UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Chapter of Associated Builders and Contractors, Inc., et al.,	Court File No. 25-cv-00550 (JRT/JFD)
Plaintiffs,	**DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**
vs.	
Nicole Blissenbach, et al.,	
Defendants.	

INTRODUCTION

Misclassifying workers as independent contractors deprives those workers of wages and protections to which they are entitled. It also disadvantages law-abiding employers; results in less revenue for state programs and has a negative impact on the economy. A 2024 report by the Minnesota Office of the Legislative Auditor ("OLA Report") concluded that Minnesota lacks an "adequate . . . approach for ensuring that Minnesota workers are properly classified." The scope of the problem is deep in the construction industry. A study by Midwest Economic Policy Institute concluded in 2020 over 30,000 construction workers in Minnesota (23% of the workforce) were either misclassified or paid off the books in cash. Following several public meetings by the Attorney General's Advisory Task Force on Worker Misclassification and the OLA Report, the Legislature revised the Statute.

For several years, Minnesota Statutes Section 181.723 provided a nine-part test to determine whether a construction worker was an employee or an independent contractor. When Section 181.723 was revised, the nine-part test became a fourteen-part test; some parts remained the same or were clarified. The Statute also added penalties. The Governor

signed the revisions into law in May 2024, but the revisions to subdivision 4 (the fourteen-part test) are scheduled to go into effect on March 1, 2025.

Plaintiffs' essential gripe with the Statute is that it will force them to change their business practices and demand accountability from their subcontractors. That is indeed the purpose of a business regulation. The Court should deny Plaintiffs' motion for a preliminary injunction.

STATEMENT OF FACTS

I. 9-PART TEST.

Since 1996, Minnesota law has provided a nine-part test for construction contractors to use to determine whether individuals are employees or independent contractors. 1996 Minnesota Laws Ch. 374.

> (a) An individual is an independent contractor and not an employee of the person for whom the individual is performing services in the course of the person's trade, business, profession, or occupation only if the individual:
>
> (1) maintains a separate business with the individual's own office, equipment, materials, and other facilities;
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> (2)(i) holds or has applied for a federal employer identification number or (ii) has filed business or self-employment income tax returns with the federal Internal Revenue Service if the individual has performed services in the previous year;
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> (3) is operating under contract to perform the specific services for the person for specific amounts of money and under which the individual controls the means of performing the services;
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> (4) is incurring the main expenses related to the services that the individual is performing for the person under the contract;
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> (5) is responsible for the satisfactory completion of the services that the individual has contracted to perform for the person and is liable for a failure to complete the services;

> (6) receives compensation from the person for the services performed under the contract on a commission or per-job or competitive bid basis and not on any other basis;
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> (7) may realize a profit or suffer a loss under the contract to perform services for the person;
>
> (8) has continuing or recurring business liabilities or obligations; and
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> (9) the success or failure of the individual's business depends on the relationship of business receipts to expenditures.

Minn. Stat. 181.723, subd. 4 (2023).[1] A construction worker, who is not an independent contractor, had the ability to bring a civil suit seeking damages. Minn. Stat. § 181.722, subd. 4 (2023). The Department of Labor and Industry had enforcement authority under Sections 326B.081-.085. The Attorney General also had enforcement authority. *See* Minn. Stat. §§ 181.1721, 8.31.

II. ATTORNEY GENERAL MISCLASSIFICATION TASK FORCE AND OFFICE OF THE LEGISLATIVE AUDITOR IDENTIFY RECOMMENDATIONS TO PREVENT MISCLASSIFICATION IN MINNESOTA.

The Attorney General convened an Advisory Task Force on Worker Misclassification in 2023. He explained,

> Misclassifying workers hurts not only those who are misclassified and their families, it hurts all Minnesotans, including businesses who do the right thing by their employees by playing by the rules, and every Minnesota taxpayer who has to make up the slack for law breaking employers.

Advisory Task Force on Worker Misclassification, Minnesota Attorney General's Office, https://www.ag.state.mn.us/Taskforce/Misclassification/ (last visited Feb. 19, 2025). The Task Force's mission was to gather information about the problem and make practical

[1] The 2023 version of Section 181.723 is attached as Exhibit 1 to the Declaration of Janine Kimble ("Kimble Decl.").

recommendations to end the problem. *Id.* According to the U.S. Census Bureau, Minnesota has over 397,000 non-employer businesses or residents who are self-employed.[2] The total value of nonemployer sales, shipments, or revenue in Minnesota exceeded $20 million.[3] After holding meetings across the state for six months, the Task Force voted to adopt a policy proposal for the Legislature, which became the misclassification bills HF4444/SF4483. (Kimble Decl. Ex. 2, at 4.)

In May 2023, the Legislative Audit Commission directed the OLA to update its 2007 report on "Misclassification of Employees as Independent Contractors."[4] The OLA issued a report on misclassification. According to that report, the misclassification of workers affects the workers and employers of our state in various ways: It deprives workers of wages and workplace protections (*see* Minn. Stat. § 181.723, subd. 7(g)(1)); disadvantages law-abiding employers; results in less revenue for state programs; and has a negative impact on the economy. (OLA Report, at 1.) The evaluation focused on

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[2] Chet Bodin, *Small Business Success*, DEED, (Dec. 2017), https://mn.gov/deed/newscenter/publications/review/december-2017/small-business-success.jsp?fbclid=IwAR1lI5GomBlAZ_gBVOz6NqzFpSgZ9nk1mdc7hXWhKrsNweBpCSP9mESUBEs (last accessed Feb. 20, 2025) (cited in *Independent Contractors*, submitted to Attorney General Task Force on Jan. 8, 2024, https://www.ag.state.mn.us/Taskforce/Misclassification/Meetings/20240108/Data_IndependentContractors.pdf).

[3] https://www.ag.state.mn.us/Taskforce/Misclassification/Meetings/20240108/Data_IndependentContractors.pdf (last accessed Feb. 19, 2025); *see also* ECF No. 12, at 6.

[4] *Worker Misclassification*, Office of the Legislative Auditor, at 1 (May 2024), https://www.auditor.leg.state.mn.us/ped/pedrep/2024-worker-misclassification.pdf, *archived at* https://perma.cc/R8GH-NTMM ("OLA Report").

Minnesota's approach to classifying workers in general and ensuring that employees who were classified as independent contractors were not misclassified. (*Id*. at 2.)

New legislation was needed because many of the issues discussed in the OLA's 2007 report on misclassification of employees as independent contractors still persist today. (*Id.* at 21.) "Minnesota has neither an adequate nor coordinated approach for ensuring that Minnesota workers are properly classified." (*Id.*)

The main agencies monitoring the classification of workers are the Department of Labor and Industry (DLI), the Department of Employment and Economic Development (DEED), and the Department of Revenue (DOR). These three agencies "generally use different tests or standards to determine a worker's classification, even if one agency confirmed that an employer misclassified a worker, the other agency would still need to make its own determination." (*Id.* at 23.)

