No. 13-2739

IN THE
United States Court Of Appeals
FOR THE EIGHTH Circuit

Jennifer Parrish, et al.,

Appellants,

vs.

Governor Mark Dayton, In His Official Capacity As Governor Of The State of Minnesota, et al.,

Appellees.

AFSCME Council 5; Angela Anderson; Sharon O'Boyle, Marilyn Geller,

Intervenors below.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

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SUMMARY OF THE CASE

Plaintiffs-Appellants challenged 2013 Minn. Laws chapter 128, article 1, which allows individual family child care providers who receive a State subsidy to seek union representation. Plaintiffs claim that they might be harmed in the future by the legislation, particularly because they might be assessed a so-called "fair share" fee by the union. Under the legislation, a fair share fee cannot be implemented until a series of seven statutorily-prescribed conditions occur in a specific sequence. To date, none of these contingencies have occurred and may never occur.

Defendants moved the district court to dismiss the Complaint, and Plaintiffs sought a preliminary injunction. The district court correctly concluded that Plaintiffs' case is not ripe due to the speculative and contingent nature of their alleged injury. The district court's order dismissing the Complaint and the motion for preliminary injunction should be affirmed.

TABLE OF CONTENTS

Page

SUMMARY OF THE CASE i

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

A. Minn. Laws 2013, Chapter 128, Article 1 3

B. State Family Child Care Subsidies 5

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE BECAUSE THEIR ALLEGED INJURY IS SPECULATIVE AND BASED ON A SERIES OF CONTINGENCIES 8

II. EVEN IF THE COURT HAD JURISDICTION, PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION WAS STILL PROPERLY DENIED 15

A. Plaintiffs Cannot Show That They Are Likely To Prevail On The Merits Because Chapter 128, Article 1, Does Not Violate Their First Amendment Rights 16

1. Plaintiffs can petition the State and its public officials regarding any family child care issue, matter or policy and can do so directly or through any person or entity they choose 17

2. If a union is certified under Chapter 128, Article 1, Plaintiffs are not required to join the union and may obtain a state subsidy whether or not they join the union 17

3. Any "fair share" fees assessed by a union must be limited to expenses regarding collective bargaining and cannot involve political activity. 19

B. The relative harm to the parties and the public interest. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 1, 18, 19, 20

Clapper v. Amnesty Int'l USA,
___ U.S. ___, 133 S. Ct. 1138 (2013) 1, 8, 9

Clinton v. Jones,
520 U.S. 681 (1997) 14

Daniel Constr. Co. v. N.L.R.B.,
341 F.2d 805 (4th Cir. 1965) 12

Dataphase Sys., Inc. v. CL Sys., Inc.,
640 F.2d 109 (8th Cir. 1981) 15, 16

Glickman v. Wileman Bros. & Elliott, Inc.,
521 U.S. 457 (1997) 21

Harris v. Quinn,
2011 WL 6019918 (2011) 14

Harris v. Quinn,
656 F.3d 692 (7th Cir. 2011), *cert. granted* ,
80 U.S.L.W. 3368 (U.S. Oct. 1, 2013) 3, 12, 13, 14

Int'l Ass'n of Machinists v. Street,
367 U.S. 740 (1961) 20

Keller v. State Bar of Cal.,
496 U.S. 1 (1990) 1, 18, 20, 21

Knox v. Serv. Emps. Int'l Union, Local 1000,
132 S. Ct. 2277 (2012) 21

Lathrop v. Donohue,
367 U.S. 820 (1961) 20

Lehnert v. Ferris Faculty Assn.,
500 U.S. 507 (1991).....21

Locke v. Karass,
555 U.S. 207 (2009).....19

Manion v. Nagin,
255 F.3d 535 (8th Cir. 2001) 15

Minn. Pub. Utils. Comm'n v. F.C.C.,
483 F.3d 570 (8th Cir. 2007) 1, 8, 9

Minn. State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984).....18

Orchard Corp. of America v. N.L.R.B.,
408 F.2d 341 (8th Cir. 1969) 1, 11, 12

Paraquad, Inc. v. St. Louis Hous. Auth.,
259 F.3d 956 (8th Cir. 2001) 12

Pediatric Specialty Care, Inc. v. Ark. Dep't of Hum Servs.,
444 F.3d 991 (8th Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007) 15

Planned Parenthood Minn., N.D., S.D. v. Rounds,
530 F.3d 724 (8th Cir. 2008) 1, 7, 15

