**Case No. 25-1480**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MINNESOTA CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., BUILDERS ASSOCIATION OF MINNESOTA, and J & M CONSULTING, LLC,

Appellants,

v.

NICOLE BLISSENBACH, in her official capacity as the Commissioner of the Minnesota Department of Labor and Industry, KEITH ELLISON, in his official capacity as the Attorney General of Minnesota,

Appellees.

On Appeal from the United States District Court
for the District of Minnesota
The Honorable John R. Tunheim, Presiding
0:25-cv-00550-JRT-JFD

# APPELLANTS' PRINCIPAL BRIEF


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## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The Minnesota law titled, "Misclassification of Construction Employees" (the "Statute"), now in effect, upends the entire construction industry in Minnesota. Appellants, comprised of two trade associations representing their association members' interests and one mutual association member (collectively, the "Members") seek to enjoin enforcement of the Statute. The law imposes a strict yet unconstitutionally vague fourteen-factor test on who qualifies as an independent contractor versus an employee. Violations of the Statute lead to criminal penalties, compensatory damages, and unconstitutionally excessive monetary fines.

Every contractor within the contractual chain must ensure compliance with *each* part of the vague fourteen-factor test. General contractors who fail to comply with any one of the fourteen factors convert their subcontractors' workers into employees. General contractors are also strictly liable for misclassification of workers by their subcontractors because misclassification liability flows upward.

The Members request twenty minutes of oral argument.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eighth Circuit Rule 26.1A, the Members state as follows:

Minnesota Chapter of Associated Builders and Contractors, Inc. ("MNABC") is a Minnesota non-profit corporation with a principal place of business at 10193 Crosstown Circle, Eden Prairie, MN 55344. No publicly held company owns 10% or more of MNABC's stock. MNABC is the Minnesota chapter of Associated Builders and Contractors, Inc., who maintains its headquarters in Washington, D.C. Builders Association of Minnesota ("BAM") is a Minnesota non-profit corporation with a principal place of business at 161 Rondo Ave., Suite 823, Saint Paul, MN 55103–2308. No publicly held company owns 10% or more of BAM's stock. BAM has no parent corporation. J & M Consulting, LLC is a single-member Minnesota limited liability company with a principal place of business at 432 Lakewood Lane NW, Rochester, MN 55901. No publicly held company owns more than 10% of JMC's stock. JMC has no parent corporation

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## JURISDICTIONAL STATEMENT

This case originates from the United States District Court, District of Minnesota. Before the district court, the Members invoked federal question jurisdiction, sought a declaration that the Statute is void, and sought injunctive relief due to violation of their rights. 42 U.S.C. § 1983; 28 U.S.C. §§ 1331, 1343(a)(3); 28 U.S.C. §§ 2201–2202.

The district court denied a preliminary injunction to the Members on March 5, 2025, with judgment entered the following day. (Joint Appendix ("App.") 210–227; R. Doc. 28 and 29; Addendum ("Add.") 007–024.) The Members appealed the order and judgment on March 7, 2025, well within the 30-day window. (App. 228; R. Doc. 30); FED. R. APP. P. 4(a)(1)(A). This Court "shall have jurisdiction of appeals" from an interlocutory order refusing an injunction. 28 U.S.C. § 1292(a)(1).

## STATEMENT OF ISSUES

1. Did the district court make an erroneous legal conclusion in not applying heightened scrutiny on specificity, applicable where criminal prosecution is a possibility, when reviewing whether the Statute is unconstitutionally vague?

Apposite Authorities:

- *D.C. v. St. Louis, Mo.*, 795 F.2d 652 (8th Cir. 1986).
- *Brandt by and through Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022).
- Minn. Stat. § 181.723 (2024).
- Minn. Stat. § 645.49 (2024).

2. Did the district court err when it concluded the Members "have alleged no specific facts that would distinguish their vagueness challenge from a broad, facial challenge"?

Apposite Authorities:

- *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249 (8th Cir. 1981).
- *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992).
- *Gray v. City of Valley Park, Mo.*, 567 F.3d. 976 (8th Cir. 2009).
- *Phelps-Roper v. Ricketts*, 867 F.3d 883 (8th Cir. 2017).

3. Did the district court err in concluding that the Members are unlikely to succeed on their void-for-vagueness claim?

Apposite Authorities:

- U.S. CONST. amend. XIV.
- *Grayned v. City of Rockford*, 408 U.S. 104 (1972).
- *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980).
- *Stephenson v. Davenport Community School* Dist., 110 F.3d 1303 (8th Cir. 1997).

4. In the pre-enforcement context, does the Eighth Amendment's bar on excessive fines apply over the Statute's monetary fines? If so, did the district court make an erroneous legal conclusion in finding that the Members are unlikely to

succeed on their Eighth Amendment claim because there is no actual extraction of monetary fines?

Apposite Authorities:

- U.S. CONST. amend. VIII.
- *United States v. Bajakajian*, 524 U.S. 321 (1998).
- *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014).
- *United States v. Aleff*, 772 F.3d 508 (8th Cir. 2014).

5. Did the district court make an erroneous legal conclusion when it ruled the Members failed to demonstrate irreparable harm, particularly in light of the Members' constitutional rights under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's bar on excessive fines?

Apposite Authorities:

- *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).
- *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009).
- *Baker v. Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466 (8th Cir. 1994).

6. Did the district court err when it ruled that the balance of harms and public interest factors weigh against enjoining enforcement of the Statute?

Apposite Authorities:

- *United States v. Iowa*, 126 F.4th 1334 (8th Cir. 2025).

## STATEMENT OF THE CASE

### I. MNABC AND BAM ARE TRADE ASSOCIATIONS REPRESENTING RESIDENTIAL AND COMMERCIAL CONTRACTORS ACROSS MINNESOTA.

MNABC is a trade association that represents the interests of 330-plus construction-related firms across Minnesota. (App. 009; R. Doc. 1, ¶ 22.) MNABC's 330-plus association members and their approximately 22,000 employees provide commercial and residential construction services across Minnesota. (App. 009; R. Doc. 1, ¶ 22.) BAM is a statewide trade association constituting a collaboration of nine local associations, all of whom collectively represent the interests of homebuilders across Minnesota. (App. 009–010; R. Doc. 1, ¶ 23.) BAM's 900 association members and their approximately 45,000 employees provide residential construction services across Minnesota. (*Id.*) To complete construction projects, MNABC's and BAM's association members regularly use independent contractors and their own employees. (App. 009–010; R. Doc. 1, ¶¶ 22, 24) The general contractor-association members frequently contract with prime subcontractors who may provide the labor, supplies, or both, so that projects may be completed. (App. 003–004; R. Doc. 1, ¶ 10.) Those prime subcontractors may further contract with sub-subcontractors to complete the work. (*Id.*)

MNABC and BAM aid their association members in a variety of ways, such as advocating for the association members' interests before the government, educating them about developments in the industry, and providing networking

opportunities. (App. 008–010; R. Doc. 1, ¶¶ 21–24.) MNABC and BAM will take reasonable steps in challenging laws that are unconstitutional and harm their association members. (App. 008–010; R. Doc. 1, ¶¶ 21, 23.)

## II. ABOUT JMC.[1]

JMC is a Minnesota business and current member of MNABC and BAM. (App. 035–036; R. Doc. 2, ¶¶ 1, 3.) As a general contractor and project manager that provides commercial construction services, to secure construction projects, JMC either relies on existing relationships or participates in the bidding process. (App. 036-037; R. Doc. 2, ¶¶ 2, 7.)

JMC provides various types of construction services across Minnesota. (App. 036; R. Doc. 2, ¶ 4.) These services include framing, excavation, plumbing, mechanical, electrical, drywall, and installation of insulation for commercial new builds and renovation. (*Id.*) On commercial projects, JMC has worked with prime subcontractors who provide only labor, such as performing drywall work. (App. 036; R. Doc. 2, ¶¶ 4–5.) In turn, the prime subcontractors have, at times, further contracted out the drywall work to their sub-subcontractors. (*Id.* ¶ 5.) Those sub-subcontractors then provide workers to perform the drywall work. (*Id.*)

[1] The Members also provided the district court with Declarations from W. Gohman Construction Co. ("WGC") and Mike Kompelien Custom Homes, Inc. ("MKCH"). WGC is a member of MNABC and BAM; MKCH is a member of BAM. (App. 043; R. Doc. 3, ¶ 3); (App. 051; R. Doc. 4, ¶ 3.)

JMC's prime subcontractors, at times, perform work on a very limited basis and complete their assignment within a few days. (App. 037; R. Doc. 2, ¶ 6.) For instance, JMC has hired a flooring prime subcontractor to first lay the tile for the project. (*Id.*) When that occurred, JMC paid the prime subcontractor an hourly rate for its workers. (*Id.*) The work was completed over a series of a few days. (*Id.*)

## III. THE STATUTE PASSES ON MAY 19, 2024, AND ITS TERMS CONFLICT WITH COMMON INDUSTRY STANDARDS.

### A. Legislators Cannot Truly Read or Debate the Entire Omnibus Bill.

The Minnesota Legislature buried the Statute within a 1,492-page Omnibus Bill (the "Omnibus"), H.F. No. 5247.[2] The Omnibus passed last minute on May 19, 2024 before the end of the legislative session. (App. 014–015; R. Doc. 1, ¶ 38.) The Republican minority confirmed it lacked any real opportunity to read or debate the Omnibus before it passed. (App. 162; R. Doc. 12, at 102.) The Omnibus made its way to the senate floor about one hour before the end of the legislative session. (*Id.*) There were not enough paper copies for legislators to read, and the electronic version of the bill crashed. (*Id.*) Legislators could not cast an informed vote because they lacked access to the final language of the bill. (*Id.*)

[2] H.F. No. 5247, MINN. OFFICE OF THE REVISOR OF STATUTES, https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF5247&y=2024&ssn=0, *see* 4th Engrossment (last visited Apr. 22, 2025).