The OLA Report recommended in 2024—as it did in 2007—that Minnesota enact common criteria for determining worker classification when possible. (*Id*. 26.) Additionally, the OLA Report noted that DLI, DEED, and DOR do not have many requirements in law specific to addressing worker misclassification. (*Id.* at 27.) It recommended, "If the Legislature would like agencies to take a more active role in addressing worker misclassification, the Legislature should direct agencies to do so in law." (*Id.* at 29.) It also recommended: "The Legislature should amend statutes to ensure that agencies are required to penalize employers that repeatedly misclassify workers." (*Id*. at 35.)

III. 14-PART TEST.

Among those who testified in connection with the misclassification bills, a representative for the union LiUNA testified in particular about how widespread worker misclassification is in the construction industry.[5] She directed the Legislature's attention to a study by Midwest Economic Policy Institute that concluded in 2020 over 30,000 construction workers in Minnesota (23% of the workforce) were either misclassified or paid off the books in cash.[6] Plaintiff ABC testified in opposition to the bill, explained that it was unclear what was wrong with the nine-factor test, and asked for an effective date later than August 1.[7]

The worker misclassification bill was added to the omnibus bill that was signed by the Governor on May 24, 2024. See HF 5247, 4th Engrossment – 93d Leg. (2023–2024). Article 10, Section 8. It revised Section 181.723, subd. 4—the independent contractor test for the construction industry. With the change, effective March 1, 2025, the test will have 14 parts:

> (a) An individual is an independent contractor and not an employee of the person for whom the individual is providing or performing services in the course of the person's trade, business, profession, or occupation only if the

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[5] House Labor & Industry Finance & Policy Commtitee, March 5, 2024, *available at* https://www.youtube.com/watch?v=Bg2FIliLG-k (32:48-33:19).

[6] *Id.* (referring to Frank Manzo IV, "Construction Wage Theft Costs WI, MN, and IL Taxpayers $362 Million Per Year," Midwest Economic Policy Institute (Jan. 14, 2021), at https://midwestepi.org/2021/01/14/construction-wage-theft-costs-wi-mn-and-il-taxpayers-362-million-per-year/, *archived at* https://perma.cc/9PLE-DVBY.

[7] House Labor & Industry Finance & Policy Commtitee, March 5, 2024, *available at* https://www.youtube.com/watch?v=Bg2FIliLG-k (starting at 54:59; *see also* 56:00-56:13; 57:50-58:29). Counsel Tom Revnew also testified. *Id.* at 58:54.

individual is operating as a business entity that meets all of the following requirements at the time the services were provided or performed:

(1) was established and maintained separately from and independently of the person for whom the services were provided or performed;

(2) owns, rents, or leases equipment, tools, vehicles, materials, supplies, office space, or other facilities that are used by the business entity to provide or perform building construction or improvement services;

(3) provides or performs, or offers to provide or perform, the same or similar building construction or improvement services for multiple persons or the general public;

(4) is in compliance with all of the following:

(i) holds a federal employer identification number if required by federal law;

(ii) holds a Minnesota tax identification number if required by Minnesota law;

(iii) has received and retained 1099 forms for income received for building construction or improvement services provided or performed, if required by Minnesota or federal law;

(iv) has filed business or self-employment income tax returns, including estimated tax filings, with the federal Internal Revenue Service and the Department of Revenue, as the business entity or as a self-employed individual reporting income earned, for providing or performing building construction or improvement services, if any, in the previous 12 months; and

(v) has completed and provided a W-9 federal income tax form to the person for whom the services were provided or performed if required by federal law;

(5) is in good standing as defined by section 5.26, if applicable;

(6) has a Minnesota unemployment insurance account if required by chapter 268;

(7) has obtained required workers' compensation insurance coverage if required by chapter 176;

(8) holds current business licenses, registrations, and certifications if required by chapter 326B and sections 327.31 to 327.36;

(9) is operating under a written contract to provide or perform the specific services for the person that:

(i) is signed and dated by both an authorized representative of the business entity and of the person for whom the services are being provided or performed;

(ii) is fully executed no later than 30 days after the date work commences;

(iii) identifies the specific services to be provided or performed under the contract;

(iv) provides for compensation from the person for the services provided or performed under the contract on a commission or per-job or competitive bid basis and not on any other basis; and

(v) the requirements of item (ii) shall not apply to change orders;

(10) submits invoices and receives payments for completion of the specific services provided or performed under the written proposal, contract, or change order in the name of the business entity. Payments made in cash do not meet this requirement;

(11) the terms of the written proposal, contract, or change order provide the business entity control over the means of providing or performing the specific services, and the business entity in fact controls the provision or performance of the specific services;

(12) incurs the main expenses and costs related to providing or performing the specific services under the written proposal, contract, or change order;

(13) is responsible for the completion of the specific services to be provided or performed under the written proposal, contract, or change order and is responsible, as provided under the written proposal, contract, or change order, for failure to complete the specific services; and

(14) may realize additional profit or suffer a loss, if costs and expenses to provide or perform the specific services under the written proposal, contract, or change order are less than or greater than the compensation provided under the written proposal, contract, or change order.

Minn. Stat. § 181.723, subd. 4 (2024) (eff. Mar. 1, 2025).[8] The revision also added the penalties:

> (2) a penalty of up to $10,000 for each individual the person failed to classify, represent, or treat as an employee pursuant to this section;
>
> (3) a penalty of up to $10,000 for each violation of this subdivision; and
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> (4) a penalty of $1,000 for any person who delays, obstructs, or otherwise fails to cooperate with the commissioner's investigation. Each day of delay, obstruction, or failure to cooperate constitutes a separate violation.

Minn. Stat. § 181.723, subd. 7(g)(2)-(4). Compensatory damages are addressed in subdivision 7(g)(1). Violations of Section 181.723 may be investigated or enforced under the DLI Commissioner's authority. Minn. Stat. § 181.723, subd. 7(h).

Just like the previous version, it remains true that DLI has enforcement authority. *See* Minn. Stat. § 177.27, subd. 4. The Attorney General also still has enforcement authority. *See* Minn. Stat. §§ 181.1721, 8.31. And there is still a private right of action. Minn. Stat. § 181.171, subd. 1.

A violation of § 181.723 may result in DLI issuing a compliance order under Minnesota Statutes Section 177.27, subd. 4.[9] Subdivision 4 reads in relevant part:

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[8] The 2024 version of Section 181.723 is attached as Exhibit 3 to the Declaration of Janine Kimble. It is referred to herein as "the Statute." The effective date of March 1, 2025, for subdivision 4 can be found at Laws 2024, chapter 127, article 10, section 8, the effective date. All other changes to Section 181.723 (including the penalties) were effective July 1, 2024.

[9] Section 326B.081, subd. 3, also incorporates the Statute in its definition of applicable law. Pursuant to Section 326B.082, subd. 7(a), and 326B.082, subd. 11(b)(1)-(2), DLI may issue licensing or administrative orders for violations of Section 181.723. *See also* Minn. Stat. § 326B.082, subd. 8 (administrative proceedings to contest the administrative order); Minn. Stat. § 326B.082, subd. 12 (providing for contested-case hearings under chapter 14);

> The department shall serve the order upon the employer or the employer's authorized representative in person or by certified mail at the employer's place of business. An employer who wishes to contest the order must file written notice of objection to the order with the commissioner within 15 calendar days after being served with the order. **A contested case proceeding** must then be held in accordance with sections 14.57 to 14.69 or 181.165. If, within 15 calendar days after being served with the order, the employer fails to file a written notice of objection with the commissioner, the order becomes a final order of the commissioner.