Pub. Water Supply Dist. No. 10 v. City of Peculiar, Mo.,
345 F.3d 570 (8th Cir. 2003) 12

Renne v. Geary,
501 U.S. 312 (1991).....8

Ry. Emps.' Dep't v. Hanson,
351 U.S. 225 (1956)..... 19, 20

Sierra Club v. U.S. Army Corps of Engineers,
771 F.2d 409 (8th Cir. 1985) 15

Texas v. United States,
523 U.S. 296 (1998).....9

Vogel v. Foth & Van Dyke Associates, Inc.,
266 F.3d 838 (8th Cir. 2001) 8

Warth v. Seldin,
422 U.S. 490, 499 n.10 (1975) 9

Whitmore v. Arkansas,
495 U.S. 149 (1990) 9

MINNESOTA STATUTES

2013 Minn. Laws chapter 128, article 1 ..... *passim*

Minn. Stat. § 119B.02 6

Minn. Stat. § 119B.03 5

Minn. Stat. § 119B.09 5

Minn. Stat. § 119B.125 6

Minn. Stat. § 119B.13 6

Minn. Stat. § 179A.06 ..... 11, 19

Minn. Stat. § 179A.12 ..... 10, 11

Minn. Stat. § 179A.51 .....4, 5

Minn. Stat. § 179A.52 ..... *passim*

OTHER STATE STATUTES

A.B. 641, 2013-2014 Leg. Sess. (Cal. 2013) 4

Conn. Gen. Stat. § 17b-705a 3, 4

305 Ill. Comp. Stat. 5/9A-11 4

Mass. Gen. Laws Ch. 15D, § 17 4

Md. Code Ann., Fam. Law § 5-595.3 4

N.J. Stat. Ann. § 30:5B-22.1 4

N.M. Stat. § 50-4-33 4

N.Y. Labor Law § 695-a 4

Or. Rev. Stat. § 657A.430 4

2013 R.I. Pub. Laws 12-456 (13-S 794A) 4

Wash. Rev. Code § 41.56.028 4

ADDITIONAL AUTHORITIES

AFSCME Minnesota Council 5 Child Care Providers Together, *FAQ-What's Next* http://ccptmn.org/node/860 11

Family Child Care Providers Representation Act: Hearing on S.F. 778 Before the S. Comm. on State & Local Gov't, 88th Leg. (Mar. 4, 2013) 4

Family Childcare Working Group, *Final Report Submitted to Governor Daniel P. Malloy pursuant to Executive Order #9, http://www.governor.ct.gov/malloy/lib/malloy/FCC_Final_Report.pdf* 4

JURISDICTIONAL STATEMENT

Plaintiffs' notice of appeal was timely filed on August 6, 2013.

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that Plaintiffs' claims are not ripe for adjudication because their alleged injuries are hypothetical and based on a series of successive contingencies, which have not and may never occur?

   Apposite authorities:

   Clapper v. Amnesty Int'l USA, ___ U.S. ___, 133 S. Ct. 1138 (2013)
   Minn. Pub. Utils. Comm'n v. Fed. Commc'n Comm'n, 483 F.3d 570 (8th Cir. 2007)
   Orchard Corp. of Am. v. N.L.R.B., 408 F.2d 341 (8th Cir. 1969)

2. Assuming *arguendo* that the Court has jurisdiction to consider Plaintiffs' claims, did the district court clearly err or abuse its discretion in denying Plaintiffs' motion for a preliminary injunction?

   Apposite authorities:

   Keller v. State Bar of Cal., 496 U.S. 1 (1990)
   Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)
   Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008)

STATEMENT OF THE CASE

Plaintiffs served their Complaint on June 5, 2013. The Complaint challenges the constitutionality of 2013 Minn. Laws chapter 128, article 1, which allows individual family child care providers who receive a state subsidy to seek union representation. Plaintiffs claim that the legislation interferes with their right of free association by allowing a majority of individual family child care providers to certify an exclusive representative and because, if elected, an exclusive representative may charge a fair share fee. *See, e.g.*, Appellants' Appendix ("App.") 12 (Compl. ¶¶ 23, 24); Docket No. 1.

Defendants, Mark Dayton, Josh Tilsen and Lucinda Jesson, moved to dismiss because Plaintiffs' claims were not justiciable. Defs.' Mem. in Supp. of Mot. to Dism. 2, 6-9; Docket No. 16. On June 26, 2013, Plaintiffs filed a motion for preliminary injunction with the district court seeking to enjoin implementation or enforcement of the legislation. Both motions were heard by the district court, the Honorable Michael J. Davis, on July 18, 2013.