### B. Summary of the Statute.

#### 1. The Statute amends and replaces the predecessor law.

The Statute amends and replaces the prior version of Minn. Stat. § 181.723 (2023)[3] by: (1) adding factors that determine whether a subcontractor is an independent contractor; (2) broadening the scope of prohibited conduct as to classification; and (3) incorporating significantly larger monetary damages and fines, and criminal penalties for misclassification. For the subcontractors to qualify as independent contractors under the Statute, they must meet, among other items, the following factors *at the time services are provided or performed*:

- Own, rent, or lease the tools, vehicles, supplies, or other facilities in their capacity as a "business entity,"[4] when providing construction or improvement services. Minn. Stat. § 181.723, subd. 4(a)(2).
- Provide or perform (or offer) the same or similar construction or improvement services to multiple "persons"[5] or the general public. *Id*. (a)(3).
- Hold a Minnesota tax identification number when required by law. *Id*. (a)(4)(ii).

[3] (App. 196–198; R. Doc. 23-1, at 2–4); Minn. Stat. § 181.723 (2023), MINN. OFFICE OF THE REVISOR OF STATUTES https://www.revisor.mn.gov/statutes/2023/cite/181.723 (last visited Apr. 22, 2025).
[4] Minn. Stat. § 181.723, subd. 1(g) (defining "business entity").
[5] *Id*. subd. 1(a) (defining "persons").

- Receive and retain 1099 forms for income received for building construction or improvement services when required by law. *Id*. (a)(4)(iii).
- File their business and self-employment income taxes with the IRS *and* Minnesota Department of Revenue. *Id*. (a)(4)(iv).
- Provide a completed W-9 federal income tax form to the "person for whom the services were provided or performed" where required by law. *Id*. (a)(4)(v).
- Maintain any required unemployment insurance account and workers' compensation insurance coverage. *Id*. (a)(6)–(7).
- Hold any required business licenses, registrations, and certifications. *Id*. (a)(8).
- Operate under a written contract to provide services that:
    - Must be signed and dated by the independent contractor—while acting in the capacity as a business entity—and the person for whom services are being provided or performed. *Id*. (a)(9)(i).
    - Must be fully executed no later than 30 days after the work commences. *Id*. (a)(9)(ii).
    - Identifies the specific services to be provided or performed. *Id*. (a)(9)(iii).
    - Provides for compensation on a commission or per-job or competitive bid basis and not on any other basis. *Id*. (a)(9)(iii).

- Submit invoices for payment and receive payments for completed services under the written proposal, contract, or change order in the name of the business entity. *Id*. (a)(10). Cash payments are not allowed. *Id*.
- Incur the main expenses and costs related to providing or performing the specific services under the written proposal, contract, or change order. *Id*. at (a)(12).
- 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. *Id*. at (a)(14).

Compared to its predecessor, the Statute also broadens the scope of prohibited conduct, such as:

- A person cannot fail to classify, represent, or treat an individual as an employee, if that individual qualifies as an employee under the Statute. Minn. Stat. § 181.723, subd. 7(c)(2).
- A person cannot fail to report or disclose to any person or any local, state, or federal government agency an individual who is an employee when required to do so under any applicable local, state, or federal law. *Id*. (c)(3).

The Statute's predecessor made it unlawful to "knowingly misrepresent or misclassify an individual as an independent contractor." Minn. Stat. § 181.723, subd.

7(c)(2) (2023). The Statute removes the word "knowingly" from the predecessor version and penalizes for misclassifications, even when innocent or inadvertent. Minn. Stat. § 181.723, subd. 7(c)(2).[6]

**2. The Statute's criminal penalties.**

The State of Minnesota has also instituted a statutory framework where worker misclassification is a crime. As the Statute's enforcement officers, Appellees Nicole Blissenbach, in her official capacity ("DOLI") and Keith Ellison in his official capacity ("MN AG," who with DOLI are collectively "Appellees"), initially represented to the district court "the Statute does not impose criminal penalties for violations." (R. Doc. 22, at 18–19.)

At oral argument, Appellees conceded that violations of the Statute may lead to criminal penalties:

> THE COURT: So is it your view that theoretically, not been specifically argued here, but theoretically someone could be liable for criminal penalties under this statute?
>
> MR. McGUIRE: I can certainly imagine that situation if there were an intent to intentionally misclassify their workers. That does not render the statute criminal by nature.

(Tr. 25:20–26:1.)

[6] "Knowingly" appears in the Statute, but in the context of personal liability. Minn. Stat. § 181.723, subd. 7(d).

Appellees then reversed themselves and stated they were "not sure" whether violating the Statute leads to criminal penalties:

> THE COURT: If all they did was simply misclassify employees as independent contractors and do it over and over again, could they get charged with a crime?
>
> MS. KIMBLE: I'm not sure. I think it would depend on the specific relevant criminal statute. I'm not sure if that would be enough . . . [.]

(Tr. 30:20–25.)

The district court later ruled: "The Statute itself only contemplates civil fines, but the parties acknowledge that there is some possibility of criminal prosecution from violations of the Statute." (App. 214; R. Doc. 28, at 5; Add. 011). The district court's conclusion squares with the Legislative Auditor's 2007 report on "Misclassification of Employees as Independent Contractors" referenced by Appellees in their district court briefing, which states penalties for employee misclassification under Minnesota law include "administrative, civil *and criminal* penalties." (R. Doc. 22, at 4–5) (emphasis added).[7]

Various examples exist concerning how the Statute imposes criminal penalties. For example, if the Members consider their subcontractors to be independent contractors, they would not provide the subcontractors' workers with

[7] OFFICE OF THE LEGISLATIVE AUDITOR, *Evaluation Report | Misclassification of Employees as Independent Contractors*, at 53 (Nov. 2007) https://www.lrl.mn.gov/docs/2007/other/070704.pdf.

employee-specific benefits or wage supplements. Nevertheless, if the workers are misclassified under the Statute, the Members may be criminally liable (gross misdemeanor) under Minn. Stat. § 181.74, subd. 1 (2024) due to failure to provide those benefits or wage supplements. A gross misdemeanor includes a maximum fine of $3,000.00 and up to 364 days of imprisonment. Minn. Stat. § 609.02, subd. 4 (2024); Minn. Stat. § 609.0341, subd. 1 (2024).

Similarly, Members who are commercial contractors must provide workers' compensation and unemployment benefits to their employees, or else be criminally liable (misdemeanor) under Minn. Stat. § 181.721, subds. 1, 4–5 (2024). A misdemeanor includes a jail sentence of no more than 90 days, a fine of no more than $1,000.00, or both. Minn. Stat. § 609.02, subd. 3 (2024). If the commercial contractors consider their subcontractors to be independent contractors for purposes of the Statute, then they would not have obtained workers' compensation insurance coverage or provided unemployment benefits to the subcontractors' workers. Nevertheless, if the Statute is applied so those workers are considered employees, then the commercial contractors may be criminally liable for failure to provide workers' compensation insurance coverage and unemployment benefits.

Finally, where a contractor misclassifies a subcontractor as an independent contractor, the contractor logically would not pay the subcontractor's workers as employees—*i.e.*, provide the workers with minimum wage, overtime payments,

commissions, and benefits. Nevertheless, Appellees may claim that the contractor committed wage theft with intent to defraud, which triggers the criminal penalties under Minn. Stat. § 609.52, subd. 3 (2024), which provides for imprisonment between 90 days to 20 years and a range of fines. *Id*. subd. 3(1)–(5).

**3. The Statute's compensatory damages and monetary fines.**

In addition to the criminal penalties, the Statute, unlike its predecessor, also expressly imposes compensatory damages and monetary fines:

- Compensatory damages to the misclassified individuals including the loss of legally owed wages and various benefits, recoverable in a private action. Minn. Stat. § 181.723, subd. 7(g)(1); Minn. Stat. § 181.171, subd. 1 (2024).
- A monetary fine up to $10,000.00 for each misclassified individual. Minn. Stat. § 181.723, subd. 7(g)(2).
- A monetary fine up to $10,000.00 for each separate violation of Minn. Stat. § 181.723, subd. 7, which includes each failure to report each individual as an employee to a local, state or federal agency. *Id*. (g)(3).
- A monetary fine of $1,000.00 per day for delaying, obstructing, or failing to cooperate with DOLI's investigation into misclassification. *Id*. (g)(4).
    - Hindering or delaying DOLI's investigation under Minn. Stat. § 181.723 is also a misdemeanor offense. Minn. Stat. § 177.32, subd. 1(1) (2024).