Minn. Stat. § 177.27, subd. 4 (2024) (emphasis added).

DLI issued an FAQ document and PowerPoint to educate the public about the meaning of the Statute.[10]

LEGAL STANDARD

A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 24 (2008). Its primary function is to preserve the status quo, until upon final hearing, a court may grant full effective relief. *Wilbur-Ellis Co., LLC v. Erikson*, 103 F.4th 1352, 1355 (8th Cir. 2024). The party seeking preliminary injunctive relief "bears the burden of establishing the necessity of this equitable remedy." *General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). In determining whether to grant a preliminary injunction, the Court must consider (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; and (4) the public interest.

Minn. Stat. § 326B.083, subd. 3(c) (addressing administrative and licensing orders with penalties and an administrative law judge's review).

[10] *See* ECF 12, at 104; *Employee Misclassification*, Minn. Dep't of Labor & Industry, https://www.dli.mn.gov/sites/default/files/pdf/presentation_employee_misclassification.pdf, *archived at* https://perma.cc/L8KD-JM2T.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981). When deciding whether to grant a preliminary injunction, courts ask "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Morehouse Enter., LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 78 F.4th 1011, 1016 (8th Cir. 2023).

Because it seeks to enjoin legislation, Plaintiffs bear the heavy burden of establishing as a threshold matter that it is likely to succeed on the merits. The Eighth Circuit reasoned in *Planned Parenthood of Minn., N.D., S.D. v. Rounds* as follows:

> [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*.

530 F.3d 724, 732 (8th Cir. 2008) (emphasis added) (internal citation omitted). Plaintiffs have not met their burden.

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. Facial versus As-Applied Challenge.

A facial challenge to a statute's constitutionality is the "most difficult challenge to mount successfully." *United States v. Rahimi*, 602 U.S. 680, 708 (2024) (Gorsuch, J., concurring) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)). To prevail on this sort of challenge, Plaintiffs must show that "no set of circumstances" exist in which the

Statute can be applied without violating the relevant constitutional principle. *Salerno*, 481 U.S. at 745.[11]

Although Plaintiffs allege an as-applied challenge, in actuality they are just bringing a facial challenge. The entire statute is about construction workers and businesses only; the Plaintiffs are businesses in the construction space. And there is no indication that ABC's members are limited to general contractors, although general contractors are discussed in the memorandum. Instead, all of the declarations allege that the Plaintiffs and members follow general industry practices and utilize form documents for their work. Plaintiffs allege nothing unique about any particular Plaintiff to explain how an as-applied challenge would even work in this case.

B. Plaintiffs Are Unlikely to Succeed on Count 1.

In Count 1, Plaintiffs allege the Statute violates the Due Process Clause of the Fourteenth Amendment because it is void-for-vagueness insofar as it fails to define material terms, and is therefore facially unconstitutional and as applied to its members. (Compl. ¶ 75.). Plaintiffs also allege that Defendants will arbitrarily and inconsistently enforce the Statute because there are no definite guidelines Defendants must follow when enforcing the statute. Furthermore, Plaintiffs implore the Court to subject the Statute to heightened scrutiny because they allege violators of the Statute might be subject to criminal penalties. Plaintiffs are wrong about all of those things.

[11] *Salerno* does not control the void-for-vagueness challenge. *Johnson v. United States*, 576 U.S. 591, 602 (2015).

1. The Statute identifies its proscribed conduct with sufficient specificity to prevent arbitrary enforcement.

In keeping with due-process principles, a law is void for vagueness "if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972). "A two-part test determines whether a statute is vague: 'The statute must first provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement.'" *Metro. Omaha Prop. Owners Ass'n, Inc. v. City of Omaha*, 991 F.3d 880, 886 (8th Cir. 2021) (quoting *United States v. Barraza*, 576 F.3d 798, 806 (8th Cir. 2009)). "'[F]lexibility and reasonable breadth' are acceptable as long as it is 'clear what the [rule] as a whole prohibits.'" *Rowles v. Curators of Univ. of Mo.*, 983 F.3d 345 (8th Cir. 2020) (quoting *Grayned*, 408 U.S. at 110). The second prong of the void-for-vagueness doctrine is of greater importance than the first. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Plaintiffs offer little more than vaguely worded questions to claim the Statute leaves key wording undefined and is beyond ordinary comprehension. (Pls. Br. 29.) And Plaintiffs fail to acknowledge that many of the terms in the Statute carry plain and ordinary definitions. *See* Minn. Stat. § 645.08(1). For example, despite being business owners, contractors, and industry specialists, Plaintiffs don't know what constitutes an "invoice." (Pls. Br. 29.) "Invoice" is not defined in the Statute; but there is no requirement that every statutory term is defined, especially when their common meaning suffices. *Nelson v. Schlener*, 859 N.W.2d 288, 293 (Minn. 2015). Further, dictionary definitions are commonly consulted, and words are to be viewed in context. *Matter of Surveillance and Integrity Review*, 996 N.W.2d 178, 186 (Minn. 2023). An invoice is "a detailed list of

goods shipped or services rendered, with an account of all costs; an itemized bill. *The American Heritage College Dictionary* 715 (3d ed. 1993) (defining "invoice"); *The American Heritage Dictionary of the English Language* 949 (3d ed. 1992) (same). Similarly, per-job basis is a plain language term with common meaning.

Moreover, businesses and their trade associations are not expected to sit on their hands and wonder about a new law's meaning. Rather, they "can be expected to consult relevant legislation in advance of action. . . . [T]he regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc*., 455 U.S. 489, 498 (1982). In fact, DLI has released publicly available documents to help the construction industry understand and comply with the Statute.[12] And indeed, these publications provide guidance for the very situations that Plaintiffs allege are impermissibly vague. (*See*, e.g. ECF 12, at 114 (invoice), 115 (profit or loss risk).)

Plaintiffs' claimed unfamiliarity with the Statute's language is hard to understand. Most of the allegedly vague language existed in a prior version of the statute,[13] or has been defined by Minnesota appellate courts. *See Nelson v. Levy*, 796 N.W.2d 336, 340 (Minn. Ct. App. 2011) (analyzing a previous version of the statute, holding the scope of the contract determines main expenses). Plaintiffs fail to identify any new language in the Statute that modifies this common understanding.

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[12] *See* ECF 12, at 104; *Employee Misclassification*, Minn. Dep't of Labor & Industry, https://www.dli.mn.gov/sites/default/files/pdf/presentation_employee_misclassification.pdf, *archived at* https://perma.cc/L8KD-JM2T.

[13] *See* Minn. Stat. § 181.723, subd. 4(b)(2) (2023) (invoice).

2. The Statute survives plaintiffs' challenge because their hypothetical conduct clearly falls within the statute's proscription.

Vagueness challenges that do not involve the First Amendment must be examined in light of the specific facts of the case at hand and not with regard to the statute's facial validity. *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir.1993) (citing *Chapman v. United States*, 500 U.S. 453, 467 (1991)). Accordingly, the Court should only analyze whether the Statute violates the due process clause as applied to the specific facts of this case. *Hoffman*, 455 U.S. at 495, n.7. Here, Plaintiffs have not alleged a scintilla of evidence that the Statute or its predecessor has been enforced in a discriminatory manner. Thus, a party must show that the challenged statute "lacks specificity as to [their] own behavior and not as to some hypothetical situation" in order to prevail on a void-for-vagueness challenge. *United States v. Trudell*, 563 F.2d 889, 892 (8th Cir. 1977).