On July 28, 2013, the district court dismissed Plaintiffs' Complaint because the case was not ripe for adjudication due to the speculative and contingent nature of their alleged injuries. App. 111 (Mem. of Law & Order at 3); Docket No. 49. The district court also denied Plaintiffs' motion for a preliminary injunction. App. 127, 128 (Mem. of Law & Order at 19, 20). This appeal followed.

On August 27, 2013, the district court denied Plaintiffs' motion for an injunction pending appeal. Appellee's Addendum ("A.A.") 2-3 (Mem. of Law & Order – Den. Mot. Inj. Pend. App. at 2-3); Docket No. 62. Plaintiffs moved this Court for the same relief, which the Court 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).[1] Order of Sept. 18, 2013. Intervenors-Appellee AFSCME Council 5, *et al.* (collectively "AFSCME") moved this Court to reconsider its order granting Plaintiffs' motion for injunction pending appeal. Mot. for Recon. On October 1, 2013, the Supreme Court granted the petition for writ of certiorari in *Harris*. On October 15, 2013, this Court denied AFSCME's motion for reconsideration and ordered that the injunction pending appeal remain in effect during the pendency of this appeal. Order of Oct. 15, 2013.

STATEMENT OF FACTS

A. Minn. Laws 2013, Chapter 128, Article 1.

On May 20, 2013, the Minnesota Legislature enacted Chapter 128, article 1, allowing State-subsidized family child care providers to seek possible union representation.[2] Governor Dayton signed the law on May 24, 2013, and it is

[1] Counsel for Plaintiffs in this case also represented the plaintiffs in *Harris*.

[2] At least ten other states have enacted legislation allowing State-subsidized family child care providers to be represented by a union. Conn. Gen. Stat. § 17b-705a (Footnote Continued on Next Page)

codified at Minn. Stat. §§ 179A.51 and .52. The legislation applies to "individual" family child care providers who currently receive a State subsidy. Minn. Stat. § 179A.51, subd. 4. It creates a limited employment relationship with the State for purposes of possible union representation regarding, in particular, the State subsidy. Section 179A.52, subd. 1.

Legislative testimony states that the legislation was designed to provide "service recipients" of State-subsidized family child care "better access, better quality and more stability"; and for the subsidized "service providers" to "improve their wages, [and] to allow access to better training and provide fairness." *Family Child Care Providers Representation Act: Hearing on S.F. 778 Before the S. Comm. on State & Local Gov't*, 88th Leg. (Mar. 4, 2013) (Statement of Sen. Sandra Pappas, Chair, S. Comm. on State & Local Gov't), available at

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(Footnote Continued from Previous Page)
(Connecticut); 305 Ill. Comp. Stat. 5/9A-11 (Illinois); Md. Code Ann., Fam. Law § 5-595.3 (Maryland); Mass. Gen. Laws Ann. Ch. 15D, § 17 (Massachusetts); N.J. Stat. Ann. § 30:5B-22.1 (New Jersey); N.M. Stat. § 50-4-33 (New Mexico); N.Y. Labor Law § 695-a (New York); Or. Rev. Stat. § 657A.430 (Oregon); 2013 R.I. Pub. Laws 12-456 (13-S 794A) (Rhode Island); Wash. Rev. Code § 41.56.028 (Washington). Similar legislation has been proposed in California. *See* A.B. 641, 2013-2014 Leg. Sess. (Cal. 2013). A number of other states have implemented processes by gubernatorial directive to hold a vote of State-subsidized family child care providers on union representation. *See, e.g.*, Family Childcare Working Group, *Final Report Submitted to Governor Daniel P. Malloy pursuant to Executive Order #9* (Feb. 15, 2012), *http://www.governor.ct.gov/malloy/lib/malloy/FCC_Final_Report.pdf* (last visited Nov. 6, 2013).

http://www.senate.leg.state.mn.us/schedule/unofficial_action.php?ls=88&bill_type=SF&bill_number=0778&ss_number=0&ss_year=2013 (last visited Nov. 6, 2013).

