UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

HOLLEE SAVILLE, et al.,

Plaintiffs,

v.

MEMORANDUM OF LAW & ORDER
Civil File No. 13-1281 (MJD/AJB)

MARK DAYTON, Minnesota Governor, in his official capacity as the Governor of the State of Minnesota, et al.,

Defendants,

and

AFSCME COUNCIL 5,

Intervenor.

Tara Craft Adams, Thomas R. Revnew, and Douglas P. Seaton, Seaton, Peters & Revnew, PA, Counsel for Plaintiffs.

Alan I. Gilbert and Kristyn M. Anderson, Minnesota Attorney General's Office, Counsel for Defendants.

Gregg M. Corwin and Jordan Stockberger, Gregg M. Corwin & Associate Law Office, PC, and John M. West, Bredhoff & Kaiser PLLC, Counsel for Intervenor.

I. INTRODUCTION

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction, or in the Alternative, a Temporary Restraining Order [Docket No. 5] and Defendants' Motion to Dismiss [Docket No. 28]. The Court heard oral argument on July 18, 2013.

Plaintiffs' claim that the Family Child Care Providers Representation Act is preempted by federal law is not ripe. Through their preemption claim, Plaintiffs seek to avoid being members of or paying money to a union. They argue that various sections of the National Labor Relations Act and the Taft-Hartley Act will be violated or interfered with if they are required to engage in collective bargaining, become members of a union, or financially support a union. They do not assert any current injury, when no union election has been announced, no voting has occurred, no union has been certified, no collective bargaining has occurred, and no financial contribution to any union has been required. At this time, the state statute does not require Plaintiffs to associate with a union, be represented by a union, engage in collective bargaining, or pay money to any union. Plaintiffs may never be required to do any of these things. No injury is certainly impending. Their claim is not ripe.

Plaintiffs' equal protection claim fails on the merits. Non-subsidized family child care providers are not similarly situated to subsidized family child care providers with regard to negotiating and meeting with the State regarding Minnesota Child Care Assistance Program subsidies. By definition, one group receives the subsidies and is directly affected by them, and the other group does not receive the subsidies and is not directly affected by them. The subsidized group has an economic and regulatory relationship with the State that the other does not. Moreover, the State has a rational basis to negotiate regarding subsidy rates, terms, and conditions with the very providers who receive the subsidies, rather than with those providers who do not receive the subsidies. Plaintiffs cannot show a violation of their right to equal protection.

II. BACKGROUND

A. The Family Child Care Providers Representation Act

On November 15, 2011, Defendant Governor Mark Dayton issued an executive order to facilitate a vote of Minnesota State-subsidized family child care providers to determine whether a majority desired union representation. (Gilbert Aff., Ex.1.) On April 6, 2012, a Minnesota State District Court invalidated the executive order on the grounds that the establishment of a

process for possible union representation of family child care providers was a legislative function. (Gilbert Aff., Ex. 2.)

On May 24, 2013, Governor Dayton signed the Family Child Care Providers Representation Act ("FCCPRA"), codified as Minnesota Statute §§ 179A.50-179A.52. The FCCPRA was effective May 25, 2013.

The FCCPRA provides that family child care providers shall be considered as executive branch state employees, solely "[f]or the purposes of the Public Employment Labor Relations Act." Minn. Stat. § 179A.52, subd. 1. The "section does not require the treatment of family child care providers as public employees for any other purpose." Id. A "family child care provider" is "an individual, either licensed or unlicensed, who provides legal child care services . . . and who receives child care assistance to subsidize child care services for a child or children currently in their care under [Chapter 119B]." Minn. Stat. § 179A.51, subd. 4. Child care centers are not included in the definition. Id.

Under the timeline set forth in the FCCPRA, by July 1, 2013, the Commissioner of the Minnesota Department of Human Services ("DHS Commissioner") must compile a list of all eligible family child care providers, as defined by § 179A.51, subd. 4, and who also have had an active registration

under Chapter 119B within the previous 12 months. Minn. Stat. § 179A.52, subd. 3.

Next, any union seeking to represent the subsidized family child care providers must show the Commissioner of the Bureau of Mediation Services ("BMS") that 500 family child care providers support union representation. Minn. Stat. § 179A.52, subd. 4. Upon such a showing, the DHS Commissioner will share the list of eligible family child care providers with the union seeking to represent the unit. Id.

