clapper* cites for its holding, *Babbit* is far more relevant here, as the Providers do rely on that case. *See* App. Br. 39-41. *Babbit* holds that "[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," 442 U.S. at 298 (emphasis), and that a union's constitutional challenge to a never-invoked election procedure satisfied this standard. *Id.* at 300-01. Tellingly, AFSCME did not attempt to distinguish *Babbit*.

Finally, the State and AFSCME rely on *Pub. Water Supply Dist. No. 10 v. City of Peculiar, Mo.*, 345 F.3d 570 (8th Cir. 2003). The case involved a Missouri law that allows citizens to dissolve a water district if: (1) one-fifth of registered voters in the district petition for dissolution; (2) a state court finds dissolution to be in the public interest, in which case an election is conducted; and (3) a super-majority vote for dissolution in that election. *Id.* at 572. In *City of Peculiar*, a water district filed suit alleging that a city was illegally soliciting citizens to dissolve the district. *Id.* This Court held the claim to not be ripe because

no petition had been filed under step one of the statute, and because the water district could contest a petition's validity in state court under step two of the statute before an election was conducted. *Id.* at 573.

The threat of harm to the Providers is far more imminent than in *City of Peculiar* because the state-court review requirement is not present here. That step meant the water district's claims against a petition could be adjudicated *before* an election is conducted. *Id.* at 573-74. That is not the case here. Once AFSCME files an election petition under the Act, the election will be conducted and over in about a month. *See* App. Br. 46. It would be difficult, as well as burdensome, for the parties to re-litigate, and for the district court to adjudicate, the complicated issues presented herein during the short crucible of an election. *Id.* It makes far more sense to determine if the Act is constitutional *before* an election is called for under the Act. *See Babbit*, 442 U.S. at 300-01 (union challenge to constitutionality of election procedures held to be ripe before invocation of those procedures); *Mulhall*, 618 F.3d at 1291-92 (individual's challenge to legality of union organizing agreement ripe for adjudication prior to the individual being

unionized under the challenged agreement).[10]

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

Ripeness is "peculiarly a question of timing." *Nebraska Pub. Power. v. Midamerican Energy Co.*, 234 F.3d 1032, 1039 (2000). As explained on pages 45-47 of the Providers' opening brief, there is no better time than now to consider their claims because the alternatives are unacceptable. AFSCME's brief only proves this point.

The union acknowledges that plaintiffs cannot be required to wait until after they are injured to file suit. AFSCME Br. 26-27. The union further acknowledges that "the injury of which they complain . . . [is] recognition by the State of an exclusive bargaining representative." *Id.* at 30 n.11. Nevertheless, AFSCME asserts that the Providers' claims will become ripe only "upon BMS certification of an exclusive representative, or perhaps upon a union winning majority support at a representation election." *Id.*

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[10] The State and AFSCME's arguments regarding *Harris v. Quinn*, 656 F.3d 692, 695 (7th Cir. 2011), *writ of certiorari granted*, No. 11-681 (Oct. 1, 2013), are addressed on pages 42-43 of the Providers' opening brief, and need not be repeated here.

AFSCME's two alternatives are actually one-in-the same, because "BMS certification of an exclusive representative" will occur "upon a union winning majority support at a representation election." *See* Minn. Stat. § 179A.12, Subd. 10 ("Upon a representative candidate receiving a majority of those votes cast in an appropriate unit, the commissioner *shall certify* that candidate as the exclusive representative of all employees in the unit.") (emphasis added). AFSCME is thereby arguing the Providers' claims will not be ripe until State certification of an exclusive representative, and thus *after* the Providers' are injured. This position is irreconcilable with the union's own recognition that a plaintiff "'does not have to await the consummation of threatened injury to obtain preventive relief.'" AFSCME Br. 26 (quoting *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 581 (1985)); *see also Babbit*, 442 U.S. at 298 (same); *Iowa League of Cities*, 711 F.3d at 867 (similar).

In short, AFSCME and the State have failed to prove there is any time better than the present to adjudicate the Providers' challenge to the Act. Accordingly, their claims should be adjudicated now.

C. Postponement of Litigation Will Create Hardship for the Providers.

AFSCME asserts the Providers will not "suffer any cognizable hardship if adjudication of their First Amendment claim is put off until the injury they claim actually occurs or is certainly impending." AFSCME Br. 34-35. This is untenable on its face, as the Supreme Court has held, in a compelled-association case no less, that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 & n.29.[11]

In addition to this threat of irreparable harm to their First Amendment rights, the Providers will endure the hardship of campaigning against AFSCME if the Act is not enjoined before an election is conducted. *See* App. Br. 44-45. The union argues this hardship is a "self-inflicted cost," akin to the "costs citizens incur" if they wish to influence political and social decisions. *See* AFSCME Br.

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[11] It is for this reason that plaintiffs alleging violations of their First Amendment rights, like the Providers here, need only prove a likelihood of success on the merits to obtain a preliminary injunction—because irreparable harm is inherent in a First Amendment violation and the balance of harms and public interest favor enforcement of constitutional rights. *See Swanson*, 692 F.3d at 870; *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester*, 697 F.3d 678 (8th Cir. 2012).

35-36. The analogy is inapt, because the Providers will be protecting themselves from an already-enacted law that threatens their constitutional rights. Given the First Amendment exists to protect individual rights from the tyranny of the majority, s*ee New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), each Providers' right to choose if she associates with AFSCME should not be put to a majority vote in the first place. The Providers should not have to expend time, talent, and treasure protecting themselves from this unlawful encroachment on their right to choose with whom they associate to petition government.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

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 5,374 words in 14-point proportionately-spaced Century Schoolbook font. I further certify that the foregoing brief are virus free according to a scan conducted with Sophos Endpoint Security and Control, v.10.

I further certify that on 6 December 2013, I electronically filed the foregoing Reply Brief 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.

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