If a majority of the providers vote in favor of union representation, and the Commissioner of the Bureau of Mediation Services ("BMS Commissioner") certifies the union, the union will then negotiate with the State regarding the subsidy. It may also negotiate other matters relating to terms and conditions of service of the subsidized providers. Section 179A.52, subd. 6. The legislation does not require providers to join the union, and explicitly precludes the provider's eligibility for or payment of the subsidy to be conditioned upon membership in the union. *Id.*, subd. 10. Moreover, the statute recognizes "the right or obligation of any state agency to communicate or meet with any citizen or organization concerning family child care legislation, regulation, or policy." *Id.*, subd. 9(2). Any agreement between the union and State officials does not become effective unless the Legislature approves the agreement. *Id.*, subd. 6.

B. State Family Child Care Subsidies.

The Minnesota Child Care Assistance Program ("CCAP") provides low-income families, who would otherwise be unable to participate in employment and educational opportunities due to child care needs, with financial assistance to pay for quality child care. *See, e.g.*, Minn. Stat. §§ 119B.03, subd. 3, 119B.09, subds.

1, 5. The Commissioner of the Department of Human Services ("DHS Commissioner") is responsible for developing standards and adopting rules to govern CCAP, including the payment of the subsidy. *See* Minn. Stat. §§ 119B.02, subd. 1, .125, subd. 1, .13, subd. 1.

The State paid subsidies under CCAP to family child care providers in the aggregate amount of approximately $211.5 million in fiscal year 2011 and $194 million in fiscal year 2012. Affidavit of Alan I. Gilbert, Ex. 3; Docket No. 17, 17-3. According to current projections, the State will pay approximately $215 million in child care subsidies in fiscal year 2013 and make similar subsidy payments for the foreseeable future. *Id.*

SUMMARY OF ARGUMENT

The district court correctly concluded that this case is not currently justiciable because of the speculative and contingent nature of Plaintiffs' alleged injury. App. 122-27 (Mem. of Law & Order at 14-19). Several successive contingencies must occur before any of Plaintiffs' alleged harm is even possible: (1) the union files a petition establishing that thirty (30) percent of the providers support union representation; (2) a majority of the eligible providers vote in favor of union representation; (3) the union is certified by the Commissioner of Mediation Services as the majority exclusive representative; (4) the union and the State reach an agreement; (5) the agreement is approved by the Legislature; (6)

eligible providers approve the agreement; and (7) the union seeks to charge a fee. Section 179A.52, subds. 4-6. To date, none of these contingencies have occurred and may never occur.

Due to the various contingencies that must take place before a union can be certified, the district court correctly concluded that this case does not present a controversy ripe for adjudication. Based on its lack of jurisdiction to hear the case, the district court correctly dismissed Plaintiffs' Complaint. The district court's decision should be affirmed.

In any event, even assuming this case is justiciable, Plaintiffs cannot satisfy their high burden of proof for a preliminary injunction. Plaintiffs are unlikely to succeed on the merits, a threshold condition for obtaining a preliminary injunction. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008) (en banc). Their claims rest on a number of fundamental misinterpretations of the legislation, which does not require any family child care providers to join a union and does not impair a family child care provider's right to petition the government either as an individual or as a member of any other organization. Nor does the law allow assessment of a fair share fee for any activities unrelated to collective bargaining. Moreover, Plaintiffs cannot show the necessary irreparable and imminent harm or that their alleged speculative and contingent injury outweighs the public interest in enforcing the State's duly enacted legislation.

ARGUMENT

The Court reviews a district court's decision on a motion to dismiss *de novo*. *Vogel v. Foth & Van Dyke Associates, Inc.*, 266 F.3d 838, 840 (8th Cir. 2001). When the Court's jurisdictional powers are at issue, the jurisdictional issues are considered first. *Id.*

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE BECAUSE THEIR ALLEGED INJURY IS SPECULATIVE AND BASED ON A SERIES OF CONTINGENCIES.

Ripeness and standing are based in the Article III requirements for federal court jurisdiction. *See, e.g.*, *Minn. Pub. Utils. Comm'n v. F.C.C.*, 483 F.3d 570, 582 (8th Cir. 2007) (recognizing that ripeness doctrine arises from Article III limits on federal court jurisdiction and concluding that a case is not ripe if it rests on "contingent future events that may not occur as anticipated") (quotations and citations omitted); *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S. Ct. 1138, 1146, 1150 (2013) (stating that standing doctrine arises from Article III's jurisdictional limitations, and concluding that standing cannot be based on a "speculative chain of possibilities").