After July 31, 2013, any union wishing to represent an "appropriate unit of family child care providers" may obtain an election by mail ballot upon a petition stating that at least 30 percent of the unit wishes to be represented by the union. Minn. Stat. § 179A.52, subd. 5. "The only appropriate unit under this section shall be a statewide unit of all family child care providers who meet the definition in section 179A.51, and who have had an active registration under chapter 119B within the previous 12 months." Minn. Stat. § 179A.52, subd. 2. Only those family child care providers who appear on the list compiled by the DHS Commissioner will be eligible to vote in the union election and eligible to be a member of the union. Minn. Stat. §179A.52, subds. 2, 5. Thus, only those

family child care providers who receive a child care subsidy for a child currently in their care and had an active registration under Chapter 119B in the previous 12 months are eligible voters.

If a union wins the election, then the BMS Commissioner will certify the union as the majority exclusive representative. Minn. Stat. § 179A.52, subd. 6. A certified "exclusive representative" is granted "the right to represent family child care providers in their relations with the state." Minn. Stat. § 179A.51, subd. 3. This includes the right to "meet and negotiate" with the State, through the Governor or his designee, "regarding grievance issues, child care assistance reimbursement rates under Chapter 119B, and terms and conditions of services." Minn. Stat. § 179A.52, subd. 6. "'Terms and conditions of employment' means the hours of employment, the compensation therefor including fringe benefits . . ., and the employer's personnel policies affecting the working conditions of the employees." Minn. Stat. §§ 179A.52, subd. 8; 179A.03, subd. 19. The FCCPRA further provides that the State has the obligation to "meet and confer . . . with family child care providers to discuss policies and other matters relating to their service that are not terms and conditions of service." Minn. Stat. § 179A.52, subd. 7. A certified exclusive representative also has the right to "enter into

agreements" with the Governor or his designee on behalf of all subsidized family child care providers. Minn. Stat. §179A.52, subd. 6. Those negotiated agreements must be submitted to the legislature to be accepted or rejected. Id. The FCCPRA provides that the unionized family child care providers do not have the right to strike. Minn. Stat. § 179A.52, subd. 1.

Family child care providers are not required to join the union, and a provider's eligibility to receive a subsidy or to serve a child who receives a subsidy cannot be conditioned upon membership in the union. Minn. Stat. § 179A.52, subd. 10. Additionally, the FCCPRA does not interfere with "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." Minn. Stat. § 179A.52, subd. 9(2).

Under Minnesota's Public Employment Labor Relations Act ("PELRA"), "[a]n exclusive representative may require employees who are not members of the exclusive representative to contribute a fair share fee for services rendered by the exclusive representative." Minn. Stat. § 179A.06, subd. 3. If a fair share fee is assessed by a certified union, those assessed that fee may challenge it before the

BMS Commissioner and appeal any adverse decision to the Minnesota Court of Appeals. See Minn. Stat. §§ 179A.06, subd. 3; 179A.03, subd. 9; 179A.051.

If an exclusive representative is not certified or a petition that results in certification is not pending on or before June 30, 2017, then the FCCPRA expires. Minn. Stat. § 179A.53, subd. 6.

B. Minnesota Child Care Subsidies

The Minnesota Child Care Assistance Program ("CCAP") provides financial assistance to low-income families to pay for child care. See Minn. Stat. §§ 119B.03, subd. 3; 119B.09, subds. 1, 5. CCAP's hourly subsidy rate is currently set by the legislature based on bi-annual surveys of market rates. See also Minn. Stat. § 119B.13, subd. 1. Families enrolled in CCAP may choose which approved private child care service to use and they are responsible for paying a designated co-payment and any difference between their providers' rates and the CCAP reimbursement rate. Minn. Stat. §§ 119B.09, subd. 5; 119B.12; 119B.13, subd. 1(f). Providers who are willing to accept CCAP payments must register with their county to receive payment. Minn. Stat. § 119B.125, subd.1.

In 2011, Minnesota paid an aggregate amount of $211.5 million in CCAP subsidies to child care providers; it paid $194 million in 2012. (Gilbert Aff., Ex. 3

at 73.) Current projections are that the State will pay approximately $215 million in 2013. (Id.)