### 4. The Statute conflicts with common industry practice.

The Members follow the below common industry practices, but if they do, they may trigger violations of the Statute and subject themselves to the Statute's consequences:

| The Statute's Requirements | Conflicts with Common Industry Practice |
|---|---|
| Subcontractors must operate under a *written* contract "to provide or perform the specific services for the person[.]" Minn. Stat. § 181.723, subd. 4(a)(9) (emphasis added). | The general contractor has a longstanding relationship with the subcontractor. (App. 053; R. Doc. 4, ¶ 13.) The two operate under a good faith verbal agreement. (*Id.*)<br>Examples include a crane company-subcontractor who verbally agrees to set the trusses for a project and bills out hourly. (*Id.* ¶ 13(a).) Or the general contractor hires a cleaner-subcontractor to clean the project before owner-occupancy and pays the cleaner's hourly rate without documentation. (*Id.* ¶ 13(b).) |

| The Statute's Requirements | Conflicts with Common Industry Practice |
|---|---|
| Written contracts must be executed no later than 30 days after work commences. Minn. Stat. § 181.723, subd. 4(a)(9)(ii). | Even after exercising reasonable efforts, general contractors cannot always secure fully written contracts from their subcontractors within the 30-day window. (App. 037–038; R. Doc. 2, ¶¶ 8–9); (App. 044–45; R. Doc. 3, ¶¶ 7–8); (App. 051–052; R. Doc. 4, ¶¶ 7–8.)<br>JMC and MKCH cannot recall a single project where all the contracts between the general contractor and prime subcontractors were executed within 30 days of work commencing. (App. 038; R. Doc. 2, ¶ 10); (App. 052; R. Doc. 4, ¶ 8.)<br>For the residential and commercial projects that WGC oversaw in 2024, valued over $500,000.00, not one project had fully executed contracts from every subcontractor within 30 |

| The Statute's Requirements | Conflicts with Common Industry Practice |
|---|---|
| | days of work commencing. (App. 045; R. Doc. 3, ¶ 10.)<br><br>For very complex construction projects where there are tiers of subcontractors, WGC cannot recall a single instance where all contracts between WGC and its prime subcontractors were executed within 30 days after work commencing. (*Id.* ¶ 9.) |
| Subcontractors must be paid on "a commission or per-job or competitive bid basis and not on any other basis." Minn. Stat. § 181.723, subd. 4(a)(9)(iv). | The general contractor pays its subcontractor under a master service agreement, which acts as an umbrella agreement between the general contractor and subcontractor for multiple projects. (App. 053–054; R. Doc. 4, ¶ 14(b).) |
| Subcontractors must be paid after submitting an invoice. Minn. Stat. § 181.723, subd. 4(a)(10). | Where there is a master service agreement between the general contractor and subcontractor, the |

| The Statute's Requirements | Conflicts with Common Industry Practice |
|---|---|
| | general contractor pays the subcontractor without receiving an invoice because the parties have an agreed-upon price. (App. 053–054; R. Doc. 4, ¶ 14(a).) |
| Subcontractors must incur the "main expenses and costs" for the project. Minn. Stat. § 181.723, subd. 4(a)(12). | The general contractor provides the raw materials for the project, the subcontractors provide only the labor. (App. 048–049; R. Doc. 3, ¶ 21.) |
| Subcontractors may realize additional profit or suffer a loss. Stat. § 181.723, subd. 4(a)(14). | The general contractor executes a "time and materials" contract with the owner. (App. 044; R. Doc. 3, ¶ 6.) Under that type of contract, which is standard in the industry, subcontractors and their workers are paid a set hourly rate regardless of their performance on the project and regardless of what happens on the project; thus there is no |

| The Statute's Requirements | Conflicts with Common Industry Practice |
|---|---|
| | opportunity to realize additional profit or suffer a loss on that project. (*Id.*) |

## IV. THE MEMBERS MUST SUFFER THROUGH APPELLEES' ENFORCEMENT OF THE STATUTE, EVEN IF THE MEMBERS TRY TO REASONABLY COMPLY.

### A. Appellees Will Enforce the Statute Against the Members.

Appellees undeniably will enforce the Statute even if the Members attempt to comply:

- The MN AG created an advisory taskforce on how to "put an end" to the problems surrounding employee misclassification and the MN AG has a known history of going after employers for alleged employee misclassification. (App. 011; R. Doc. 1, ¶ 28); (App. 066; R. Doc. 12, at 6.)
- When Commissioner Blissenbach voiced support for H.F. No. 4444, whose terms were later largely incorporated into the Statute, she erroneously claimed, "The legislation provides more clarity which will promote compliance, allow investigations to be more impactful, streamline and expand enforcement authority, and strengthen the consequences for the employers who do in fact violate the law." (App. 011–012; R. Doc. 1, ¶ 28.)
- For the 2026–2027 Biennial Budget, DOLI proposed funding for an additional 2.5 full time labor investigators, "to increase and strengthen enforcement of

worker misclassification laws in construction and non-construction industries." (App. 012; R. Doc. 1. ¶ 29); (App. 102; R. Doc. 12, at 42; Add. 001.)

- Governor Walz proposed $281,000.00 for fiscal year 2026 and $286,000.00 for each proceeding year "to increase funding for the enforcement of worker misclassification laws." DOLI estimated that misclassification enforcement action will generate "$712,000 in misclassification-related penalties per year," with an additional $90,000.00 per year if additional staff are added. (App. 012–013; R. Doc. 1. ¶ 29); (App. 101; R. Doc. 12, at 41; Add. 001.)

Indeed, even if the Members exercise reasonable efforts to comply with the Statute, they may still face an enforcement action. They could also exercise reasonable efforts to ensure their prime subcontractors comply with the Statute. (App. 039; R. Doc. 2 ¶ 15); (App. 047, R. Doc. 3 ¶ 18); (App. 054–055; R. Doc. 4, ¶ 15.) For instance, regardless of the general contractors' diligence, a substantial risk exists that the subcontractors below them in the contractual chain do not meet every part of the fourteen-factor test. Many subcontractors do not even know about the Statute's existence. (App. 040; R. Doc. 2, ¶ 19.) Under the Statute, the general contractors are subject to liability not only for the subcontractors' failures, but the sub-subcontractors' failures.

Even if the subcontractors are aware of the Statute, the Members cannot guarantee that their prime subcontractors have strictly complied. For instance:

- The general contractors could confirm that their subcontractors receive Form 1099s, but the Members do not know if the prime subcontractors retain those forms as required by the Statute. The general contractors do not control whether these subcontractors retain the Form 1099s.
- While the Statute, Minn. Stat. § 181.723, subd. 4(4)(iv), requires independent contractors to have filed tax returns with the IRS and the Minnesota Department of Revenue in the previous 12 months, the subcontractors working with general contractors have historically not shared any business or self-employment tax returns filed with the IRS or Minnesota Department of Revenue.

(App. 039–040; R. Doc. 2, ¶¶ 15–16); (App. 047–048, R. Doc. 3, ¶¶ 18–19); (App. 054–055; R. Doc. 4, ¶¶ 15–16.)

Moreover, the Members cannot know with certainty whether the sub-subcontractors have strictly complied with the Statute, because the Members often do not know who all the sub-subcontractors are. (App. 040, R. Doc. 2, ¶ 17; App. 048, R. Doc. 3, ¶ 20; App. 055; R. Doc. 4, ¶ 17.) Where sub- subcontractors fail to comply with the fourteen-factor test, their workers may also become the general contractors' employees. Minn. Stat. § 181.723, subd. 4(b)(3)–(4); (App. 176; R. Doc.

12, at 116.) The general contractors then must incur the expenses associated with treating those workers as employees, face the Statute's criminal penalties, compensatory damages, and monetary fines.

## V. PROCEEDINGS BEFORE THE DISTRICT COURT.

The Statute took effect on March 1, 2025. (App. 003; R. Doc. 1, ¶ 9); (App. 211; R. Doc. 28, at 2; Add. 008.) Several weeks beforehand, the Members sued and sought a preliminary injunctive relief that would have prevented Appellees from enforcing the Statute. (App. 001; R. Doc. 1); (App. 057; R. Doc. 8.) Relevant here, the Members asserted that the Statute violated the Due Process Clause of the Fourteenth Amendment because it is unconstitutionally vague. (App. 026–027; R. Doc. 1, ¶¶ 71–80.) The Members also asserted that because the Statute imposes stacking monetary fines arising from inadvertent, innocent, or technical violations, the Statute violates the Eighth Amendment's bar on excessive fines. (App. 028; R. Doc. 1, ¶¶ 81–85.)

The day after the Members filed suit, they moved for preliminary injunctive relief. (App. 057; R. Doc. 8.) On the same day, the Members and Appellees appeared before the district court to discuss a briefing schedule and motion hearing date. (App. 189; R. Doc. 16.) The district court set the motion hearing for February 26, 2025. (App. 192; R. Doc. 20.)