A party bringing suit in federal court bears the burden of establishing both ripeness and standing. *See Renne v. Geary*, 501 U.S. 312, 316 (1991) (holding that the burden of proving jurisdiction, including ripeness, rests with the party invoking federal jurisdiction); *Clapper*, 133 S. Ct. at 148-49 (stating that "[t]he party

invoking federal jurisdiction bears the burden of establishing standing") (citations and quotations omitted). Plaintiffs have not and cannot meet their burden of proof as to justiciability.

Issues of ripeness and standing focus on "whether the harm asserted has matured sufficiently to warrant judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). A claim is not ripe if it is dependent on events that may or may not occur in the future. *See, e.g.*, *Minn. Pub. Utils. Comm'n*, 483 F.3d at 582 (recognizing that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all") (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998) (finding claim regarding sanctions was not ripe since "'we have no idea whether or when such a sanction will be ordered'")).

A plaintiff similarly lacks standing unless the alleged injury-in-fact is "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quotation omitted). Indeed, the United States Supreme Court recently "decline[d] to abandon [its] usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper*, 133 S. Ct. at 1150 (holding that a plaintiff failed to establish an injury because the "speculative chain of possibilities" relied heavily on conjecture as to future decisions).

Plaintiffs allege that they may be harmed if they are forced to associate with, or pay a fee to, a union if a union is certified in the future as the exclusive representative of family child care providers pursuant to Chapter 128, article 1. *See, e.g.*, App. 12 (Compl. ¶¶ 23, 24). Plaintiffs' claim is not justiciable because several contingencies must occur before any such alleged harm is even possible.

The legislation first provides for a union to make a "showing" to the BMS Commissioner that at least 500 family child care providers as defined by the law support representation by the union. Section 179A.52, subd. 4. If that showing is made, the DHS Commissioner will provide the union with the most recent list of family child care providers compiled in accordance with section 179A.52, subd. 3. A union can seek exclusive representation of the family child care providers only by filing a petition with the BMS Commissioner establishing that "at least 30 percent of the [providers] wish[] to be represented by the [union]." Section 179A.52, subd. 5.

If the petition is filed, then the BMS Commissioner will issue an order to conduct a "secret ballot election" by the eligible family child care providers. *Id.*; Section 179A.12. If the union receives a majority of the votes cast, and is certified by the BMS Commissioner as the exclusive representative of the providers, the

union would then negotiate with the State.[3] Sections 179A.52, subds. 5, 6 and 179A.12, subd. 10. If an exclusive representative of the individual family child care providers is not certified, or a petition that results in certification is not pending, on or before June 30, 2017, then the legislation expires. Chapter 128, article 1, § 6.

As the district court stated: "Plaintiffs request that the Court peer into a crystal ball, predict the future, and then opine on the constitutionality of a speculative scenario." App. 111 (Mem. of Law & Order at 3). For example, the district court concluded that it "cannot predict whether an election will be held . . . and, subsequently, whether an exclusive representative is likely to be certified, let alone whether such a certified exclusive representative is likely to assess a fair share fee."[4] App. 127 (Mem. of Law & Order at 19).

Eighth Circuit precedent supports this conclusion as the district court recognized. *See Orchard Corp. of America v. N.L.R.B.*, 408 F.2d 341 (8th Cir.

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[3] The State is not obligated to enter into an agreement. Section 179A.52, subd. 6.

[4] As the district court correctly recognized, even if a union is certified, a fee may not be assessed. *See* Section 179A.06, subd. 3 (stating an exclusive representative "may" assess a fair-share fee); App. 125 (Mem. of Law & Order at 17). If a fee is assessed, it would not be until "after union members ratify their first contract with the State of Minnesota," *see* AFSCME Minnesota Council 5 Child Care Providers Together, *FAQ-What's Next*, http://ccptmn.org/node/860 (last visited Nov. 5, 2013), which may never occur.

1969). In *Orchard*, this Court held in the labor context that judicial review was "not ripe" due to future contingencies such as a union prevailing in an election. *Id.* at 342, n.1. The Court then quoted from a Fourth Circuit decision which reasoned that an employer would be entitled to judicial review in the future "if the following succession of events occur," which included, among other things, that "the union wins the new election and is certified by the NLRB as the bargaining agent for the employees in question." *Id.* (quoting *Daniel Constr. Co. v. N.L.R.B.*, 341 F.2d 805, 810 (4th Cir. 1965)).