The DHS Commissioner has the responsibility to develop standards and adopt rules to govern CCAP. See Minn. Stat. §§ 119B.02, subd.1; 119B.125, subd. 1. These standards and rules impose terms and conditions regarding the provider's service under CCAP and the receipt of subsidy payments that do not apply to family child care providers who do not accept CCAP subsidies. (See Gilbert Aff., Ex. 4-5.) See Minn. Stat. §§ 119B.125; 119B.13.

The CCAP statute provides: "Receipt 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." Minn. Stat. § 119B.09, subd. 8.

According to Plaintiffs, there are approximately 11,000 licensed family child care providers in Minnesota. (Compl. ¶ 21.) Plaintiffs claim that approximately 5,000 to 6,000 of these licensed family child care providers currently receive CCAP subsidies and, thus, are eligible to vote in an election. (Id.)

C. Plaintiffs

Plaintiffs Jean Lang, Erin Rheault, Terrie Boyd, and Misty Fisk are Minnesota family child care providers who currently receive CCAP subsidies for providing subsidized child care services to a child in their care. (Compl. ¶ 3.) Plaintiffs Hollee Saville, Nikki Geffre, Jennifer Lutgen, Rebecca Swanson, Kristi Johnson, Joan Finely, and Susan Johnson are Minnesota family child care providers who do not currently receive subsidies through CCAP for a child currently in their care. (Compl. ¶ 2.) Saville, Swanson, Rheault, Boyd, Fisk, and Lutgen regularly employ other individuals in their child care businesses or hire independent contractors to perform services for their child care businesses. (Saville Aff. ¶ 6; Swanson Aff. ¶ 6; Rheault Aff. ¶¶ 6-7.)

Plaintiffs claim that negotiated agreements between a potentially certified union and the State on CCAP issues will impact all Minnesota family child care providers, including non-subsidized family child care providers. (Compl. ¶ 26.)

D. Procedural Background

On May 29, 2013, Plaintiffs filed a Complaint in this Court against Defendants Minnesota Governor Mark Dayton, in his official capacity; BMS; Josh Tilsen, in his official capacity as BMS Commissioner; DHS; and Lucinda Jesson, in her official capacity as DHS Commissioner. The Complaint asserts Count I:

Violation of the Equal Protection Clauses of the United States and Minnesota Constitutions based on the exclusion of non-subsidized family child care providers from the FCCPRA; and Count II: Violation of the Supremacy Clause of the United States Constitution – Preemption by Federal Labor Law based on the allegation that allowing family child care providers who are employers or independent contractors to unionize, the FCCPRA conflicts with the National Labor Relations Act ("NLRA") and the Taft-Hartley Act.

On May 30, Plaintiffs filed a Motion for Preliminary Injunction. [Docket No. 5] Plaintiffs seek an injunction enjoining Defendants from implementing or enforcing the FCCPRA.

On May 30, the American Federation of State, County and Municipal Employees, Council 5 ("AFSCME") moved to intervene in this lawsuit. [Docket No. 14] The Court granted the motion to intervene on June 11. [Docket No. 39]

On June 7, Defendants brought a motion to dismiss Plaintiffs' lawsuit for lack of subject matter jurisdiction, for failure to state a claim upon which relief can be granted, and, as to BMS and DHS, on the basis of sovereign immunity. [Docket No. 28]

III. MOTION TO DISMISS DISCUSSION

A. Legal Standard for Motion to Dismiss

Defendants assert that this case should be dismissed both for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief may be granted, under Federal Rule of Civil Procedure 12(b)(6). In this case, the standards are the same.

"A plaintiff has the burden of establishing subject matter jurisdiction . . . ." Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006) (citations omitted).

> In order to properly dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments. In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction.

Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993) (citations omitted). Here, Defendants mount a facial challenge, so the Rule 12(b)(6) standard applies. See Stalley v. Catholic Health Initiatives, 509 F.3d 517, 520-21 (8th Cir. 2007).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted. In reviewing a motion to dismiss, the Court takes all facts alleged in the complaint to be true. Zutz v. Nelson, 601 F.3d 842, 848 (8th Cir. 2010).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Thus, although a complaint need not include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Id. (citations omitted).

In deciding a motion to dismiss, the Court considers "the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits attached to the complaint." PureChoice, Inc. v. Macke, Civil No. 07-1290, 2007 WL 2023568, at *5 (D. Minn. July 10, 2007) (citing Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)).