Here, Plaintiffs have not alleged any specific behavior that they engage in or intend to engage in that is impacted by the Statute. Instead, Plaintiffs offer a litany of hypothetical situations in an attempt to illustrate the Statute's supposed vagueness. These hypotheticals are unpersuasive. Persons of ordinary intelligence understand, for example, that if a subcontractor's worker is an employee of a general contractor pursuant to Section 181.723, subdivision 4(b), the general contractor must treat that worker as an employee for however long the worker is providing or performing construction or improvement services for the general contractor. Even if a broad reading of the Statute leaves certain situations up to interpretation, Plaintiffs have failed to establish that the Statute is unconstitutionally vague as applied to their actual conduct. *See Hill v. Colorado*, 530 U.S. 703, 733 (2000)

(speculation about possible vagueness in hypothetical situations "will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." (quotation omitted)).

For these reasons, Plaintiffs cannot establish that the Statute is unconstitutionally vague pursuant to the first prong of the void-for-vagueness analysis.

3. The Statute contains neutral limitations that prevent arbitrary enforcement.

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Hoffman*, 455 U.S. at 495. Because textual components such as these impose "neutral limitations" on the officials who enforce and apply a statute, *Kolender*, 461 U.S. at 360, their inclusion brings into focus the precise conduct that a statute proscribes and fairly narrows that statute's reach.

In this matter, the Statute contains neutral limitations in the form of judicial review that restrict how Defendants may enforce the statute. A violation of Section 181.723 may result in DLI issuing a compliance order under Section 177.27, subd. 4.[14] Subdivision 4 reads in relevant part:

> The department shall serve the order upon the employer or the employer's authorized representative in person or by certified mail at the employer's

[14] Section 326B.081, subd. 3, also incorporates the Statute in its definition of applicable law. Pursuant to Section 326B.082, subd. 7(a), and 326B.082, subd. 11(b)(1)-(2), DLI may issue licensing or administrative orders for violations of Section 181.723. *See also* Minn. Stat. § 326B.082, subd. 8 (administrative proceedings to contest the administrative order); Minn. Stat. § 326B.082, subd. 12 (providing for contested-case hearings under chapter 14); Minn. Stat. § 326B.083, subd. 3(c) (addressing administrative and licensing orders with penalties and an administrative law judge's review).

> place of business. An employer who wishes to contest the order must file written notice of objection to the order with the commissioner within 15 calendar days after being served with the order. **A contested case proceeding** must then be held in accordance with sections 14.57 to 14.69 or 181.165. If, within 15 calendar days after being served with the order, the employer fails to file a written notice of objection with the commissioner, the order becomes a final order of the commissioner.

Minn. Stat. § 177.27, subd. 4 (2024) (emphasis added). This section limits the discretion of DLI to enforce the Statute as the employer may challenge the agency's determination through the normal chapter 14 administrative process. In other words, the employer may bring their case before an administrative law judge, present evidence, and cross-examine witnesses or otherwise litigate the agency's decision. *See* Minn. Ch. 14.57-62. The employer may then appeal the administrative law judge's decision directly to Minnesota's appellate courts. Minn. Stat. § 14.63-69. In short, there are constitutional safeguards in the form of judicial review that prevent arbitrary enforcement of the Statute. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230 (1990) (failure to provide prompt judicial review of First Amendment regulation renders ordinance unconstitutional); *see also Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 401 (6th Cir. 2001) (safeguards were inadequate where neither ordinance nor state law provided for prompt judicial review).

In sum, therefore, Plaintiffs fail to satisfy either prong of the void-for-vagueness analysis. The Statute defines proscribed conduct in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357. Accordingly, the Statute satisfies the constitutional requirements of due process, and Plaintiffs' constitutional challenge should be rejected.

4. The Statute, like all economic regulations, is not subject to heightened scrutiny.

The Statute is clearly a civil, rather than a criminal statute. The Court should not apply heightened scrutiny when determining whether the Statute is unconstitutionally vague because the Statute is inherently civil, not criminal in nature. The Statute is found in Section 181 of the Minnesota Statutes, under the subsection "Labor, Industry." Chapter 181 is titled "Employment." If the Statute were criminal in nature, it would be found in Section 609, the Criminal Code. Furthermore, the Statute does not have a prohibitory or stigmatizing effect to render it quasi-criminal; rather, the Statute gives the Commissioner the authority to impose fines when violations occur. *Hoffman*, 455 U.S. at 489, 499 (prohibitory or stigmatizing effect renders statute quasi-criminal). The Statute is clearly aimed at regulating economic behavior, not protecting society or preventing crime.

When courts evaluate a vagueness challenge to economic regulations like the Statute, they apply a "less strict vagueness test." *Id.* at 498*; Chalmers v. City of Los Angeles*, 762 F.2d 753, 757 (9th Cir. 1985) (quoting *Hoffman*, 455 U.S. at 498–99) ("[G]reater tolerance is permitted with legislation imposing only civil rather than criminal penalties." (internal quotation marks omitted)). There are two justifications for a less strict test for economic or business regulations. First, "its subject matter is often more narrow, and [ ] businesses . . . can be expected to consult relevant legislation in advance of action." *Chalmers*, 762 F.2d at 757 (citation omitted). Second, "the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id*. (citation omitted). Here, the Statute's subject matter is narrow:

to regulate employers that use independent contractors in the construction industry. Plaintiffs clearly consulted with the legislature in advance of the Statute's passage as they testified to the Legislature.[15] Finally, Plaintiffs are able to ask about the meaning of the Statute's regulation by asking DLI questions on a case-by-case basis or by appealing violations through the administrative process outlined in chapter 14. In sum, because the Statute regulates purely economic activity, the Court should apply a less strict vagueness test. *Hoffman*, 455 U.S. at 498.

Plaintiffs argue that the Statute is criminal in nature because violations may lead to criminal prosecution under different statutes. (Pls. Br. 40.) First, the Statute does not impose criminal penalties for violations. Section 181.721, subds. 1, 4-5 (2024) and Section 181.74, subd. 1 (2024) are different statutes that may carry criminal penalties. Section 181.74, subd. 1,[16] is a general wage payment statute that requires employers to make timely payments to their employees. Section 326B.082, subd. 16, makes a violation of Section 181.723 a misdemeanor. Plaintiffs catastrophize that innocent employers could inadvertently treat an employee as an independent contractor, fail to pay that worker as an employee, and face draconian criminal consequences imposed by Defendants.[17] (*See* Pls.

[15] House Labor & Industry Finance & Policy Commtitee, March 5, 2024, *available at* https://www.youtube.com/watch?v=Bg2FIliLG-k (starting at 54:59; *see also* 56:00-56:13; 57:50-58:29).

[16] Counsel for Defendants were unable to find a single instance of State criminal prosecution under Section 181.74, subd. 1, since 2007.