One week after the motion hearing, the district court denied preliminary injunctive relief to the Members. (App. 210–225; R. Doc. 29, at 1–16; Add. 007–22.) The district court ruled that the Members were unlikely to succeed on the merits of their void-for-vagueness and Eighth Amendment claims. As to the void-for-vagueness claim, the district court acknowledged that violations of the Statute may lead to criminal prosecution, but it nonetheless did not apply heightened scrutiny on specificity. (App. 214; R. Doc. 28, at 5–6; Add. 011–012.) The district court ruled the Statute was not unconstitutionally vague, the Members "just isolate certain terms and speculate about possible interpretations," and DOLI's Misclassification FAQs (the "FAQs") qualify as "clarifying resources." (App. 216; R. Doc. 28, at 7; Add. 013.) And the district court held that the "extensive administrative appeals process"—triggered after DOLI issues a compliance order—prevents arbitrary enforcement. (App. 217–218; R. Doc. 28, at 8–9; Add. 014–015); Minn. Stat. § 177.27, subd. 4. On the Members' Eighth Amendment claim, the district court ruled that the claim "may be premature" because no fines have been imposed, the Statute imposes only civil penalties, and the fines are not grossly disproportional. (App. 218–220; R. Doc. 28, at 9–11; Add. 015–017.) The district court further ruled that the Members alleged only economic harm, which does not constitute irreparable harm, and that the remaining *Dataphase* factors weighed against injunctive relief. (App. 223–224; R. Doc. 28, at 14–15; Add. 020–021.) The clerk entered judgment

the next day. (App. 226; R. Doc. 29, at 1; Add. 023.) Then on March 7, 2025, the Members timely filed their Notice of Interlocutory Appeal. (App. 228; R. Doc. 30 at 1.)

## SUMMARY OF ARGUMENT

This case calls for the extraordinary remedy of preliminary injunctive relief that is applicable statewide.

The district court abused its discretion in denying preliminary injunctive relief to the Members. This Court should reverse the district court's order and remand with instructions that the district court enter a preliminary injunction that enjoins Appellees from enforcing the Statute. In doing so, this Court maintains the status quo: No enforcement of the Statute pending resolution of this lawsuit. *West Plains, L.L.C. v. Retzlaff Grain Company Inc.*, 870 F.3d 774, 785 (8th Cir. 2017) ("The purpose of a preliminary injunction, like the one imposed here, is to mitigate the immediate effect of the harm, *i.e.*, preserve the status quo.").

To obtain injunctive relief, the Members must first make a threshold showing they are likely to succeed on the merits. *Planned Parenthood Minnesota, et al. v. Rounds et al.*, 530 F.3d 724, 730 (8th Cir. 2008) (en banc). Assuming the Members make that threshold showing, the Court then considers the remaining *Dataphase* factors. *Id*. at 732 (citation omitted).

***Succeeding on the void-for-vagueness claim***. No dispute exists that violations of the Statute may lead to criminal penalties. *D.C. v. City of St. Louis, Mo.*, 795 F.2d 652, 654 (8th Cir. 1986) (citations omitted); (*supra*, pp. 10–11.) Yet, in error, the district court still did not apply heightened scrutiny on specificity when reviewing the Statute. (App. 214–215; R. Doc. 28, at 5–6; App. 011–12.)

This Court, applying heightened scrutiny, should conclude the Statute is unconstitutionally vague. Indeed, the material terms are so vague that the Members, those of common intelligence, cannot understand what is prohibited. *Stephenson v. Davenport Community School Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1997). The Members must guess as to whether following common industry practice triggers statutory violations.

In ruling the Members would not succeed on their void-for-vagueness claim, the district court erroneously boiled the Members' arguments down to how they "just isolate certain terms and speculate about possible interpretations." (App. 216; R. Doc. 28, at 7; Add. 013.) The Members identified specific vague terms within the fourteen-factor test because this test is all inclusive—every factor must be met to avoid the presumption that the worker is an employee. The test likens to having fourteen separate pillars forming the foundation of a house. If one pillar falls, the house collapses. The Statute is the house. The Statute likewise collapses if one factor is found unconstitutionally vague.

The Members also did not speculate possible interpretations. Instead, the Members provided a myriad of common industry practices and how following those practices lead them to guessing on whether their conduct violates the Statute. (R. Doc. 11, at 14–15, 27–29.)

Additionally, the Statute is unconstitutionally vague because it lacks explicit enforcement standards and invites arbitrary and discriminatory enforcement by Appellees. *Stephenson*, 110 F.3d at 1308. The district court's order does not comment on the Statute lacking those enforcement standards. (*See generally* App. 210–225; R. Doc. 28; Add. 007–22.) Instead, the district court ruled that the Statute is not vague because DOLI published the FAQs, which act as "clarifying resources." (*Supra*, p. 22.) The FAQs, which are non-binding and may be changed at DOLI's whims, offer non-responsive or circular answers and conflict with the Statute.

The district court also ruled that if the Members are subject to monetary fines, they may rely on the "extensive administrative appeals process that prevents arbitrary enforcement by curbing D[O]LI's discretionary power[.]" (App. 218; R. Doc. 28, at 9; Add. 015.) The administrative process is found under Minn. Stat. § 177.27, subd. 4, entirely separate from the Statute. (*Id.*)[8] The district court erred when relying on the separate administrative process. The Statute *itself* must provide

[8] The Statute does not incorporate Minn. Stat. § 177.27 by reference; the Statute generically cites to "chapter[] 177. Minn. Stat. § 181.723, subd. 3, subd. 4(b)(4).

"explicit standards for those who apply them[.]" *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Minn. Stat. § 177.27, subd. 4 authorizes DOLI to issue compliance orders; it does not provide any explicit enforcement standards for the Statute.

Moreover, Minn. Stat. § 177.27, subd. 4 only applies after the compliance order's issuance. ("The department shall serve the order upon the employer . . . 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."). Contrary to the district court's order, the law makes clear, however, the Members are entitled to know what is prohibited *before* enforcement action occurs. *Stahl v. City of St. Louis, Mo*., 687 F.3d 1038, 1041 (8th Cir. 2012) ("[T]he problem is that the ordinance does not provide people with fair notice of when their actions are likely to become unlawful . . . The ordinance criminalizes speech if it has the consequence of obstructing traffic, but the speaker does not know if his or her speech is criminal until after such an obstruction occurs."). And even when the administrative process starts, the Members are at the whims of Appellees' enforcement officers because the Statute provides no explicit standards.

***Succeeding on the Eighth Amendment claim***. The district court also ruled the Members are unlikely to succeed on their Eighth Amendment claim because: (1) Appellees have not yet imposed any fines; and (2) the imposed fines are not

"grossly disproportional" because they are limited by the factors in Minn. Stat. § 14.045, subd. 3 (2024)—factors that must be balanced when determining the fines' amount. (APP. 218–220; R. Doc. 28, at 9–11; Add. 015–017.)

The district court erred when ruling the Members are not likely to succeed on this pre-enforcement action. The United States Constitution explicitly protects against excessive fines. U.S. CONST. amend. VIII. This protection is a fundamental right. *Timbs v. Indiana*, 586 U.S. 146, 149 (2019); *Zink v. Lombardi*, 783 F.3d 1089, 1111 (8th Cir. 2015) ("Fundamental rights consist of only those rights that are 'explicitly or implicitly guaranteed by the Constitution."') (citation omitted). The Court should rule that the Members need not wait for actual extraction of fines to seek an injunction that protects their Eighth Amendment rights. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–160 (2014); *Jones v. Jegley*, 947 F.3d 1100, 1103 (8th Cir. 2020); *Employers Ass'n Inc. v. United Steelworkers of Am., AFL-CIO-CLC*, 32 F.3d 1297, 1299 (8th Cir. 1994) (citations omitted).

In addition, the district court erred when it limited its review to the potential *amount* in monetary fines. The Statute's monetary fines are also grossly disproportional because of how they are assessed in the first instance. The Statute first lures contractors into violations by using vague terms, and then imposes stacking fines for the alleged misclassification, even where the misclassification was innocent or inadvertent.

***Irreparable harm***. The district court erred in limiting its review on irreparable harm to the Members' economic harm. (App. 223; R. Doc. 28, at 14; Add. 020.) Irreparable harm arises when the government infringes on one's constitutional rights. *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 866 (8th Cir. 1977). The loss of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury."' *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). JMC demonstrated how the Statute violating its constitutional rights constitutes irreparable harm. (App. 007, 020–028; R. Doc. 1, ¶¶ 18, 53–85.) Because JMC is a representative member of MNABC and BAM, its suffering of irreparable harm represents all the association members suffering that same harm. (*See* APP. 036; R. Doc. 2, ¶ 3.)

The Members further demonstrated they lack an adequate legal remedy because Appellees enjoy sovereign immunity. (App. 026; R. Doc. 1, ¶ 69.) The Members cannot sue Appellees to recover money damages. The Members briefed that same issue. (R. Doc. 11, at 43–44.) The district court did not comment on Appellees' sovereign immunity. (App. 223–224; R. Doc. 28, at 14–15; Add. 020–021.) Had the district court correctly accounted for Appellees' sovereign immunity, it would have ruled that the Members lack an adequate legal remedy, and thus, they have demonstrated irreparable harm.

***Balance of equities and public interest***. These factors merge when the government is the non-moving party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The Statute violates the U.S. Constitution because it is unconstitutionally vague and imposes excessive fines. The Members' rights under the U.S. Constitution defeat Appellees' state interests in enforcing the Statute. In sum, this Court should issue a preliminary injunction that enjoins enforcement of the Statute.[9]

## ARGUMENT

### I. PRELIMINARY INJUNCTIVE RELIEF: STANDARD OF REVIEW.

This Court's review of the district court's denial of preliminary injunctive relief is "'layered.'" *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1133 (8th Cir. 2019). The Court reviews factual findings for clear error, reviews legal conclusions *de novo*, and the "ultimate decision to grant [or deny] the injunction is reviewed for abuse of discretion." *Id*. (cleaned up and citation omitted); *D.M. by Bao Xiong v. Minn. State High School League*, 917 F.3d 994, 999 (8th Cir. 2019) (citation and quotation omitted). The district court abuses its discretion when it "'rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions.'" *Brandt by and through Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022) (citing

[9] The district court acknowledged that MNABC and BAM assert associational standing because JMC has standing to sue. (App. 211; R. Doc. 28, at 2 n.1; Add. 008.) To date, Appellees have not expressly argued that the Members lack standing.

*Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008)).

A factual finding is not clearly erroneous if it is supported by substantial evidence in the record. *Brandt*, 47 F.4th at 669. However, "'clear error exists when despite evidence supporting the finding, the evidence as a whole leaves us with a definite and firm conviction that the finding is a mistake.'" *Id*. (citation omitted).

This Court will not disturb the district court's denial of preliminary injunctive relief if the district court's decision "'remains within the range of choice available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment.'" *Xiong*, 917 F.3d at 999 (citation omitted).

## II. THE *DATAPHASE* FACTORS ALL WEIGH TOWARDS ISSUING PRELIMINARY INJUNCTIVE RELIEF.

In deciding whether the Members are entitled to preliminary injunctive relief, the Court considers the following factors:

(1) Whether the Members are likely to succeed on the merits of their claims;

(2) Whether the Members are likely to suffer irreparable harm absent injunctive relief;

(3) Whether the balance of equities tips in favor of the Members; and

(4) Whether the injunction furthers public interest.

*Dataphase Systems, Inc. v. CL Systems, Inc*., 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *Nken*, 556 U.S. at 435.

In reviewing whether to issue a preliminary injunction, the Members must first make a threshold showing they are likely to succeed on the merits. *Planned Parenthood Minn., et al. v. Rounds et al*., 530 F.3d 724, 730 (8th Cir. 2008) (en banc). The Members need not guarantee that they will succeed on each claim. The Members need only show that there is a "greater than fifty percent likelihood of prevailing on the merits" on each claim. *Edwards v. Beck*, 946 F.Supp.2d 843, 847 (E.D. Ark. 2013) (citing *Rounds*, 530 F.3d at 732–33). Assuming the Members make that threshold showing, the Court then considers the remaining *Dataphase* factors. *Rounds*, 530 F.3d at 732–33.

Based upon the foregoing, the Members have made a threshold showing they are likely to succeed on the merits of their claims and the remaining *Dataphase* factors favor the issuance of a preliminary injunction.

### A. The Members are Likely to Succeed on their Claims the Statute Is Unconstitutionally Vague.

This Court should find the district court erred in failing to declare the Statute void-for-vagueness. In determining whether a law is void, this Court considers: (1) whether the law provides adequate notice of the prohibited conduct; and (2) whether the law lends itself to arbitrary enforcement. *U.S. v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002), *rehearing on banc denied*; *Stephenson v. Davenport*

*Community School Dist.*, 110 F.3d 1303, 1309–10 (8th Cir. 1997); *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

"[D]ue process has two requirements: that laws provide notice to the ordinary person of what is prohibited and that they provide standards to law enforcement officials to prevent arbitrary and discriminatory enforcement." *Geiger v. City of Eagan*, 618 F.2d 26, 28 (8th Cir. 1980). *Geiger* held that vague laws offend several important values. First, this Court explained "'that laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.'" *Id.* (citation omitted) Second, this Court explained "'if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.'" *Id.* (citation omitted). "'Vague law impermissibly delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" *Id.* (citation omitted).

**1. Heightened scrutiny on specificity applies over the Statute.**

The Court should first find the district court erred in not applying heightened scrutiny when evaluating the vagueness of the Statute. "When violations carry criminal penalties, a strict test of specificity is applied in reviewing the vagueness of a statute." *D.C. v. St. Louis, Mo.*, 795 F.2d 652, 654 (8th Cir. 1986) (citing *Grayned*,

408 U.S. 108–09) The district court recognized "the parties acknowledge that there is some possibility of criminal prosecution from violations of the Statute." (*Supra*, p. 11.) As a result, heightened specificity should apply.

Nevertheless, despite finding the possibility of criminal violations, the district court did not apply heightened scrutiny because the Statute has a civil label. (App. 214–215; R. Doc. 28, at 5–6.) Under Minnesota statutory interpretation cannons, however, a law's label means nothing. Minn. Stat. § 645.49 (2024); *Cellco P'ship v. Hatch*, 431 F.3d 1077, 1083 (8th Cir. 2005) (relying on Minnesota Chapter 645 to guide the interpretation of a Minnesota statute). When the district court recognized that violations of the Statute may lead to criminal penalties, following Minn. Stat. § 645.49 and *St. Louis*, the district court had to apply heightened scrutiny and it erred in not doing so.

The district court ruled that the Members had to present "'clearest proof"' that the Statute imposes criminal penalties, despite its civil label. (App. 214–215; R. Doc. 28, at 5–6; Add. 011–012) (citation omitted). Misclassifying a worker under the Statute triggers criminal penalties. (*Supra,* pp. 11–12.) The Statute is part of the broader Chapter 181, which imposes criminal penalties when contractors fail to pay legally owed benefits or wage supplements; or where they fail to provide workers' compensation and unemployment insurance benefits. Minn. Stat. §§ 181.74, subd. 1, 181.721, subd. 5. Further, failing to pay an employee's wages may arise to

criminal wage theft. Minn. Stat. § 609.52, subd. 1(13). Given these facts, the district court should have applied heightened scrutiny to the Statute.

### 2. The Statute Fails to Provide Adequate Notice of Prohibited Conduct.

By applying heightened scrutiny on specificity, the Court should reverse the district court and rule that the Members are likely to succeed on their void-for-vagueness claim because the Statute fails to provide adequate notice of the prohibited conduct. *United States v. Washam*, 312 F.3d 926, 929 (8th Cir. 2002), *rehearing on banc denied*; *Stephenson v. Davenport Community School Dist.*, 110 F.3d 1303, 1309–10 (8th Cir. 1997); *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Indeed, average citizens cannot understand the fourteen-factor test's language and the test leaves too many open questions on what is prohibited. *Stephenson*, 110 F.3d at 1309–10 (8th Cir. 1997) ("In short, a regulation is void-for-vagueness if it 'forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application[.]"') (citation omitted).

*Geiger* is compelling, especially because neither the district court nor Appellees distinguished this case. In *Geiger*, this Court reversed the district court's denial of preliminary injunctive relief to the plaintiff. 618 F.2d 26 (8th Cir. 1980). There, the plaintiff challenged, as vague, a city ordinance that barred the sale, transfer, and possession of "drug-related devices." *Id*. at 27–28. This Court ruled that

the ordinance was unconstitutionally vague on its face, even though the ordinance defined "drug-related device" and provided a list of characteristics, because the list of characteristics left open too many questions on what was prohibited. *Id*. at 28–29.

Despite *Geiger*, the district court instead relied on *Thorburn v. Austin*, which is inapplicable. In *Thorburn*, the ordinance not only included "specific definitions" to inform the average person on what was prohibited as to residential picketing, but the ordinance also sufficiently informed the average person on what was barred. 231 F.3d 1114, 1121 (8th Cir. 2000). Here none of the material terms are defined and the average person does not know what is barred. Further, although the district court criticized the Members for isolating certain terms and speculating about possible interpretation, the fourteen-factor test requires such isolation and speculation. (*Supra*, p. 22.) Under the fourteen-factor test, the presumption is employee status unless all the factors are met at the time the services are provided or performed. Minn. Stat. § 181.723, subd. 4(a). If any one of the factors is unconstitutionally vague, the entire fourteen-factor test is unconstitutionally vague.

**a. "Main expenses *and costs related to*" is vague.**

The Statute vaguely requires that, to be an independent contractor, the individual must incur the "main expenses *and costs related to* providing or performing the specific services under the written proposal, contract, or change order." Minn. Stat. § 181.723, subd. 4(a)(12) (emphasis added). Yet the Statute

fails to define "main expenses and costs related to" providing or performing the specific services. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (statute void-for-vagueness on its face because, "[w]ithout a definition of 'violence,' the statute lacks any 'narrowly drawn, reasonable and definite standard[]' identifying the expression that is subject to the statute's restriction").

Industry standard dictates that the general contractor provides the raw materials. (App. 048–049; R. Doc. 3, ¶ 21.) Subcontractors routinely provide only the labor to install the raw materials. (App. 036; R. Doc. 2, ¶ 4); (App. 043; R. Doc. 3, ¶ 5.) For instance, the general contractor may provide the raw lumber materials for a subcontractor to install. The Statute, however, does not define the meaning of "main expenses and costs related to providing or performing the specific services" under the written contract. Clearly, lumber material is a major cost and expense that is necessary to complete the framing. Yet, the Statute is unclear whether, in this example, the lumber material is considered a main expense and costs related to the service of installing the lumber. This ambiguity leaves contractors vulnerable to misclassification claims and the corresponding fines, penalties, and criminal prosecution if they classify a subcontractor as independent when the subcontractor only provides labor and not the materials.

