UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JENNIFER PARRISH, et al.,

Plaintiffs,

v. **MEMORANDUM OF LAW & ORDER**
Civil File No. 13-1348 (MJD/AJB)

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

Defendants,

and

AFSCME Council 5, et al.,

Intervenors.

William L. Messenger, National Right to Work Legal Defense Foundation; and Craig S. Krummen, Winthrop & Weinstine, 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 Intervenors.

I. INTRODUCTION AND SUMMARY

This matter is before the Court on Defendants' Motion to Dismiss [Docket No. 14] and Plaintiffs' Motion for Preliminary Injunction [Docket No. 33]. The Court heard oral argument on July 18, 2013.

Plaintiffs express a fear that, one day, there may be a certified union for family child care providers who accept State subsidies and that, one day, such a union may decide to impose a fair share fee on nonmembers of the union. They claim that these possible factual scenarios will violate their First Amendment rights. Plaintiffs' claims are based on contingency upon contingency. For an exclusive representative to be certified, all the following events must occur: First, a union has to make a showing to the Commissioner of the Bureau of Mediation Services that at least 500 family child care providers support union representation. If that occurs, then the Commissioner of the Department of Human Services will provide the union with the most recent list of eligible family child care providers. The union can then seek exclusive representation of the subsidized family child care providers by filing a petition with the Commissioner of the Bureau of Mediation Services establishing that at least 30 percent of the providers wish to be represented by the union. If the petition is

filed, then the Bureau of Mediation Services 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 the Bureau of Mediation Services as the exclusive representative of the providers. After that, the union may – or may not – in its discretion, implement a fair share fee. As of today, **none** of the foregoing events have occurred.

Plaintiffs request that the Court peer into a crystal ball, predict the future, and then opine on the constitutionality of a speculative scenario. As Associate Justice Robert Jackson most eloquently stated: "The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." Pub. Serv. Comm'n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 244 (1952). Courts may not give such advisory opinions. Plaintiffs' claims are not ripe. This Court does not have jurisdiction. Plaintiffs' Complaint is dismissed.

II. BACKGROUND

A. Factual Background

1. 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 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.

2. 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.

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.

3. The Plaintiffs

Plaintiffs Jennifer Parrish, Addie Clyde, Cynthia Cunningham, Patricia Gentz, Holly Goad, Sara Nelson, Jerol Oldenkamp, Tracy Stengel, Lisa Templin, Ruth Tessmer, Sally Willis-Oeltjen, and Tabitha Zimmer are individuals who

operate licensed family child care businesses in their own homes in Minnesota. (Compl. ¶ 4.) See also Minn. R. 9502.0315, subd. 11 (defining "family day care"). Some of them employ employees. (Compl. ¶ 8.) All Plaintiffs are registered to accept CCAP money as partial payment for enrolled families, some Plaintiffs provided child care services to CCAP subsidized families in 2013, and all Plaintiffs anticipate that they will provide child care services to subsidized families in the future. (Compl. ¶¶ 13-14.) Plaintiffs oppose the possibility of being forced to accept and financially support a union to petition the State regarding child care policy issues. (Compl. ¶ 23.)

B. Procedural History

On June 5, 2013, Plaintiffs filed a Complaint in this Court against Defendants Governor Mark Dayton, BMS Commissioner Josh Tilsen, and DHS Commissioner Lucinda Jesson, all in their official capacities. The Complaint asserts Count I, Violation of 42 U.S.C. § 1983 and the United States Constitution, based on the allegation that the FCCPRA violates the First Amendment on its face and as applied to Plaintiffs by "threaten[ing] to wrongfully deprive Plaintiffs of their constitutional rights to not associate with an organization for purposes of speech and 'petition[ing] the Government for redress of grievances;" Count II, Violation of 42 U.S.C. § 1983 and the United States Constitution, based on the

allegation that the portion of the FCCPRA allowing an election is unconstitutional on its face and as applied to Plaintiffs by "threaten[ing] to wrongfully deprive Plaintiffs of their right to individually choose with whom they associate to speak and petition [the] government under the First Amendment . . . by subjecting them to an election in which the majority of those voting will dictate the organization with which they must associate to petition the State;" and Count III, Injunctive Relief.