The Court's holding in *Pub. Water Supply Dist. No. 10 v. City of Peculiar, Mo.*, 345 F.3d 570 (8th Cir. 2003) also supports the district court's order. The Court concluded that a challenge to a municipal ordinance allegedly in conflict with federal law was not ripe because "no petition for dissolution has been filed, and it is not clear that a petition will ever be filed." *Id.* at 573. The Court held that even in cases posing a purely legal question, a plaintiff must show hardship based on something more than "abstract" or "speculative" injuries. *Id.* Rather, an injury must be "certainly impending" and "direct, immediate, or certain to occur." *Id.* (citing *Paraquad, Inc. v. St. Louis Hous. Auth.*, 259 F.3d 956, 959-60 (8th Cir. 2001) (stating that "the injury must be 'certainly impending'")).

The Seventh Circuit decision in *Harris v. Quinn*, 656 F.3d 692 (7th Cir. 2011), *cert. granted* 80 U.S.L.W. 3368 (U.S. Oct. 1, 2013) (No. 11-681) similarly

supports the district court's decision. Some of the plaintiffs in *Harris* were in-home care providers for individuals with disabilities who brought a First Amendment free association challenge to an executive order issued by the Governor of Illinois. The order directed the state to recognize an exclusive representative for the providers if a majority of them voted in favor of the exclusive representative. *Id*. at 695. The plaintiffs sought relief in the form of a declaration that they "may not be compelled to support a union, and by enjoining the State from enforcing its laws and executive orders in such a way that compels the plaintiffs to support a union." *Id* at 700.

The Seventh Circuit held that the plaintiffs' claim was not ripe because of the uncertainty of whether the providers would unionize or that a fair share fee would be imposed. *Id*. The court reasoned as follows:

> There is no certainty that the Disabilities Program personal assistants will ever unionize. Hence, *the State has no representative to recognize and cannot agree to compel the plaintiffs to pay fair share fees at all*. The plaintiffs' claims are *contingent on events that may never occur and thus are not ripe*.

Id. (emphasis added). The court similarly stated:

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

> To do so would be to render an *advisory opinion, which is precisely what the doctrine of ripeness helps to prevent*.

Id. at 700-01 (emphasis added).[5]

The Supreme Court's recent decision to grant certiorari in *Harris* does not detract from the persuasive weight of the Seventh Circuit's well-reasoned analysis. *See Clinton v. Jones*, 520 U.S. 681, 689 (1997) (stating that the Court's "decision to grant the petition [for certiorari] expressed no judgment concerning the merits of the case"). Indeed, the ripeness issue in *Harris* is incidental to the certiorari petition, encompassing less than two out of the 29 pages of the petition for writ of certiorari. *See* Petition for Writ of Certiorari at 27-28, *Harris v. Quinn*, No. 11-681, 2011 WL 6019918 (2011). Ripeness is not even mentioned in plaintiffs' three subsequent briefs filed with the Supreme Court in support of their petition. *See* Reply Brief of Petitioner to Respondent SEIU, 2012 WL 522097 (2012); Reply Brief of Petitioner to Respondent Quinn, 2012 WL 1652608 (2012); Supplemental Brief of Petitioner in Response to the United States, 2013 WL 2251688 (2013).

Since Plaintiffs have failed to satisfy their burden to demonstrate that their claims are justiciable, the district court's dismissal of Plaintiffs' Complaint should be affirmed.

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[5] Plaintiffs' attempt to distinguish *Harris* (Appellants' Br. at 42) is unavailing. Here, just as in *Harris*, the alleged injuries arising out of potential unionization may never occur. The analysis is therefore the same because both alleged injuries are contingent on future events that may never occur.

II. EVEN IF THE COURT HAD JURISDICTION, PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION WAS STILL PROPERLY DENIED.

The district court has broad discretion in ruling on motions for preliminary injunction. *See, e.g.*, *Manion v. Nagin*, 255 F.3d 535, 538 (8th Cir. 2001). As this Court noted in *Pediatric Specialty Care, Inc. v. Ark. Dep't of Hum Servs.*, 444 F.3d 991 (8th Cir. 2006), *cert. denied*, 549 U.S. 1205 (2007), the standard for appellate review of such rulings is highly deferential, "only permitting us to reverse the district court if, 'after a thorough review of the record, the proof unmistakably establishes clear error or an abuse of discretion.'" *Id.* at 994 (citation omitted). Moreover, the district court's factual determinations are binding unless clearly erroneous. *See, e.g.*, *Manion*, 255 F.3d at 538; *Sierra Club v. U.S. Army Corps of Engineers*, 771 F.2d 409, 412 (8th Cir. 1985).