The district court erroneously ruled that "main expenses and costs" is not vague because the phrase "main expenses" arose in *Nelson v. Levy*, 796 N.W.2d 336

(Minn. Ct. App. 2011). *Levy,* however, concerned an appeal of an unemployment benefits decision and dealt with an independent contractor law arising under Minnesota's unemployment compensation laws. *Id*. at 339–340. The full statutory provision at issue in *Levy* was more narrowly drafted; "incurs the main expense related to the service or work that the independent contractor performs under contract." 796 N.W.2d at 340. The language before this Court provides, "incurs the main expenses *and costs related to* providing or performing the specific services under the written proposal, contract, or change order." Minn. Stat. § 181.723, subd. 4(a)(12) (emphasis added). And so, the Statute's current language is significantly different than the language in *Levy* and district court erred in relying on *Levy*.

**b. "Commission or per-job or competitive bid basis and not on any other basis" is vague.**

Additionally, the phrase paid on a "commission or per-job or competitive bid basis and not on any other basis" is unconstitutionally vague. Minn. Stat. § 181.723, subd. 4(a)(9)(iv). While, this factor was present in the predecessor law, Minn. Stat. § 181.723, subd. 4(a)(6) (2023), the Statute still does not define what it means to be paid on a "per-job" basis. It is unclear whether it means paid per construction project, or per specific job task performed on the project (tasks could include installation of drywall, electrical work, or framing), or paid on time and materials. *See Stephenson*, 110 F.3d at 1309–10 (concluding that the ordinance was unconstitutionally vague under the Fourteenth Amendment's Due Process Clause

because the critical term, "gang," was not defined). Furthermore, the Statute does not specify whether general contractors paying subcontractors under a master service agreement qualifies as payment on a commission, per-job, or competitive bid process. (App. 053–054; R. Doc. 4, ¶ 14(b).) Assume a drywall contractor enters into a master agreement with a general contractor to install drywall at an agreed upon dollar amount per square yard of drywall for projects throughout the year. (*Supra*, p. 16.) It is unclear whether such a master service agreement complies with a "per-job" or "competitive bid" basis for purposes of this factor. FAQ No. 19, which discusses master subcontractor agreements, fails to even address this scenario other than to indirectly state that this factor is evaluated on a case-by-case basis, further illustrating this factor's vagueness. (App. 173; R. Doc. 12, at 113.)

**c. "Invoices" is vague.**

The Statute is also unconstitutionally vague because it requires the contractor "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." Minn. Stat. § 181.723, subd. 4(a)(10). The Statute does not define an invoice and DOLI admits that the Statute provides no additional test on what constitutes an invoice. (App. 174; R. Doc. 12, at 114.) Further, Subd. 4(a)(10) is unclear whether the invoice must be in the name of the business entity or whether the written

proposal, contract, or change order should be in the name of the business entity. The answer to this question is not clear, but the ramifications are significant.

**d. "Identifies the specific services to be provided or performed under the contract" is vague.**

Of the fourteen factors, Minn. Stat. § 181.723, subd. 4(a)(9)(iii) requires the written contact identify the specific services to be provided under the contract. The question, however, becomes how specific the contract needs to be to comply with the law. To illustrate the ambiguity (and the arbitrary nature of enforcement), FAQ No. 20 attempts to answer the question of whether a contract that states, "scope of work: carpentry as per plans and specs" is specific enough. DOLI is unable to clearly answer the question and merely states other documents will need to be examined to determine the specificity. (App. 174; R. Doc. 12, at 114.) Given the ramification of non-compliance, contractors should have a clear answer on what is necessary to meet the definition of "specific services."

**e. "Realize additional profit or suffer a loss" is vague.**

Similarly, the Statute is vague in its requirement that subcontractors be able to "realize additional profit or suffer a loss." Minn. Stat. § 181.723, subd. 4(a)(14). The profit and loss factor partially existed in the Statute's predecessor. Minn. Stat. § 181.723, subd. 4(a)(7) (2023). General contractors, using industry standard contractual language through the American Institute of Architects and Consensus Documents, pay their subcontractors a set hourly rate for labor under the "time and

materials contract" between the general contractor and owner. (App. 044; R. Doc. 3, ¶ 6.) The subcontractors and their workers receive that set rate, regardless of their performance on the project and or what happens on the project. (*Id*.) In amending the Statute, the Minnesota Legislature failed to clarify whether subcontractors and their workers receiving a set hourly rate satisfied the profit and loss factor.

**f. The Statute fails to define the length of the employment relationship if the fourteen-factor test is not met.**

If one of the fourteen factors is not met, the subcontractor (and all of its workers) become employees of the general contractor. Minn. Stat. § 181.723, subds. 3–4. The Statute, however, does not explain how long the "[e]mployee-employer relationship" exists if the fourteen-factor test is not met. *Id*. subd. 3. For instance, the Statute does not define how long subcontractors' workers qualify as the general contractor's employees when the test is not met—for the length of the construction project, indefinitely until termination, or when the subcontractor cures the fourteen factors? The Statute also fails to define what happens if those workers only perform one week's worth of work during the project's lifespan—would those workers only be on the general contractor's health insurance plan for one week or until termination? (App. 043, 047; R. Doc. 3, ¶¶ 4, 17 ) (App. 053; R. Doc. 4, ¶ 13.)

**3. The Statute invites arbitrary and inconsistent enforcement.**

The district court also erroneously suggested that because a separate administrative appeals process exists for a contractor to challenge DOLI's

compliance order and the FAQs are "clarifying resources," the Statute does not invite arbitrary enforcement. (App. 215–216, 218; R. Doc. 28, at 6–7, 9; Add. 012–013, 015.). That is in error.

**a. By the time contractors face a compliance order, it is too late.**

The district court's decision that the parties may litigate the merits of the compliance order concerning employee misclassification misses the point. (*Supra*, p. 22.) The Members are entitled to know what the Statute prohibits *before* any enforcement action occurs. *Stahl*, 687 F.3d at 1041. DOLI issuing the compliance order is an enforcement action. Minn. Stat. 177.27, subd. 4. Under the district court's erroneous reasoning, the Members must wait until Appellees enforce the Statute—*i.e.*, issue a compliance order and proceed to an administrative hearing—to learn whether a violation occurred. *Washam*, 312 F.3d at 929; *Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). Even worse, because various terms are undefined and there are open questions on the Statute's meaning, there is no consistency as to what the Statute means, which will lead to arbitrary, unpredictable, and inconsistent enforcement. *See Stephenson*, 110 F.3d at 1311 ("The District regulation, therefore, violates a central purpose of the vagueness doctrine that 'if

arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."').

**b. The FAQs offer non-responsive or circular answers.**

While the district court deemed that the FAQs are "clarifying resources" that avoid arbitrary enforcement, contractors cannot rely upon the FAQs because they create more ambiguity, are not formal administrative rules and may be changed at any time.[10] (App. 166; R. Doc. 12, at 106.) The FAQs provide no clarification.

The FAQs state: "Employers should evaluate each worker individually, consult state and federal contractor tests and seek advice from legal counsel as needed." (*Id.*) In other words, contractors asked DOLI how to properly classify a worker under the Statute, and DOLI re-directed them to the Statute. Further, DOLI qualifies the FAQs with how determinations are made on "a case-by-case basis." *Geiger*, 618 F.2d at 28 ("There is concern that lawmaking will be entrusted 'to the moment-to-moment judgment of the policeman on his beat."') (citation omitted); *Carolina Youth Action Project; D.S. by and through Ford v. Wilson*, 60 F.4th 770, 784 (4th Cir. 2023) (ruling that the South Carolina law's vagueness was exacerbated because whether a student violated the law "turns on the whims" of the enforcement officer); (App. 175; R. Doc. 12, at 115; Add. 006.).

[10] The FAQs provide "The FAQs are intended as informational and guidance only and do not have the force or effect of law." The Statute separately contemplates binding administrative rulemaking. Minn. Stat. § 181.723, subd. 13.

Additionally, the FAQs create so much ambiguity or offered such non-responsive and circular answers that DOLI can rely on the FAQs to justify any conclusion. (App. 165–176; R. Doc. 12, at 105–116.) Some examples:

- FAQ No. 14 asks: "On my job, materials are purchased on a tax-exempt basis and I'm the owner's 'purchasing agent.' Can I be considered an independent contractor on this project if I don't own the materials at any point?" Contrary to the Statute that provides each of the fourteen-factors are assessed at the time the services are provided, the FAQs state: "This requirement assesses the business entity generally and not at a specific project or contract level." (App. 171; R. Doc. 12, at 111; Add. 005.) Not only do the FAQS create an ambiguity on when this factor is assessed, the FAQs conflict with the Statute's terms and show Appellees' arbitrary enforcement.
- Under FAQ No. 18, contractors asked for clarification about the Statute's requirements for a written contract. *See* Minn. Stat. § 181.723, subd. 4(a)(9); (App. 173; R. Doc. 12, at 113.) Instead of offering a clarifying response, the FAQs copied and pasted the statutory language. (Compare App. 173; R. Doc. 12, at 113; *with* Minn. Stat. § 181.723, subd. 4(a)(9).)
- Under FAQ No. 21, contractors asked a simple question: "I do not have a signed contract with my subcontractor. Are they now my employee?" (App. 174; R. Doc. 12, at 114.) Instead of responding "yes" or "no," the FAQs stated:

"The independent contractor test requires that a written contract be signed by an authorized representative of both parties and that it be fully executed no later than 30 days after the work commences (except for change orders) in order for a subcontractor to meet the requirements of the test." (*Id.*)

In sum, because the Statute lacks any explicit enforcement standards, Appellees' officials will reach different conclusions on any number of the questions and ambiguities the Members raised above, even when facing the same facts. (*Supra*, pp. 35–40.) The Members are at the whims of Appellees' officials "*ad hoc* and subjective basis" on deciding whether there has been any misclassification. *Grayned*, 408 U.S. at 108–09. That is arbitrary enforcement. *Geiger*, 618 F.2d at 28.