[17] Assuming arguendo that Plaintiffs did face criminal charges for violating Section 181.74, they would still be afforded all the protections of due process that all criminal defendants are entitled, for example, the right to counsel, confrontation, trial, etc.

Br. 24.) The relationship between criminal penalties under Section 181.74, subd. 1, and the Statute is attenuated at best. The Commissioner does not have criminal prosecutorial authority. At most, the Commissioner could impose fines employers can challenge with the same administrative protections and restrictions as any other administrative decision. *See* Minn. Stat. § 14.045, subds.1-3.[18] Because the Statute is clearly a civil, rather than a criminal, regulation, the Court should decline to apply heightened scrutiny.

C. The Law Does Not Violate the Proscription Against Excessive Fines.

Under the Eighth Amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "Taken together, these Clauses place 'parallel limitations' on 'the power of those entrusted with the criminal-law function of government.'" *Timbs v. Indiana*, 586 U.S. 146, 151 (2019) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989)).

1. The Excessive Fines Clause is not implicated by Section 181.723.

The Excessive Fines Clause is not implicated by Section 181.723 because Section 181.723 is not connected to any criminal proceeding and Section 181.723 has remedial applications.

Only monetary penalties that function as "'punishment for some offense'" are encompassed by the Excessive Fines Clause. *United States v. Toth*, 33 F.4th 1, 15 (1st Cir.

[18] Further, the Attorney General's wage theft activity is civil. *See In the Matter of Arise Virtual Solutions*, Settlement Agreement (unfiled) (Ramsey Cnty.), https://www.ag.state.mn.us/Office/Communications/2024/docs/Arise_AoD.pdf, unless a criminal matter is referred to the Attorney General by a county attorney or the Governor. Minn. Stat. § 8.01.

2022), *cert denied* 143 S. Ct. 552 (2023)[19] (quoting *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998)). The Clause is concerned with fines, "uniquely of all *punishments*." *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of Scalia, J.) (emphasis added). Historically, there were reasons to be particularly worried about fines as punishment because they are a source of revenue; and States may have reasons to assess them in amounts that are "'out of accord with the penal goals of retribution and deterrence.'" *Timbs*, 586 U.S. at 153-54 (quoting *Harmelin*, 501 U.S. at 979, n.9 (opinion of Scalia, J.)). The problem arises if fines as punishment are "out of accord" with the penal goals of retribution and deterrence and are instead used for improper purposes, such as a retaliatory purpose, or to chill the speech of political enemies. *Id.*

There is no per se rule that the Excessive Fines Clause applies only to criminal proceedings, but it generally applies only when there is a connection to criminal proceedings; courts have commonly analyzed its application in *in rem* actions. *See Austin v. United States*, 509 U.S. 602 (1993). In *Austin*, the Court concluded that civil *in rem* forfeiture was subject to the limitations of the Clause, observing the forfeiture could occur only after a drug-trafficking conviction. *Id.* at 619-20. Further, legislative history suggested Congress enacted the forfeiture provision to deter or punish, and not to redress "any damages sustained by society or to the cost of enforcing the law." *Id.* at 620 & 621. The same was true in *Bajakajian*, where the Court concluded a civil forfeiture imposed at the culmination of a criminal proceeding was subject to the Clause. 524 U.S. at 328. It

[19] Justice Gorsuch dissented from the denial of cert. 143 S. Ct. 552 (2023).

was imposed in part for the punitive purpose of deterrence. *Id.* at 329 n.4. Similarly in *Timbs*, the Court concluded it was consistent with history and tradition to apply the Excessive Fines Clause to civil *in rem* actions.[20] *Timbs*, 586 U.S. at 155-56. Importantly, the *in rem* action was directly related to the criminal action. *Id.* at 148 (noting Timbs pleaded guilty and at the time of his arrest, the police seized his vehicle).

In *Toth*, in contrast, the civil penalty was not tied to any criminal sanction and the government conceded no punitive purpose. 33 F.4th at 16. Therefore, the First Circuit concluded it was not a fine subject to the Clause. *Id.* *But see United States v. Schwarzbaum,* 127 F.4th 259, 274 (11th Cir. 2025) (concluding the same civil penalty statute was subject to the Clause).

The Eighth Circuit has concluded that False Claims Act penalties fall in the reach of the Clause, *see Hays v. Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003), but there is also a criminal hook there. The False Claims Act allows private parties to bring *qui tam* actions against those who have defrauded the federal government. *Id.* at 987. The plaintiff receives part of the penalty recovered and the government receives the rest. *Id.* at 986 n.1. The Supreme Court observed in 1958 that the civil provisions in the False Claims Act used to co-exist with the criminal sanctions in the same statute; although the criminal and civil penalties were moved, the civil provisions have not been altered. *Rainwater v. United States*, 356 U.S. 590, 593 n.8 (1958). As a result, when the Eighth Circuit is analyzing the

[20] *Timbs* did not analyze whether there was a categorical exclusion—that is, whether the Excessive Fines Clause categorially does not apply to purely civil claims. *See Timbs*, 586 U.S. at 155.

statutory penalty under the False Claims Act, it is "actually construing the provisions of a criminal statute." *Hays*, 325 F.3d at 992 (quoting *United States v. Bornstein,* 423 U.S. 303, 313 n.8 (1976)).[21] In short, although the False Claims Act appears to be purely civil, the Court has instructed that it is construed as a criminal statute. There is no surprise then that the Excessive Fines Clause applies to FCA claims. Here, in contrast, the penalties in Section 181.723 are not criminal in nature and they are not connected to a criminal action, nor do they require a criminal conviction. *See supra* at 18-20.

Second, Section 181.723 has remedial applications. The penalty could be imposed based on the costs incurred by the government in pursuing the action. *See United States v. Bajakajian*, 524 U.S. at 342 (reimbursing the government for losses is remedial). Plaintiffs cite a statement by Representative Emma Greenman that the prior misclassification law on "detecting, preventing, and punishing misclassification fraud is not working the way it needs to" and that the misclassification laws had to be strengthened. (Pls. Br. 32.) That statement is not particularly instructive, as it is backward looking.

Because the penalties in Section 181.723 are not connected to a criminal proceeding and have remedial applications, the Excessive Fines Clause is not implicated.

[21] On the other hand, the Eighth Circuit has separately concluded as to the Double Jeopardy Clause that penalties under the FCA are not criminal punishment. *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014). And although the Eighth Circuit has stated generally that "[t]he Excessive Fines Clause applies to civil penalties that are punitive in nature," *id.*, both *Aleff* and the case it cites, *United States v. Lippert*, 148 F.3d 974, 977 (8th Cir. 1998), involved civil penalties that followed criminal convictions. There is no such criminal connection here.

2. Even if the Excessive Fines Clause applies, Section 181.723 does not violate the Clause.

Even if it applied, Plaintiffs are unlikely to succeed on their claim that the fines are excessive. There are two elements of an Excessive Fine claim: "(1) did the government extract payment for the purpose of punishment, even in part, and (2) was the extraction excessive?" *Strizheus v. City of Sioux Falls, S. Dakota*, 664 F. Supp. 3d 937, 957 (D.S.D. 2023) (citing *Wright v. Riveland*, 219 F.3d 905, 915 (9th Cir. 2000)). Here, there is no compensatory damages award that the Court can compare the additional fines to. *See Grant on behalf of United States v. Zorn*, 107 F.4th 782, 798-99 (8th Cir. 2024), *cert. filed.* (analogizing punitive damages cases and comparing compensatory damages awarded with the punitive sanction). In other words, the government has not "extract[ed any] payment for the purpose of punishment." *Strizheus*, 664 F. Supp. 3d at 957. Plaintiffs cannot meet the first element of this claim. The undersigned could find no pre-enforcement Excessive Fine case in the Eighth Circuit.

