

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

BECKY SWANSON, HOLLEE SAVILLE,
LINDA CHRISTIANSEN, JULIE
HALVERSON, RENEE HOLZ, JEAN
LANG, TAMMY LARSON, ERIN
RHEAULT, KELLY ROMANO, TAMMY
DREWES, AND JANET KRUTZIG,

Plaintiffs,

v.

MINNESOTA GOVERNOR MARK
DAYTON, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF
MINNESOTA; MINNESOTA BUREAU OF
MEDIATION SERVICES; AND JOSH
TILSEN, IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF THE BUREAU OF
MEDIATION SERVICES,

Defendants.

Judge Dale B. Lindman

Court File No.: 27-CV-10-27509

***AMICUS CURIAE* BRIEF OF CHILD
CARE CUSTOMERS IN SUPPORT OF
PLAINTIFFS' MOTIONS FOR A
TEMPORARY INJUNCTION AND
FOR SUMMARY JUDGMENT**

INTEREST OF *AMICI CURIAE*¹

Amici are 13 Minnesota residents who are current customers of licensed registered family child care providers.² Currently, *Amici* and all day-care customers are protected by antitrust laws from anti-competitive collusion by licensed registered family child care providers.

¹ No counsel for any party authored this brief in whole or in part, and no other party made any monetary contribution to the preparation or submission of this brief.

² A full list of *Amici* is attached hereto as Appendix A.

For the reasons set forth below, Executive Order 11-31 endangers the consumer protections contained in the antitrust laws, harming *Amici* and all customers of licensed registered family child care providers. *Amici* are working parents who would personally suffer if the rates charged by licensed registered family child care providers were increased through collusive behavior.

QUESTION PRESENTED

The question addressed by *Amici* is: Whether Executive Order 11-31 exceeds the Governor's authority by attempting to exempt licensed registered family child care providers from antitrust laws.

INTRODUCTION

Federal and Minnesota antitrust laws protect consumers by requiring independent businesses to compete with each other, not collude with each other. This policy is expressed not only in legislation adopted by the Minnesota legislature and the U.S. Congress, it is enshrined in the Minnesota Constitution, which declares that “[a]ny combination . . . to interfere with, or restrict the freedom of markets is a criminal conspiracy and shall be punished as the legislature may provide.” Minn. Const. art. XIII, § 6.

These laws currently protect customers of licensed registered family child care providers in Minnesota and bar anticompetitive collusion between those independent businesses. As such, they would bar the creation of any “labor union” consisting of independent licensed family child care providers which might provide a vehicle for an antitrust conspiracy. Executive Order 11-31, however, attempts to

specifically exempt some licensed registered family child care providers, providing that

In affording licensed registered subsidized family child care providers the right to engage in collective action . . . the State intends that the “State Action” exemption from federal antitrust laws will be fully available to the State, based on the State’s active supervision of licensed family child care providers.

(Exec. Order 11-31³ at 3-4.)

But Governor Dayton lacks the authority to exempt licensed registered family child care providers from either the federal or state antitrust laws. Under federal law, the state action exemption only applies if there is a clearly articulated and affirmatively expressed state policy and the Governor lacks authority to unilaterally set Minnesota state policy. As this Court correctly noted in issuing a temporary restraining order limiting the implementation of Executive Order 11-31, “if unionization of day-care providers is to become the law of the State of Minnesota, it must first be submitted to the law-making body of the state” and “vetted through the law-making process” because “the separation of powers provisions of the Minnesota Constitution do not allow the Governor to enact by executive order a law which should be initiated in the legislature.” (Dec. 5, 2011 Judge’s Ruling Tr. 2:14-3:1.) Similarly, the state action exemption to the Minnesota antitrust laws requires action pursuant to some statutory authority, and no current statutory authority supports extension of Minnesota’s state action exemption to licensed registered family child care providers or any other independent businesses.

³ Available at <http://mn.gov/governor/images/EO-11-31.pdf>.

Executive Order 11-31 thus exceeds the Governor's authority and attempts to compromise the consumer protections enshrined in the Sherman Act, the Minnesota Constitution, and the Minnesota antitrust laws. Plaintiffs' motions for a temporary injunction and for summary judgment barring the implementation of this executive order should be granted.