**4. The Statute is vague as applied to the Members and facially vague.**

Finally, the district court erred when ruling that the Members failed to allege specific facts that distinguish their vagueness challenge from a broad facial challenge. (App. 215; R. Doc. 28, at 6; Add. 12.) The record shows the Statute's vagueness specifically impacts various association members. *Phelps-Roper v. Ricketts*, 867 F.3d 883, 896 (8th Cir. 2017) ("'An as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court.'") (citation omitted). The Complaint incorporated and attached the declarations of JMC (John McGuine), WGC (Michael Gohman), and MKCH (Chad Kompelien). (App. 025; R. Doc. 1, ¶ 67.) Each of those declarants belong to MNABC, BAM, or both.

(App. 036; R. Doc. 2, ¶ 3); (App. 043; R. Doc. 3, ¶ 3); FED. R. CIV. P. 10(c). Each of those declarants testified about how following common industry practices that are *specific* to their individual experiences in the construction industry may lead to violations of the Statute or create a debate on whether a violation arises. (App. 035–041; R. Doc. 2, ¶¶ 2–17); (App. 042–049; R. Doc. 3, ¶¶ 2–21); (App. 050–056; R. Doc. 4, ¶¶ 2–18.)

For instance, WGC testified about how it historically provides raw materials (lumber, sheetrock, etc.) to its subcontractors, such as a framer, who then provides labor only to install those materials on projects. (App. 048–049; R. Doc. 3, ¶ 21.) Minn. Stat. § 181.723, subd. 4(a)(12), however, provides a subcontractor (and its employees) are presumed to be the general contractor's employees if it does not incur "the main expenses and costs" related to providing the specific services under the contract. As noted above, the definition of "main expenses and costs" is ambiguous because it is unclear whether it includes only labor or if it includes both labor and materials. JMC similarly testified that it works with prime subcontractors who only provide labor. (App. 036; R. Doc. 2, ¶ 4.)

The Statute, at its core, regulates the Minnesota construction industry. MNABC's and BAM's association members' experiences are representative of contractors across Minnesota. These other contractors are subject to the Statute's vague terms, just like the association members are. The Statute infringes on

contractors' constitutional rights in the same way, regardless of whether the contractors are part of MNABC or BAM. Accordingly, because a common thread exists amongst the association members and other contractors across Minnesota, the Court ruling that the Statute is facially vague as applied to the association members should persuade it to rule that the Statute is facially vague when applied to all contractors in Minnesota. *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254–55 (8th Cir. 1981) (ruling that ordinance's vagueness rendered it invalid "in its entirety"); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690–91 (8th Cir. 1992) (ruling that the statute was impermissibly vague in all applications, facially unconstitutional, and affirming the permanent injunction).

In conclusion, given the Statute's unconstitutional vagueness, the Court should find the Members are likely to succeed on Count I.

### B. The Statute Is Presumptively Unconstitutional Because of Its Stacking and Excessive Fines Violate The Eighth Amendment Protections.

The district court ruled in error that the Members are unlikely to succeed on their Eighth Amendment claim because: (1) Appellees have not yet imposed any fines; and (2) the imposed fines are not "grossly disproportional" as they are limited by the factors in Minn. Stat. § 14.045, subd. 3 (2024). Extending existing precedent, the Court should rule that the Members may file a pre-enforcement suit to protect their Eighth Amendment rights. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149,

158–160 (2014); *Jones*, 947 F.3d at 1103. The Eighth Amendment protects against excessive fines, making this protection a fundamental right. *Timbs v. Indiana*, 586 U.S. 146, 149 (2019); *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 76 (1980) ("It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional."), *superseded by statute on other grounds*, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Zink v. Lombardi*, 783 F.3d 1089, 1111 (8th Cir. 2015) (citation omitted). The Eighth Amendment limits the government's power to extract payment (in cash, or in kind) as punishment. *Grant on behalf of United States v. Zorn*, 107 F.4th 782, 797 (8th Cir. 2024), *pet. for cert. docketed* (Feb. 7, 2025). By operation of the Fourteenth Amendment, the Eighth Amendment protects against excessive fines imposed by state laws. *Timbs*, 586 U.S. at 150–51.

*Driehaus* ruled that the Members need only allege "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute"' to sustain a pre-enforcement action. 573 U.S. at 159. The Members have done so here. The Members would continue to follow common industry practices, but doing so would subject themselves to the Statute's criminal penalties and excessive fines. (*Supra*, pp. 11–13.)

### 1. The Statute's fines are punitive and grossly disproportional.

The Statute's fines are punitive. *Sec. & Exch. Comm'n v. Jarkesy*, 603 US 109, 123 (2024) (citation omitted); *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014). Minnesota Representative Emma Greenman, who voted for the Statute, once stated that the prior misclassifications 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.[11] The Statute provides for punitive monetary fines and compensatory damages for misclassification of construction workers, which were absent in its predecessor.

### 2. The fines and penalties are grossly disproportionate.

The Statute's fines are also excessive because they grossly and disproportionally punish the Members. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). These excessive fines essentially constitute monetary forfeitures that violate the Eighth Amendment. *Id*. The amount the government takes "must bear some relationship to the gravity of the offense that it is designed to punish." *Id*. In

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[11] Brian Basham, *House labor panel approves bill to bar businesses from misclassifying employees*, MINN. HOUSE OF REPRESENTATIVES, https://www.house.mn.gov/sessiondaily/Story/18129 (last updated Mar. 5, 2024); *see also Labor committee approves bill to prohibit misclassification of employees 3/5/24*, YOUTUBE, https://www.youtube.com/watch?v=w_1-jkjGs4Y&t=293s (last visited Apr. 22, 2025), timestamps at 4:14–4:52; H.J., 93rd Legislative Session, Journal of the House, 119th Day, pp. 19605–06 (2024), https://www.house.mn.gov/cco/journals/2023-24/J0519119.htm#19606 (last visited Apr. 22, 2025).

determining proportionality, the Court considers various factors, "including the reprehensibility of the defendant's conduct; the relationship between the penalty and the harm to the victim; and the sanctions in other cases for comparable misconduct." *U.S. v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014). Other factors include legislative intent and the defendant's ability to pay. *Id*.

To illustrate the excessive and punitive nature of the Statute, one need only consider the fact only one of the fourteen factors is not met, all of a subcontractor's employees become employees of the general contractor. Minn. Stat. § 181.723, subd. 4(b)(1). On any one construction project, there may be dozens of subcontractor-workers who Appellees could deem were misclassified. (App. 022; R. Doc. 1, ¶ 58); (App. 038; R. Doc. 2, ¶ 12); (App. 045; R. Doc. 3, ¶¶ 11–12); (App. 055–056; R. Doc. 4, ¶ 18(a).) Because the Statute imposes monetary fines per misclassified individual, the stacking nature of fines can severely harm the Members' ongoing business operations. (App. 011; R. Doc. 1, ¶ 28); (App. 038–039; R. Doc. 2, ¶ 13); (App. 046, 048–49; R. Doc. 3, ¶¶ 15, 21); (App. 055–056; R. Doc. 4, ¶ 18(b)–(b).) The FAQs acknowledge those concerns: "If an employer has misclassified a group of workers over an extended period, *potential monetary liabilities may be significant*." (App. 166; R. Doc. 12, at 106) (emphasis added).[12] To illustrate this

[12] In responding to the Members' Eighth Amendment claim, Appellees deviated from the FAQs and represented that the imposed fines "could be zero." (*Compare* R. Doc. 22, at 24 *with* App. 166; R. Doc. 12, at 106.)

point, as WGC testified, on average it has between 30–50 subcontractor workers on a project, which does not necessarily include sub-subcontractors. (App. 045; R. Doc. 3, ¶¶ 11–12.) Additionally, MKCH testified on average it has 38 subcontractor workers and six sub-subcontractor workers on a job site. (App. 052; R. Doc. 4, ¶ 10.) JMC testified that on one of its projects in 2023, it had 15 prime subcontractors with up to 40 subcontractor workers. (App. 038; R. Doc. 2, ¶ 12.) All of them have testified that given the nature of the industry, it is rare to have fully executed contract within 30 days after the work commences on a project. (*Supra*, pp. 15–16.) Nevertheless, if JMC, WGC, or MKCH fail to obtain fully executed contracts with the subcontractors within 30 days of work commencing, then dozens of workers automatically become their employees because one factor of the fourteen-factor test under the Statute has not been met. Minn. Stat. § 181.723, subd. 4(a)(9)(ii).