Plaintiffs may have a different argument if some penalty was required—i.e., the general contractor *must* pay a penalty equal to 100 times the awarded compensatory damages. But there is no such scheme here. Instead, the provisions Plaintiffs quarrel with state "up to." The plain language of the statute makes imposition of penalties discretionary; the amount imposed could be zero. And any penalties imposed would be subject to Minnesota Statutes Section 14.045. The agency must consider the following factors when the agency has discretion over a fine:

(1) the willfulness of the violation;

> (2) the gravity of the violation, including damage to humans, animals, and the natural resources of the state;
>
> (3) the history of past violations;
>
> (4) the number of violations;
>
> (5) the economic benefit gained by the person by allowing or committing the violation; and
>
> (6) other factors that justice may require.

Id., subd. 3(a). For repeat violations, the agency must consider additional factors. *Id.*, subd. 3(b). Because no fine has been extracted, and neither is one required, nor is a certain amount required, Plaintiffs do not satisfy the first element of an Excessive Fine claim.

Second, the Court must determine if the fine is excessive. The Court should assess whether the fine is grossly disproportionate to the gravity of the offense. *Bajakajian*, 524 U.S. at 323. "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. The Eighth Amendment "demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime." *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995). The non-exhaustive list of factors to consider includes

> the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, . . . the value of the property forfeited . . . an assessment of the personal benefit reaped by the [fined party], the [fined party's] motive and culpability, and, of course, the extent that the [fined party's] interest and the enterprise itself are tainted by criminal conduct

Id. If there has been no excessive fine extracted, then Plaintiffs are not entitled to a preliminary injunction. *See Strizheus*, 664 F. Supp. 3d at 958.[22] Plaintiffs are unlikely to succeed on their Excessive Fine claim as no fine has been extracted.

D. Section 181.723 is Not Preempted Under the National Labor Relations Act.

"[F]ederal law preempts state law when the two conflict." *Glacier Northwest, Inc. v. Int'l Brotherhood of Teamsters Loc. Union No. 174*, 598 U.S. 771, 776 (2023). NLRA preemption operates differently, however. The NLRA can preempt state law "even when the two only arguably conflict," a principle termed *Garmon* preemption. *Id.* at 776 (emphasis omitted) (citing *San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 245 (1959)). And under *Machinists* preemption, the NLRA can also preempt state law when the state regulates "certain zones of labor activity" that Congress intended to be left unregulated and subject to the "'the free play of economic forces.'" *Chamber of Commerce of the United States v. Brown*, 554 U.S. 60, 62, 65 (2008) quoting *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)). Neither type of preemption applies here.

[22] Plaintiffs may wonder when they can raise their excessive fines argument. They can raise it as a defense in any future administrative action (preserving it for adjudication by the Minnesota Court of Appeals, *see Musta v. Mendota Heights Dental Ctr.*, 965 N.W.2d 312, 320 (Minn. 2021), and can seek federal court review by the United States Supreme Court. Not all claims are entitled to preenforcement review; Plaintiffs will have an adequate remedy.

1. *Garmon* preemption.

Plaintiffs are unlikely to succeed on their *Garmon* preemption claim because there is no arguable conflict between the NLRA and Section 181.723.

Garmon preempts state laws that regulate "activities [that] are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." *Garmon*, 359 U.S. at 244. The party "asserting [*Garmon*] pre-emption must advance an interpretation of the NLRA that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or the Board. The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Glacier*, 598 U.S. at 776 (citation and internal quotation marks omitted).

The purpose of *Garmon* preemption is "to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986) (quoting *Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282, 289 (1986)). "[T]he *Garmon* rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Gould*, 475 U.S. at 286. The U.S. Supreme Court has summarized the bounds of this preemption doctrine as:

> the pre-emption inquiry is whether the conduct at issue was arguably protected or prohibited by the NLRA. . . .
>
> The precondition for pre-emption, that the conduct be 'arguably' protected or prohibited, is not without substance. It is not satisfied by a conclusory

> assertion of pre-emption. . . . If the word 'arguably' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board.

Int'l Longshoremen's Asso. v. Davis, 476 U.S. 380, 394-95 (1986) (quoting *Marine Engineers v. Interlake S. S. Co.*, 370 U.S. 173, 184 (1962)). A party asserting *Garmon* preemption "is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor." *Davis*, 476 U.S. at 395.

Even if the party asserting preemption satisfies the *Garmon* requirements, the NLRA does not necessarily preempt state authority. An exception to *Garmon* preemption exists for situations "where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, a court cannot conclude that Congress deprived the States of the power to act." *Glacier*, 598 U.S. at 777 n.1 (citations and internal quotation marks omitted).

Plaintiffs premise their *Garmon* preemption claim on Section 8(a)(5), which states it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5). And in the context of a representation petition, the employer

must furnish to the NLRB and the union a list of current employees. 29 C.F.R. § 102.62(d)[23] (before election) & 29 C.F.R. § 102.63(b)(1)(i).[24]

There is no preemption. Plaintiffs argue that because federal regulations already require providing employee lists during representation petitions, the following portion of the Law is preempted:

> A person who provides or performs building construction or improvement services in the course of the person's trade, business, occupation, or profession shall not . . . fail to report or disclose to any person or to any local, state, or federal government agency an individual who is an employee pursuant to subdivision 3, as an employee when required to do so under any applicable local, state, or federal law. Each failure to report or disclose an individual as an employee shall constitute a separate violation of this provision.

Minn. Stat. § 181.723, subd. 7(c)(3).[25]

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[23] "[T]he employer shall provide to the Regional Director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular "cell" telephone numbers) of all eligible voters." 29 C.F.R. § 102.62(d).

[24] The [employer's] Statement of Position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit." 29 C.F.R. § 102.63(b)(1)(i)(C).

[25] Based on the record before the Court and the applicable law, the *most* that *Garmon* could preempt is the application of subdivision 7(c)(3) ("fail to report or disclose [employees] when required to do so under any applicable . . . federal law") to the provision of an employee list during a representation petition. Nothing more.

DLI's definition of employee versus independent contractor have no bearing on the misclassification test under the NLRA and the definition in Section 181.723 is not seeking to regulate any conduct under the NLRA. A determination using DLI's test, just like the prior nine-factor test, does not control any obligations or requirements under the NLRA.

There is no evidence in the record that any of Plaintiffs' members have unionized workforces or that there is an imminent representation petition. JMC has had union representatives approach it and asked JMC to hire unionized labor or approached workers on JMC's worksite to try to organize a union campaign. (McGuire Decl. [ECF No. 2] ¶ 18.) JMC provides benefits to its employees—but not independent contractors, but there is no evidence the benefits are provided pursuant to a collective bargaining agreement. (*See id.* ¶ 13.) The same is true for WGC, (Gohman Decl. [ECF No. 3] ¶ 15) and MKCH, (Kompelien Decl. [ECF No. 4] ¶ 18(a)).