When deciding a motion for interim injunctive relief, a court considers: (1) the moving party's probability of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest in the issuance of the injunction. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). However, in a case such as this, Plaintiffs bear the heavy burden of establishing as a threshold matter that they are likely to succeed on the merits. As this Court stated in *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc):

> [A] more rigorous standard "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." If the party with the burden of proof makes a threshold showing that *it is likely to prevail on the merits, the district court should then proceed to weigh the other Dataphase factors*.

Id. at 732 (emphasis added; citation omitted). The district court correctly denied Plaintiffs' motion for a preliminary injunction.

A. Plaintiffs Cannot Show That They Are Likely To Prevail On The Merits Because Chapter 128, Article 1, Does Not Violate Their First Amendment Rights.

Plaintiffs are not entitled to a preliminary injunction even if this case is justiciable because their First Amendment claim is based on several erroneous interpretations of Chapter 128, article 1. Their First Amendment right to petition the government, including the Governor, DHS Commissioner, and the Legislature, is explicitly preserved by the legislation. Plaintiffs similarly do not have to associate with a union if one is certified, and their eligibility to receive a State subsidy is unaffected if they choose not to join a union. In the event a union is certified and assesses a "fair share" fee, the fee would be based on the "free rider" concept with respect to collective bargaining reflected in U.S. Supreme Court precedent and would not constitute payment for any political activity of the union. Based on a correct reading of Chapter 128, article 1, and applicable case law, the legislation does not violate Plaintiffs' First Amendment rights.

1. Plaintiffs can petition the State and its public officials regarding any family child care issue, matter or policy and can do so directly or through any person or entity they choose.

Chapter 128, article 1, specifically provides that it should not be construed to interfere with the "right or obligation of any state agency to meet with any citizen or organization concerning family child care legislation, regulation, or policy." Section 179A.52, subd. 9(2). Plaintiffs' right to petition the government is therefore expressly recognized by the legislation and they may do so directly or through others, which includes the professional association of which they are members. Appellants' Br. at 5-6. They may, of course, also petition State legislators regarding such issues, including the approval or disapproval of any agreement reached between the State and a union if a union is ever certified.

Accordingly, Chapter 128, article 1, does not violate Plaintiffs' First Amendment right to petition the government. They may petition the Governor, DHS and/or legislators if they so desire as to any issue or aspect of the provision of family child care.

2. If a union is certified under Chapter 128, Article 1, Plaintiffs are not required to join the union and may obtain a state subsidy whether or not they join the union.

Plaintiffs are not required to join a union if one is certified. Section 179A.52, subd. 10. Nor do they have to be a member of any certified union to receive a State subsidy. *Id*. They are free to associate with any group or represent

themselves in advocating any position regarding family child care, including opposition to a proposed agreement between the State and a union if a union is certified.

Collective action, such as collective bargaining, does not violate First Amendment associational rights of others. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977)[6]; *see also Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (holding that compelled membership in a state bar association is constitutional). The Supreme Court has determined that a single majority representative facilitates an efficient process for policymaking and negotiation. *See, e.g.*, *Abood*, 431 U.S. at 220-21. The Legislature's decision to provide for such negotiation with an elected group representative does not violate the First Amendment rights of those who disagree with the majority. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 288 (1984) (holding that state-authorized collective bargaining "in no way restrained [the dissenters'] freedom to speak on any . . . issue or their freedom to associate or not to associate with whom they please").

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[6] Plaintiffs acknowledge that *Abood* controls this case, stating in their brief that they "reserve the right to contest, in any further proceedings, whether the labor peace interest still justifies unionization . . . ." *See* Appellants' Br. at 20 n.5. They acknowledged the same in the district court, stating that *Abood* is "binding precedent" that "cannot be challenged at this stage of the proceedings." Pls.' Mem. in Supp. of Mot. for Prelim. Inj. at 15 n.8; Docket No. 35.

3. Any "fair share" fees assessed by a union must be limited to expenses regarding collective bargaining and cannot involve political activity.

A union "may" assess a "fair share" fee that reflects only the expense associated with collective bargaining, and the fee cannot support union political activity. *See* Section 179A.06, subd. 3 (providing that fair share fee does not include "the cost of benefits . . . available only to members of the exclusive representative"); *see also Abood*, 431 U.S. at 235-36 (holding that assessment of a fair share fee is permissible with respect to the costs of collective bargaining).