B. Eleventh Amendment Immunity

BMS and DHS are not proper parties because Eleventh Amendment immunity prohibits lawsuits directly against state agencies in federal court. See Pennhurst State Sch. & Hasp. v. Halderman, 465 U.S. 89, 100 (1984). All claims against BMS and DHS are dismissed.

C. Ripeness

1. Legal Standard for Ripeness

The ripeness doctrine requires that, before a court may assume jurisdiction over a case, there must be "a real, substantial controversy between parties having

adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (citation omitted). "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." Minn. Pub. Utils. Comm'n v. F.C.C., 483 F.3d 570, 582 (8th Cir. 2007) (citation omitted).

> The judicially created doctrine of ripeness flows from both the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction. Ripeness is peculiarly a question of timing and is governed by the situation at the time of review, rather than the situation at the time of the events under review. A party seeking review must show both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Both of these factors are weighed on a sliding scale, but each must be satisfied to at least a minimal degree.

Iowa League of Cities v. E.P.A., 711 F.3d 844, 867 (8th Cir. 2013) (citations omitted).

"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. However, plaintiffs do not need to wait for actual "consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." Id. (citation omitted).

2. Ripeness of Plaintiffs' Preemption Claim

While the equal protection Plaintiffs seek to be included in the election process and vote on the possibility of an exclusive representative, the preemption Plaintiffs seek to avoid being members of or paying money to a union. Plaintiffs argue that various sections of the NLRA and the Taft-Hartley Act will be violated or interfered with if they are required to engage in collective bargaining, become members of a union, or financially support a union. (See Pls. Mem. in Opp. at 13-21.) They do not assert any current injury, when no union election has been announced, no voting has occurred, no union has been certified, no collective bargaining has occurred, and no financial contribution to any union has been required.

a) Fitness of the Issues for Judicial Decision

The Court concludes that the preemption issue is not currently fit for judicial decision. The Court notes that "[t]he question of preemption is predominantly legal," and, therefore, often meets the fitness for judicial decision prong of the ripeness test. See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983). However, in this case, much of Plaintiffs' preemption claim is based on the possibility of paying a fair

share fee to a certified union. At this time, the Court cannot tell whether its preemption analysis should apply to the hypothetical situation in which a union has been certified, Plaintiffs have not joined, and Plaintiffs have not been assessed a fair share fee, and, thus, they make no financial contribution to a union, or, to the hypothetical situation in which a union has been certified, Plaintiffs have not joined, and Plaintiffs have been assessed a fair share fee. In the first scenario, Plaintiffs would have no apparent financial relationship with a union, so many of their preemption arguments would evaporate. Of course, the foregoing scenarios are based on the speculative assumption that a union election would be called and the union would win such an election. Thus, the Court's analysis of the legal issues presented would benefit from further factual development.

b) Hardship to the Parties of Withholding Court Consideration

When a dispute is contingent upon future possibilities, even if a claim presents issues that are largely legal in nature and can be resolved without further factual development, the claim is still not ripe unless the "issue [is] such that delayed review will result in significant harm." Neb. Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1038 (8th Cir. 2000). In Nebraska Public

Power District, delayed review of an issue of contract interpretation would have forced the plaintiff "to gamble millions of dollars on an uncertain legal foundation," id. at 1039, and in Pacific Gas & Electric Co., withholding adjudication of a preemption question would have required the plaintiffs to spend millions of dollars and more than 10 years planning to develop nuclear power plants that might never be certified, 461 U.S. at 201. Here, withholding adjudication will not force Plaintiffs to significantly modify their behavior or face substantial financial risk. See Neb. Pub. Power Dist., 234 F.3d at 1039.

At this time, the FCCPRA does not require Plaintiffs to associate with a union, be represented by a union, engage in collective bargaining, or pay money to any union. Plaintiffs may never be required to do any of these things. There are a myriad of contingencies that must occur before a union can represent subsidized family child care providers. First, the union has to make a showing to the BMS Commissioner that at least 500 family child care providers support union representation. If that occurs, then the DHS Commissioner will provide the union with the most recent list of eligible family child care providers. After July 31, 2013, the union can then seek exclusive representation of the family child care providers by filing a petition with the BMS Commissioner establishing that

"at least 30 percent of the [providers] wish[] to be represented by the [union]." Minn. Stat. § 179A.52, subd 5. If the petition is filed, then BMS will issue an order to conduct an election by eligible family child care providers. Then the union must receive a majority of the votes to be certified by BMS as the exclusive representative of the providers. If all of the foregoing occurs, the union would then meet and negotiate with the State regarding the CCAP subsidy and the terms and conditions for service paid for by CCAP. On the other hand, if an exclusive representative is not certified or a petition that results in certification is not pending on or before June 30, 2017, then the FCCPRA expires.