On June 17, Defendants moved to dismiss Plaintiffs' lawsuit for lack of ripeness and lack of standing. [Docket No. 14]

On June 24, 2013, the Court granted the motion to intervene by Intervenors American Federation of State, County and Municipal Employees, Council 5 ("AFSCME"); Angela Anderson, Sharon O'Boyle, and Marilyn Geller. [Docket No. 30] AFSCME seeks to represent subsidized family child care providers. Anderson, O'Boyle, and Geller are subsidized family child care providers who wish to vote for an exclusive representative and bargain collectively with the State.

On June 26, Plaintiffs filed a motion for a preliminary injunction, requesting that the Court enjoin Defendants from implementing or enforcing the FCCPRA. [Docket No. 33]

III. MOTION TO DISMISS

A. Motion to Dismiss Standard

Defendants assert that this case should be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). "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. Ripeness Discussion

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).

2. Fitness of the Issues for Judicial Decision

The Court concludes that this case would benefit from further factual development. For instance, at this time, the Court cannot determine whether its First Amendment analysis should be applied to the hypothetical situation in which a union has been certified and has decided not to charge a fair share fee or to the hypothetical situation where a union has been certified and has decided to

charge a fair share fee to nonmembers.[1] The imposition of a compulsory fee may be significant in First Amendment analysis. Moreover, if a fee is imposed, the Court's First Amendment analysis must take into account the manner in which the fee is collected from nonmembers and how the union spends the fair share fee. There are legally significant facts that cannot be predicted at this time. The issues in this case are not fit for judicial review.

3. Hardship to the Parties of Withholding Court Consideration

The Court concludes that Plaintiffs face no hardship from this Court's decision to deny review at this time. "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

[1] In briefing in this case, AFSCME argues that a union may or may not be certified and may or may not assess a fair share fee. ([Docket No. 43] Intervenors' Brief at 14 n.4.) During oral argument, AFSCME also pointed out that, in many states, fair share fees are not permitted and unions still engage in collective bargaining. During oral argument in the related Saville litigation, AFSCME's counsel noted that fair share fees have not been assessed and may not ever be assessed. Moreover, at this time, even assuming a union is certified, the Court does not know which union that might be and cannot ascertain the thoughts of that hypothetical union on the possibility of assessing a fair share fee.

preventive relief. If the injury is certainly impending, that is enough." Id. (citation omitted).

At this time, the FCCPRA does not require Plaintiffs to associate with a union, and no fair share fee has been or could be assessed. Plaintiffs' claims are not ripe because 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 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 simply too many contingencies that must occur before Plaintiffs face the possibility of the injury they are alleging. 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)).

A recent opinion by the Seventh Circuit Court of Appeals is instructive. In Harris v. Quinn, the court addressed a case in which in-home care providers for individuals with disabilities brought a First Amendment challenge to an executive order issued by the Governor of Illinois directing the state to recognize an exclusive representative for the providers, if a majority of the providers voted in favor of the exclusive representative, which had not yet occurred. 656 F.3d 692, 695 (7th Cir. 2011). The Seventh Circuit held that the plaintiffs' claim was not ripe for adjudication because of the uncertainty of whether the providers would unionize or that a fair share fee would be imposed. Id. at 700. The court noted:

> 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 (citation omitted).

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' claims are not ripe.

IV. MOTION FOR A PRELIMINARY INJUNCTION

Because Plaintiffs' claims are not ripe, this matter is dismissed, and 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. 14] is **GRANTED** and this matter is **DISMISSED** without prejudice.

2. Plaintiffs' Motion for Preliminary Injunction [Docket No. 33] is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 28, 2013

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