The United States Supreme Court has authorized the assessment of such a fair share fee based on a "free rider" concept. *See, e.g.*, *Ry. Emps.' Dep't v. Hanson*, 351 U.S. 225, 238 (1956); *Locke v. Karass*, 555 U.S. 207, 213 (2009) (recognizing that "the First Amendment burdens accompanying [fair share fees] are justified by the government's interest in preventing freeriding by nonmembers"); *Abood*, 555 U.S. at 221-22 (referring to the free rider rationale supporting the assessment of fair share fees).

In *Hanson*, the Court examined under the Railway Labor Act a collective bargaining agreement that required employees who were not union members to pay fair share fees. 351 U.S. at 237-38. The plaintiffs contended that the fee "force[d] men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought." *Id.* at 236-37. In

rejecting the argument, the Court held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress . . . and does not violate either the First or the Fifth Amendments." *Id.* at 238.

In *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), the Court expanded on the reasoning in *Hanson* and explained that the assessment of a fair share fee is justified as a means to distribute "the costs of negotiating and administering collective bargaining agreements, and the costs of adjustment and settlement of disputes" to all of those who benefit from the agreement. *Id*. at 764. The holdings in *Hanson* and *Street* were again applied in *Abood*, 431 U.S. at 217.

Although Plaintiffs claim that a fee can constitutionally only be assessed to employees, (Appellants' Br. at 20), a fair share fee has been upheld by the Supreme Court with respect to fair share payments made by non-employees. For example, in *Lathrop v. Donohue*, the Court relied on *Hanson* to hold that a state's requirement that lawyers pay a fair share fee for membership in a state bar association did not abridge First Amendment rights of association. 367 U.S. 820, 842 (1961) (citations omitted). Thus, the state could constitutionally "require that the costs . . . be shared by the subjects and beneficiaries of the regulatory program." *Id.* at 843. In *Keller*, the Supreme Court again held that "[i]t is entirely

appropriate that all of the lawyers who derive benefit [from the bar association] . . . should be called upon to pay a fair share of the cost." 496 U.S. at 12.

The Court similarly upheld fair share assessments on fruit growers to pay for generic advertising in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997). In so doing, the Court recognized that "our cases provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group." *Id.* at 472-73 (citing *Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507 (1991)).

Citing *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012), Plaintiffs assert that only a compelling governmental interest supporting collective bargaining in a particular context can justify the payment of a fair share fee. Appellants' Br. at 32. But *Knox* only "concerns the procedures that must be followed when a public-sector union announces a special assessment or mid-year dues increase." 132 S. Ct. at 2296 n.9. The Supreme Court expressly acknowledged that "[o]ur cases to date have tolerated [compulsory union fees]" and stated that "we do not revisit today whether the Court's former cases have given adequate recognition to the critical First Amendment rights at stake." 132 S. Ct. at 2289; see also *supra* at 18 n.6.

In any event, the affidavit of the Minnesota DHS Deputy Commissioner for Policy and Operations filed with the district court sets forth Defendants' position that Chapter 128, article 1, furthers a compelling governmental interest. See Affidavit of Charles E. Johnson; Doc. No. 45.

Based on the foregoing, it is apparent that Plaintiffs are unlikely to succeed on the merits and therefore their motion for preliminary injunction is without merit.

B. The relative harm to the parties and the public interest.

As discussed above, Plaintiffs' alleged harm is speculative and may well never occur. See *supra* at 8-14. The district court reasoned that "there are a myriad of contingencies that must occur before a union can represent subsidized family child care providers." App. 124 (Mem. of Law & Order at 16). Moreover, as the district court concluded, Plaintiffs' claim regarding the assessment of a fair share fee is based on "pure speculation." App. 125 (Mem. of Law & Order at 17).

The district court also properly determined, the "[i]mposition of an injunction based on an unripe claim and the speculative threat of injury will thwart the public interest in enforcement of a law enacted by the people's elected officials." A.A. 3 (Dist. Ct. Inj. Pending Appeal Mem. & Order at 3). The unionization process can also be very time consuming, and the law will expire in 2017 if no unionization occurs. *See* Chapter 128, article 1, § 6.

CONCLUSION

Based on the foregoing, Appellees Mark Dayton, Josh Tilsen and Lucinda Jesson respectfully request that the Court affirm the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,332 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt Times New Roman font.

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WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

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