Furthermore, even if an exclusive representative is certified and meets and negotiates with the State on behalf of Plaintiffs, it is pure speculation to assert that a fair share fee will be assessed to Plaintiffs. The FCCPRA does not require a certified union to assess a fair share fee. Nor does it provide for when such a fee would be assessed. Rather, if a union is certified, under PELRA, it "may" assess a fair share fee. See Minn. Stat. § 179A.06, subd 3. Thus, even if, as Plaintiffs fear, AFSCME goes through the required steps to be entitled to a vote, wins that vote, and is certified as the exclusive representative, AFSCME may decide that it does not want to impose a fair share fee on nonmembers. There are too many

contingencies that must occur before Plaintiffs face the possibility of the injury they are alleging.

Simply arguing that a defendant's future actions might violate federal law does not create a ripe case when the plaintiff's future injury is speculative. See, e.g., Public Water Supply Dist. No. 10 of Cass County, Mo. v. City of Peculiar, Mo., 345 F.3d 570, 573 (8th Cir. 2003) (holding that a water district's lawsuit asserting that a city's threat to dissolve the water district violated a federal law, when state law allowed dissolution after filing of a petition signed by one-fifth of registered voters, court finding that dissolution would be in the public interest, and, subsequently, a vote by two-third of voters to dissolve, was not ripe because "no petition for dissolution has been filed, and it is not clear that a petition will ever be filed"); Orchard Corp. of Am. v. NLRB, 408 F.2d 341, 342 n.1 (8th Cir. 1969) (holding that an employer's challenge to a NLRB decision ordering a new union election was "not ripe for review" until, among other things, "the union wins the new election and is certified by the NLRB as the bargaining agent for the employees in question") (quoting Daniel Constr. Co. v. NLRB, 341 F.2d 805, 810 (4th Cir. 1965)).

Here, the Court cannot predict whether an election will be held under the FCCPRA 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. Plaintiffs cannot claim that any cognizable injury is "certainly impending." Pub. Water Supply Dist. No. 8 of Clay County, Mo., 401 F.3d 930 (citation omitted). Plaintiffs' preemption claim is not ripe.

3. Ripeness of Plaintiffs' Equal Protection Claim

Plaintiffs' equal protection claim is based, in part, on the allegation that those Plaintiffs who do not receive CCAP subsidies are injured by being excluded from participation in the exclusive representation election process permitted under the FCCPRA. (See Comp. ¶ 32; Pls. Mem. in Opp. at 9 (arguing that equal protection Plaintiffs will be harmed by the inability to vote in any union election).) To the extent that Plaintiffs who do not receive CCAP subsidies seek to participate in any election and possibly vote regarding exclusive representation, their equal protection claim is ripe. Although, as explained with regard to Plaintiffs' preemption claim, at this time, no union has made the 500-name showing necessary to request the list of eligible providers from DHS, let alone made the 30-percent showing necessary to call for an election, the FCCPRA

has already put in motion actions that affect Plaintiffs' ability to influence whether an election is held and, if so, whether they are permitted to vote in that election. The Court's determination of Plaintiffs' equal protection claim will affect which names are on the list that DHS was already required to compile by July 1, 2013. Thus, if Plaintiffs succeeded on their equal protection claim, the Court would order DHS to include non-subsidized providers on the already existing DHS list. The Court's determination of Plaintiffs' equal protection claim will also determine which providers can be included on the list of 500 union supporters provided to BMS so that a union can receive the DHS list. And the Court's determination will dictate which names are on the list that DHS will share with a union seeking to represent the providers, how the 30 percent of the unit to be represented will be calculated in the petition, and who will vote in the election, if one is called. Under Plaintiffs' equal protection theory, actions have already occurred that unconstitutionally exclude them from the election process. Their injury is not dependent on any future contingencies – it has already happened. Their claim is ripe. Thus, the Court turns to the question of standing.

D. Standing

"To show Article III standing, a plaintiff has the burden of proving: (1) that he or she suffered an injury-in-fact, (2) a causal relationship between the injury

and the challenged conduct, and (3) that the injury likely will be redressed by a favorable decision." S.D. v. U.S. Dept. of Interior, 665 F.3d 986, 989 (8th Cir. 2012) (citation omitted).