Even if *Garmon* preempted the law as it applies to businesses that have to supply employee lists pursuant to the NLRA, there remain several lawful applications—i.e., any time supplying the name of an employee is required by local or state law, or a federal law other than NLRA. Plaintiffs cannot prevail on a facial *Garmon* preemption challenge when there are several lawful applications. *See Salerno*, 481 U.S. at 745. Further, there is no reason to intrude on the State's right to require construction companies to correctly identify employees when the list or identification is required by state law.

2. *Machinists* preemption.

Machinists preemption "forbids both the [NLRB] and States to regulate conduct that Congress intended be unregulated." *Brown*, 554 U.S. at 65 (citations and internal quotation

marks omitted). Even though Congress left some conduct unregulated, states possess "broad authority under their police powers to regulate the employment relationship." *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 85 (2d Cir. 2015). Because of that "traditional power," "pre-emption should not be lightly inferred." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

Although in their *Garmon* preemption argument Plaintiffs argue that the provision of employee lists is already regulated by the NLRA, Plaintiffs appear to argue under *Machinists* preemption that Congress intended no regulation of the definition of "independent contractor."[26] Plaintiffs argue that independent contractors are not entitled to the benefits of a collective bargaining agreement. That may be true, but the essence of Plaintiffs' argument is that the state has no authority to regulate whether someone is an "independent contractor" (as opposed to an employee) because the Statute "may convert an independent contractor not covered by the NLRA into an employee." (Pls. Br. 39.) But this is not a market-freedom *Machinists* argument; this is already a regulated space.[27]

Plaintiffs also argue the law interferes with the collective bargaining process by forcing employers to treat independent contractors as employees and provide them with union benefits. (Pls. Br. 39.) Apart from the fact that there is no evidence in the record

[26] Plaintiffs cite the *Machinists* standard but then do not expressly identify any conduct regulated by Section 181.723 that Congress decided should be "reserved for market freedom." But they quarrel with the definition of "independent contractor." Defendants have made a good faith effort to interpret Plaintiffs' *Machinists* argument.

[27] There may be other *Machinists* theories that are a better fit for this case, but Plaintiffs do not present them.

that Plaintiffs' members have unionized workforces, this argument just repackages Plaintiffs' earlier argument. Plaintiffs believe state law cannot inform whether a person is an independent contractor. Again, there is no reason to believe this is an unregulated space. It cannot be the case that the NLRA states employees do not include independent contractors but that the definition of who is an independent contractor is left strictly to market forces. Indeed, the NLRB uses the common law factors from the Restatement (Second) of Agency, Section 220 to determine whether a person is an employee or an independent contractor. *The Atlanta Opera Inc. & Make-Up Artists & Hair Stylists Union, Loc. 798, Iatse*, 372 NLRB No. 95 (June 13, 2023). Several of those factors mirror the factors found in Section 181.723.

Plaintiffs cite no case holding that a state law delineating who is or is not an employee is preempted by *Machinists*. (Pls. Br. 39 (citing *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370 (8th Cir. 1991) (requiring low bidder on contract to adhere to a labor stabilization agreement was preempted); *Golden State I*, 475 U.S. at 614, (conditioning renewal of taxicab franchise on settlement of ongoing labor dispute was preempted)). To the contrary, this is classically an area where states regulate. *CHCP*, 783 F.3d at 85.

Importantly, whether a particular person is an employee or independent contractor has critical implications for spaces that have nothing to do with the NLRB – i.e., workplaces that are not unionized and are not being organized. As of 2023, only about 13% of wage and salary workers in Minnesota were members of unions. https://www.bls.gov/regions/midwest/news-release/unionmembership_minnesota.htm.

Where there are several constitutional applications of the Law, Plaintiffs cannot prevail on their facial challenge. *See Salerno*, 481 U.S. at 745.

E. Plaintiffs' Procedural Due Process Claim Fails.

Plaintiffs argue that the Law violates their right to procedural due process. This claim is unlikely to succeed.

Procedural due process is implicated when government decisions deprive individuals of liberty or property interests, within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). And some form of a hearing is generally required before finally depriving someone of a liberty or property interest. *Id.* at 333.

Defendants do not dispute that Plaintiffs' members have a property interest in their money and a liberty interest to be free from confinement. (*See* Pls. Br. 40-41.) But the liberty interest is not implicated whatsoever in this case. Plaintiffs' suggestion that they may be denied their liberty—i.e., jailed—without due process is specious. They cite no state statute that would allow a state actor to take a member into custody and sentence them to prison without due process.

Before any deprivation of Plaintiffs' property, there would be process. *See supra* at 16-17. That satisfies *Mathews*; Plaintiffs make no argument that the administrative procedure fails *Mathews*.

Instead, Plaintiffs appear to argue that because the Law was part of an omnibus bill collected shortly before it was voted on, as citizens they were denied the right to speak about the bill. That is wrong on multiple fronts. First, citizens have no procedural due

process right to participate in the legislative process. *Atkins v. Parker*, 472 U.S. 115 (1985) (rejecting due process claim where the plaintiffs challenged a substantive change in the law, as opposed to an individual eligibility determination); *see also Bi–Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441, 445 (1915) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."). Therefore, there is no protected liberty or property interest that implicates the *Matthews* balancing test when it comes to legislation.

Plaintiffs present a novel theory without citation that this Court should not adopt. The limit of such a claim is hard to contemplate. How many hearings must there be? Must every single person be allowed to speak? Everyone, or just everyone affected by the statute? Would every citizen have a protected liberty interest every time the Legislature considered a new criminal statute, or a revision to a criminal statute? That makes no sense.

Second, in fact Plaintiffs were intimately involved in the legislative process, lobbying and testifying against the proposal. *Supra* at 6. House File 4444 was already proceeding through committee when it became part of the omnibus bill. Plaintiffs' novel theory about their due process interest in participating in the legislative process should be rejected—it is not a life, liberty, or property interest protected by the Clause.

Plaintiffs separately argue that because the omnibus bill allegedly violated the single-subject standard in the Minnesota Constitution, their federal procedural due process rights were violated. This is also novel and wrong on multiple counts. As a preliminary

matter, this Court is not presented with a single-subject rule claim and there is no reason for the federal court to opine about it. This Court should decline Plaintiffs' implicit invitation to decide on an expedited basis with limited briefing whether an over 1,000 page bill signed by the Governor last May is invalid as a matter of state constitutional interpretation. Regarding the legislative process, *Matthews* is not implicated in this case because there is no protected life, liberty, or property interest. And if it was, a state constitution does not establish the standard for a federal due process claim. The Court may decide that a state law creates a property interest that implicates the Due Process Clause. *See Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 756 (2005). The Court may also decide that state procedures do or do not satisfy federal due process standards. But deciding if a state scheme violates procedural due process is not the same as importing a state standard into the federal constitution. In other words, the requirements of the federal Due Process Clause do not differ by state and do not depend on the meaning or interpretation of a state constitution. In any event, it is too late for Plaintiffs to bring suit under the single subject clause as the laws have already been codified. *Iowa Dept. of Transp. v. Iowa Dist. Ct. for Linn Cnty*., 586 N.W.2d 374, 376–77 (Iowa 1998) (a claim alleging a single subject defect must be brought before codification).

II. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM FROM THE DENIAL OF AN INJUNCTION.

Even if the Court finds that Plaintiffs have made a showing of likelihood of success, the Court may still deny the motion for a preliminary injunction because Plaintiffs acted with unreasonable delay. For a court to enter a preliminary injunction, the moving party

"must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Roudachevski v. All–American Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) (internal quotation marks omitted). Bare allegations of what is likely to occur are insufficient to establish irreparable injury. *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986).

Plaintiffs' delay in bringing this action is an indication that the harm is not so serious as to justify a preliminary injunction. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 585 U.S. 155 (2018). "[D]elay in seeking relief vitiates much of the force of allegations of irreparable harm." *Hum. Rts. Def. Ctr. v. Sherburne Cnty., Minnesota*, No. CV 20-1817 ADM/HB, 2020 WL 7027840, at *6 (D. Minn. Nov. 30, 2020) (citation and internal quotation marks omitted). The legislature passed the amendments to Section 181.723 on May 19, 2024, with an effective date of March 1, 2025. (Compl. ¶¶ 4, 9.)

Plaintiffs did not file their suit until February 12, 2025, eight months later. (*See* Compl.) Plaintiffs have identified no irreparable injury sustained in the interim. Courts have held that delays comparable to Plaintiffs' fatally undermine assertions of irreparable harm. *See Hotchkiss v. Cedar Rapids Comm. Sch. Dist.*, 115 F.4th 889, 894 (8th Cir. 2024) (finding lack of irreparable harm where plaintiff delayed filing suit 16 months); *Ng v. Bd. of Regents of Univ. of Minn.*, 64 F.4th 992, 998 (8th Cir. 2023) (13-month delay was unreasonable); *Adventist Health Sys./Sunbelt, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 17 F.4th 793, 806 (8th Cir. 2021) (finding lack of irreparable harm where plaintiff delayed suit until one year after adoption of challenged policy); *City of Berkeley, Missouri v.*

Ferguson-Florissant Sch. Dist., No. 4:19CV168 RLW, 2019 WL 1558487, at *2 (E.D. Mo. Apr. 10, 2019) (same, six-month delay); *CHS, Inc. v. PetroNet, LLC*, No. CIV. 10-94 RHK/FLN, 2010 WL 4721073, at *3 (D. Minn. Nov. 15, 2010) (same; eight-month delay); *Minnesota State Coll. Student Ass'n, Inc. v. Cowles*, 620 F. Supp. 3d 835, 855 (D. Minn. 2022) (same; ten-month delay).

Plaintiffs were certainly aware of this Statute and its passage. Plaintiffs now claim that the Statute is unconstitutionally vague, imposes excessive fines, and violates due process. These claims were known to Plaintiffs when the legislature passed the Statute in May 2024. Despite knowing the changes to subdivision 4 were impending, and despite the fact that the penalties provision is already in effect, Plaintiffs sat on their rights until 17 days before the effective date of the changes to subdivision 4. None of the Plaintiffs have offered any excuse for the delay. Any injuries Plaintiffs would suffer during the pendency of litigation are the result of their own inaction. Plaintiffs should not be rewarded with an injunction maintaining the status quo right before the construction season begins after they failed to show "reasonable diligence."[28]

Additionally, Plaintiffs cannot show irreparable harm because there is no threat of harm beyond speculation that the Statute might be enforced against them. To make a showing of irreparable harm, the threat of harm must be to the movant, not to other parties.

[28] The status quo is that Section 181.723 is fully in effect, except the nine-factor independent contactor test currently applies, rather than the fourteen-factor test. (*See* ECF No. 12, at 105 ("Before [March 1, 2025], the previous version of the independent contractor test is in effect."). The only amendment to Section 181.723 that had a delayed effective date was the change to subdivision 4. Laws 2024, chapter 127, article 10, section 8, the effective date.

Dataphase, 640 F.2d at 114. A failure to demonstrate irreparable harm, "standing alone, may be a sufficient basis to deny preliminary injunctive relief." *Caballo Coal Co. v. Indiana Michigan Power Co.*, 305 F.3d 796, 800 (8th Cir. 2002). The harm must be more than mere speculation. *Padda v. Becerra*, 37 F.4th 1376, 1384 (8th Cir. 2022). Mere demonstration of a "possibility of harm" is not enough to satisfy the "irreparable harm" prong. *See Roudachevski v. All-Am. Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011) ("potential harm" is insufficient to justify preliminary injunction).

Here, Plaintiffs fail to allege that Defendants have threatened, commenced, or are about to commence investigations or criminal prosecutions for violations of the Statute. Moreover, Plaintiffs have not even alleged that the Defendants enforced the previous version of the Statute against them. All Plaintiffs have alleged is that the Statute might be difficult to comply with and there might be some future enforcement action. This is not enough to show that "harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. V. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir. 1996).[29]

Moreover, Plaintiffs' only claim of irreparable harm is that they might have to pay monetary fines or spend money litigating payment disputes. This is insufficient to show irreparable harm. "[M]onetary loss, even where substantial, does not, in and of itself,

[29] Plaintiffs have not pleaded that Defendants plan to enforce the Statute against them, which makes their claims unripe. In the absence of an enforcement action either commenced or specifically threatened, there is no actual or imminent concrete application of the statute for the Court to anchor its inquiry. *Navegar, Inc. v. United States*, 103 F.3d 994, 1002 (D.C. Cir. 1997)

constitute irreparable harm." *Corning Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 283 (E.D. Ark. 1983). Plaintiffs have not alleged any specific amount of monetary loss. Instead, they catastrophize that Defendants will levy crippling fines, forcing them to lay off employees or go bankrupt. Even if Plaintiffs face enforcement actions, they can still avoid liability by raising their defenses in administrative proceedings--a possibility that forecloses irreparable injury. *See Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weights [sic] heavily against a claim of irreparable harm."); *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).[30]

III. THE BALANCE OF HARMS TILTS HEAVILY AGAINST A PRELIMINARY INJUNCTION AND THE PUBLIC INTEREST FAVORS DENYING THE MOTION.

The third and fourth factors—balance of harms and public interest—merge when the government is the non-movant. *Morehouse*, 78 F.4th at 1018. When applying the balance of harms factor, the key question is whether the movant's likely harm without a preliminary injunction exceeds the nonmovant's likely harm with a preliminary injunction. *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1347 (8th Cir. 2024). The purpose is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward. *Id.*

[30] The fact that Plaintiffs can challenge fines and penalties through an administrative proceeding renders irrelevant the fact that they cannot sue Defendants for past damages under the Eleventh Amendment. Plaintiffs have an adequate remedy at law through the administrative process and the appellate process. Minn. Stat. § 14.63.

Here, Defendants have a sovereign interest in enforcing a democratically enacted civil statute. Entry of an injunction would severely harm the government and the workers who depend on Defendants to protect their rights. "Any time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The monetary interests of a group of contractors should not outweigh the benefits to all construction workers in Minnesota.

CONCLUSION

Defendants respectfully request that the Court deny the Plaintiffs' motion for preliminary injunction.

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Respectfully submitted,

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