Once the workers are deemed employees, general contractors are required to treat all of those workers as employees and incur the corresponding expenses, which includes "Compensatory damages including, but are not limited to the value of supplemental pay including minimum wage; overtime; shift differentials; vacation pay; sick pay; and other forms of paid time off; health insurance; life and disability insurance; retirement plans; saving plans and any other form of benefit; employer contributions to unemployment insurance; Social Security and Medicare and any

costs and expenses incurred by the individual resulting from the person's failure to classify, represent, or treat the individual as an employes." Minn. Stat. § 181.723(g)(1). Additionally, general contractors are also subject to a penalty of up to $10,000 for *each* subcontractor-workers that the contractors failed to classify, represent, or treat as an employee Minn. Stat. § 181.723 subds. 7(c)(2) and (g)(2). Further, general contractors are subject to a penalty of up to $10,000 for each individual they fail to report or disclose as employee to any local, state, or federal government agency. Minn. Stat. § 181.723, subds. 7(c)(3) and (g)(3). Since each failure to disclose to a government entity is a separate violation, the penalty can be triple the number of employees a company fails to disclose (*i.e.*, local, state, or federal government agency). In sum, the fines are grossly disproportional to gravity of the Members' conduct. *Bajakajian*, 524 U.S. at 337–338 (ruling that the government requiring forfeiture of the respondent's entire cash amount violated the Eighth Amendment's proportionality requirement, considering the respondent merely committed a reporting offense and the harm he caused was minimal).

The punitive nature of the Statute can be illustrated by other technical and innocent violations. For instance, members could pay for subcontractors' services not pursuant to an invoice, but pursuant to the terms of a master service agreement and face significant liability even though the parties reached an agreement on payment. (*Supra*, pp. 16–17.) Similarly, the Members, relying on their longstanding

relationships with subcontractors, hire the subcontractors to perform work under a verbal agreement and face the excessive fines and penalties. Minn. Stat. § 181.723, subd. 4(a)(9); (*supra*, p. 14.) Additionally, the Statute requires subcontractors to retain 1099 forms (with no limitation on how long the 1099 forms must be maintained) and to file tax returns; both of which a general contractor has no control over. Minn. Stat. §§ 181.723, subd. 4(a)(iii) and (iv). If the subcontractor fails to perform such duties, the liability falls upon the general contractor even though it has no control over the subcontractor's conduct. The sub-subcontractors may also misclassify an individual by failing to meet the fourteen factors, but the misclassification liability goes all the way up to the general contractors even though they lack control over the sub-subcontractors. (*Supra*, pp. 19–20.)

In each of these examples, there is nothing reprehensible about the Members' conduct. Nevertheless, the Members face a punitive statute with grossly excessive fines and penalties. Moreover, the penalty is not connected to the misclassified individuals' harm. In fact, the misclassified individuals have a separate cause of action to sue for misclassification, which allows them to be made whole through recovering compensatory damages. Minn. Stat. § 181.171, subd. 1 (2024). Given the fines, the Members fear they would not even be able to pay the fines, while also continuing to operate. *Aleff*, 772 F.3d at 512; (App. 038–039; R. Doc. 2, ¶ 13); (App. 046, 048–049; R. Doc. 3, ¶¶ 15, 21); (App. 055–056; R. Doc. 4, ¶ 18(a)–(b).). As

noted, there may be dozens of subcontractor-workers on a single project. (*Supra*, p. 49.) If Appellees deem the Members misclassified those workers as independent contractors, then the Members are likely on the hook for hundreds of thousands of dollars. Depending on amount of the fines, the Members may have to take drastic measures, such as imposing layoffs, shutting down, or declaring bankruptcy. (App. 038–039; R. Doc. 2, ¶ 13); (App. 046; R. Doc. 3, ¶ 15); (App. 055–056; R. Doc. 4, ¶ 18.)

As for sanctions for comparable misconduct, Minn. Stat. § 181.722 (2024) (general misclassification) sets out comparable monetary fines. This factor is neutral and outweighed by how the Statute inflicts disproportional fines on the Members, even though they commit no reprehensible conduct and there is no link between the penalty and the misclassified individual's harm.

The Legislature intended for the Statute to impose monetary fines. *See Aleff*, 772 F.3d at 512. But Minnesota law does not favor stacking fines for alleged infractions. *See Schroeder v. Kubes*, No. A12-0357, 2013 WL 1285476, at *4 (Minn. Ct. App. Apr. 1, 2013) (not allowing the plaintiff to recover the statutory penalty under each section of the applicable statute, because doing so would penalize the employer "multiple times for closely related issues."). Here the legislature overstepped its authority by imposing fines that quickly stack on each other, on top

of already allowing the misclassified individual to sue to seek compensatory damages. And so, the legislative intent factor is neutral.

On balance, because the Statute's fines violate the Eighth Amendment—as they are punitive and grossly disproportional—the Members are likely to succeed on Count II.

### C. The Members Will Suffer Irreparable Harm.

#### 1. The irreparable harm includes violation of constitutional rights.

The district court erred in limiting its review to whether the Members will suffer economic harm as a form of irreparable harm.[13] (*Supra*, p. 22.) The Members demonstrated before the district court, and again here, how the Statute violates their constitutional rights. Irreparable harm arises when the government infringes on one's constitutional rights. *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 866 (8th Cir. 1977) ("Also, Planned Parenthood's showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury."); *Brandt by and through Brandt v. Rutledge*, 47 F.4th 661, 671–72 (8th Cir. 2022) (affirming the district court's ruling that preliminarily enjoined the Arkansas law from taking effect

[13] Contrary to the Members' briefing for the preliminary injunction, which set forth how a government's violation of a party's constitutional rights creates irreparable harm, the district court erroneously found, "The only harm Plaintiffs allege is economic harm." (*Supra*, p. 22.)

because the law violated the minors' equal protection rights and caused the minors irreparable harm due to denying them access to hormone treatment).

Without an injunction, the Statute will inflict irreparable harm on the Members. As stated above, the Statute violates the Members' constitutional rights. Appellees may enforce the unconstitutionally vague Statute and impose unconstitutionally excessive fines on the Members because of innocent or inadvertent misclassifications. Appellees may impose criminal penalties, despite the Statute stating nothing about criminal prosecution.

**2. The Members have no adequate legal remedy because Appellees enjoy sovereign immunity from paying damages.**

Additionally, if the district court correctly considered Appellees' sovereign immunity as applied to irreparable harm, it would have ruled that the Members have no adequate legal remedy. Appellees enjoying sovereign immunity means that the Members, even after showing the Statute is unconstitutional, cannot sue Appellees to retroactively recover any expenses they incurred in trying to comply with the Statute. U.S. CONST. amend. XI; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984) ("[W]hen a plaintiff sues a state official alleging a violation of federal law, the federal court may . . . not . . . award [ ] retroactive monetary relief."); *Serna v. Goodno*, 567 F.3d 944, 952 (8th Cir. 2009) ("[T]he Eleventh Amendment bars damages claims against the states, but generally does not bar claims for prospective injunctive relief against public officials in their official

capacities."); *Dover Elevator Co. v. Ark. State Univ.*, 64 F.3d 442, 447 (8th Cir. 1995) (noting that a state official can be sued for prospective injunctive relief but not retroactive monetary relief); *Baker v. Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding irreparable harm and reinstating the preliminary injunction because sovereign immunity barred recovery of money damages from the government).

The Eleventh Amendment also prevents the Members from suing Appellees to recover damages for any unlawful assessment of fines. For instance, if Appellees unlawfully penalize an association member for $50,000.00 today for alleged misclassification, and the association member pays, even if the Members are successful in this lawsuit, the association member cannot retroactively sue Appellees to recover the $50,000.00. *Dover Elevator*, 64 F.3d at 447; *Halderman*, 465 U.S. at 102–03.

And let's say that an allegedly misclassified individual sues one of the Members seeking compensatory damages. Minn. Stat. § 181.723, subd. 7(g)(1). The association member spends money defending against that lawsuit, which may include paying some form of compensatory damages. Because Appellees enjoy sovereign immunity, the association member cannot sue them to retroactively recover the compensatory damages paid out, even if the Statute is declared unconstitutional.

On balance, the Members lack an adequate legal remedy.

### D. The Balance of Equities and the Public Interest Weigh Towards the Members.

Because the Members are likely to succeed on their claims under the Fourteenth Amendment and Eighth Amendment, and will suffer irreparable harm absent an injunction, the balance of equities and the public interest weigh in the Members' favor. *United States v. Iowa*, 126 F.4th 1334, 1353 (8th Cir. 2025). In *Iowa*, this Court held that "[p]reventing a state from enforcing an enacted law does harm the state." *Id*. But the Court nonetheless affirmed entry of the preliminary injunction because the federal interest prevailed over state interests. *Id*. Here Appellees have no interest in enforcing an unconstitutional law. And any of Appellees' alleged harm is outweighed by how the Statute violates the Members' Constitutional rights. Contrary to the district court's erroneous finding, the Members' federal constitutional rights defeat Appellees' interest in enforcing the Statute.

## CONCLUSION

For the foregoing reasons, the Court should reverse and remand this case with instructions that the district court enter a preliminary injunction as follows:

1. Appellees and all of their respective officers, agents, servants, employees, and attorneys, and any person in active concert or participation with

them who receive actual notice of the injunction order are hereby preliminarily and fully enjoined from the following:

a. Enforcing the Statute against any of MNABC's and BAM's association members, including JMC.

b. Enforcing the Statute against any other contractor in the State of Minnesota.

2. This injunction remains in effect until a trial on the merits can be held.

Dated: April 22, 2025

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 31(a)(7)(B) because the brief contains 12,887 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

3. The digital version of this brief filed herewith has been scanned for viruses and to the best of my knowledge, is virus-free.

*/s/ Thomas R. Revnew*
Thomas R. Revnew

**CERTIFICATE OF SERVICE**

I hereby certify that on April 22, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Thomas R. Revnew*
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