Here, the equal protection Plaintiffs have standing to assert their equal protection claim. They allege that they are currently injured by their exclusion from the list of eligible providers and the election process. Their alleged injury – exclusion from the election process – is directly caused by the FCCPRA's distinction between non-subsidized and subsidized family child care providers. Finally, a favorable decision by this Court would require inclusion of the equal protection Plaintiffs' names on the eligible list, permitting them to join in the election process and potential bargaining unit, which would address the alleged injury. The Court now turns to the merits of Plaintiffs' equal protection claim.

E. Equal Protection

Plaintiffs claim that the FCCPRA violates equal protection under the Fourteenth Amendment of the U.S. Constitution and under Article 1, Section 2, of the Minnesota Constitution. They claim that there is no basis to distinguish between family child care providers who receive state subsidies and those who do not such that those who do not may be excluded from voting in the election as part of the appropriate unit.

1. Equal Protection Standard

The Fourteenth Amendment of the U.S. Constitution and Article 1, Section 2, of the Minnesota Constitution, both require that similarly situated persons be treated alike under the law. See Klinger v. Dept. of Corrections, 31 F.3d 727, 731 (8th Cir. 1994); Matter of Harhut, 385 N.W.2d 305, 310 (Minn. 1986). "Where a law neither implicates a fundamental right nor involves a suspect or quasi-suspect classification, the law must only be rationally related to a legitimate government interest. Such a law is accorded a strong presumption of validity, and is upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Gallagher v. City of Clayton, 699 F.3d 1013, 1019 (8th Cir. 2012) (citations omitted). See also Matter of Harhut, 385 N.W.2d. at 311 ("The rational basis test entails a two-tiered analysis: First, does the statute have a legitimate purpose; and, second, was it reasonable for the legislature to believe that the use of this classification would promote that purpose?") (citations omitted). The parties agree that the Court should apply rational basis review.

2. Plaintiffs' Theory

The FCCPRA allows CCAP-subsidized family child care providers to engage in the election process and, ultimately, if a number of contingencies are met, in collective action through an exclusive representative in their negotiations with the State. The FCCPRA does not grant that ability to non-subsidized family child care providers. Plaintiffs assert that the FCCPRA further allows the exclusive representative to meet with state agencies regarding issues that will impact all child care providers. See Minn. Stat. §§ 179A.52, subd. 6 (providing that exclusive representative will meet and negotiate with State regarding "grievance issues, child care assistance reimbursement rates under chapter 119B, and terms and conditions of service"); 179A.52, subd. 8 (providing "terms and conditions of service" will have meaning in § 179A.03, subd. 19); 179A.03, subd. 19 (defining "terms and conditions of employment" as "the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of the employees"). Plaintiffs assert that union decisions will affect non-union individuals who work in the same industry – family child care.

Plaintiffs claim that there is no rational basis for this distinction between subsidized and non-subsidized child care providers.

3. Whether Subsidized and Non-Subsidized Family Child Care Providers Are Similarly Situated

"The similarly situated inquiry focuses on whether the plaintiffs are similarly situated to another group for purposes of the challenged government action." Klinger, 31 F.3d at 731. To succeed on an equal protection claim, Plaintiffs who do not receive a state subsidy must show that they are similarly situated to subsidized family child care providers "in all relevant respects." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). This, they cannot do.

Subsidized providers participate in the State's subsidy program and receive payments from the State for their services provided to families participating in CCAP. Subsidized providers must also satisfy certain requirements in order to be paid by the State. For example, a subsidized provider must register for the program in the county where the child receiving assistance lives; submit information about their child care fees, rates and policies for absences and holidays; submit proof of license status, if any; and keep detailed attendance and billing records. (Gilbert Aff., Ex. 4, Minn. CCAP Child Care Provider Guide at 2, 9, 10; Gilbert Aff., Ex. 5, CCAP Policy Manual at Ch.

11.) Non-subsidized family child care providers are not subject to these state-imposed requirements.

The State has an active administrative and financial relationship with subsidized providers. It reviews applications; decides whether to authorize a provider; determines the maximum rates that will be paid to the provider; determines the number of hours eligible for compensation; determines the co-payment the family must pay to the provider; decides whether the provider will be compensated on holidays or when the child is absent; decides whether the providers are eligible for additional compensation due to their credentials or accreditation; and decides whether the provider qualifies for special rates for caring for children with special needs. (Gilbert Aff., Ex. 4 at 10, 14-19; Gilbert Aff., Ex. 5 at Ch. 11.) In contrast, non-subsidized providers are not subject to these State rules.

Providers who receive CCAP subsidies have a direct economic interest in the subsidy rates and the other terms and conditions that the State establishes for CCAP providers. Non-subsidized Plaintiffs have no such economic relationship with the State. One group receives the CCAP subsidies and is directly affected by them, and the other group does not receive the subsidies and is not directly

affected by them. The subsidized group has a regulatory and economic relationship with the State regarding provision of CCAP-subsidized services, the other does not. In sum, non-subsidized family child care providers are not similarly situated to subsidized family child care providers with regard to negotiating and meeting with the State regarding CCAP subsidies.

4. Rational Basis

Additionally, there is clearly a rational basis for the State's different treatment of the two groups under the FCCPRA.

Under the rational basis analysis, a classification is upheld if "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe, 509 U.S. 312, 320 (1993). "[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. (citations omitted). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . ." Id. (citation omitted). "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the

democratic processes." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

Here, the State has a substantial financial interest in the millions of dollars in subsidies to be paid annually to subsidized family child care providers and to make sure that taxpayer money is well spent. The State subsidy and related terms and conditions regarding the service that subsidized family child care providers provide to the State when caring for children from CCAP-receiving families will be the subject of any negotiations that occur under the FCCPRA.

The State has a rational basis to negotiate regarding CCAP subsidy rates, terms, and conditions with the very providers who receive CCAP subsidies, rather than with those providers who do not receive CCAP subsidies. Forcing an exclusive representative to represent both subsidized and non-subsidized family child care providers would dilute one of the benefits of unionization to the State – having one voice with whom the State can consult to determine the impact of current and proposed CCAP terms and conditions on those who receive CCAP subsidies.

To the extent that Plaintiffs' objection to the FCCPRA is based on Minnesota's obligation to "meet and confer" with subsidized providers "to

discuss policies and other matters relating to their service that are not terms and conditions of service," Minn. Stat. § 179A.52, subd. 7, the fact that a meet and confer meeting with subsidized family child care providers could involve broader policy issues that might impact non-subsidized child care providers is not a basis for claiming an equal protection violation. Moreover, the meet-and-confer provision addresses the State's obligation to meet with subsidized family child care providers, not with their exclusive representative. The FCPRA does not provide for negotiation of agreements with respect to matters that do not involve CCAP subsidies, and the Act preserves the rights and obligations of state agencies to "communicate or meet with any citizen or organization concerning family child care legislation, regulation, or policy." Minn. Stat. § 179A.52, subd. 9(2). Therefore, the FCCPRA's requirement that the State confer about policy matters with CCAP-subsidized providers does not impinge on the rights of nonsubsidized providers to present their viewpoints to the State.

Additionally, as the Supreme Court noted in Minnesota State Board for Community Colleges v. Knight, the State may "amplif[y]" a particular voice in the policymaking process by deciding to meet and confer with that voice and not others. 465 U.S. 271, 288 (1984). No equal protection violation is created by

amplification of "one, and only one, voice presenting the majority view" of subsidized family child care providers on policy questions related to their provision of child care services. Id. at 291.

Because the family child care providers who receive CCAP subsidies are not similarly situated to the family child care providers who do not currently receive CCAP subsidies and because the State has a rational basis for treating the two groups differently under the FCCPRA, Plaintiffs' equal protection claim fails. Plaintiffs' equal protection claim is dismissed on the merits and with prejudice.

IV. MOTION FOR A PRELIMINARY INJUNCTION

Because all of Plaintiffs' claims have been dismissed, the Motion for a Preliminary Injunction is denied.

Accordingly, based upon the files, records, and proceedings herein**, IT IS HEREBY ORDERED**:

1. Defendants' Motion to Dismiss [Docket No. 28] is **GRANTED**: Plaintiffs' preemption claim is DISMISSED without prejudice and Plaintiffs' equal protection claim is DISMISSED with prejudice.

2. Plaintiffs' Motion for Preliminary Injunction, or in the Alternative, a Temporary Restraining Order [Docket No. 5] is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 28, 2013

s/Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court