ARGUMENT

Executive Order 11-31 Exceeds the Governor's Authority By Attempting to Exempt Licensed Registered Family Child Care Providers from Antitrust Laws.

Under current law, licensed registered family child care providers are treated as independent businesses competing with each other. As a result, Minnesota and federal antitrust laws currently prohibit collusive, anti-competitive behavior by those businesses. Executive Order 11-31 changes this landscape, by attempting to allow collective action by these independent businesses. This collective action is not protected by the existing labor antitrust exemptions, because those exemptions do not protect a labor union consisting of independent, competing businesses. Therefore, the collective action contemplated by Executive Order 11-31 is only legal if it is protected by the state action exemptions to federal and state antitrust law.

Executive Order 11-31, however, exceeds the Governor's unilateral authority in its attempt to invoke the state action exemptions. The Governor cannot unilaterally create a clearly articulated and affirmatively expressed state policy as required to invoke the federal state action exemption, nor does statutory authority exist for Executive Order 11-31 as required by the Minnesota state action exemption. Furthermore, the asserted rationales for Executive Order 11-31 offer no

basis for exempting these independent businesses from antitrust laws. By seeking to offer such an exemption, Executive Order 11-31 exceeds the Governor's authority, and should be enjoined.

A. Licensed registered family child care providers are currently subject to antitrust laws.

Minnesota's antitrust laws seek to protect consumers by prohibiting collusion by independent businesses competing with each other. Thus, they prohibit any "contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce." Minn. Stat. § 325D.51. Among the behaviors specifically prohibited are any

contract, combination, or conspiracy between two or more persons in competition:

- (a) for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any . . . service;
- (b) affecting, fixing, controlling, maintaining, limiting, or discontinuing . . . the sale or supply of any service, for the purpose or with the effect of affecting, fixing, controlling, or maintaining the market price of the . . . service; or
- (c) allocating or dividing customers or markets . . . for any . . . service.

Minn. Stat. § 325D.53, subd. 1(1).

Conspiracies restraining competition in public contracting are also prohibited, including any agreement fixing or controlling "the price quotation of any bid," an agreement that "one or more persons refrains from the submission of a bid," or if "competition is in any other manner restrained." *Id.*, subd. 1(2).

Minnesota's antitrust law thus sweeps broadly, and plainly prohibits any collusion regarding fees or customers by licensed registered family child care providers, including collusion with respect to state contracts. The applicable

statutory definitions make this clear, defining “person” as “any individual” or “legal or commercial entity,” and “service” as “any kind of activity performed in whole or in part for financial gain.” Minn. Stat. § 325D.50, subd. 3 & 5. A “[c]ontract, combination, or conspiracy” includes “any agreement, arrangement, collusion, or understanding.” *Id.*, subd. 4.

Minnesota’s antitrust laws are construed broadly to protect consumers, and generally interpreted consistently with federal antitrust laws. *See Minnesota Twins Partnership v. State ex rel. Hatch*, 592 N.W.2d 847, 851 (Minn. 1999); *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass’n.*, 294 N.W.2d 297, 305 (Minn. 1980); *see also State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 894 (Minn. App. 1992) (“Minnesota antitrust law should be interpreted consistently with federal interpretations of the Sherman Act unless state law is clearly in conflict with federal law.”). The federal Sherman Act, similar to the provisions of the Minnesota antitrust law discussed above, prohibits “[e]very contract, combination . . . , or conspiracy in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1. The Sherman Act extends to all commerce within Congress’s power to regulate interstate and foreign commerce. *See Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328-29 & n.10 (1991).

As discussed above, Governor Dayton apparently recognizes that licensed registered family child care providers are currently subject to antitrust laws as shown by the fact that the Executive Order specifically invokes “the ‘State Action’ exemption from federal antitrust laws.” (Exec. Order 11-31 at 3.)

Thus, Minnesota and federal antitrust laws currently prohibit collusion by independent businesses providing child care services, including licensed registered family child care providers.

B. The labor unions contemplated by Executive Order 11-31 are not protected by labor antitrust exemptions.

Antitrust laws, which prohibit collusion among competing businesses, are in tension with labor laws, which encourage collusion (or “collective bargaining”) by competing workers. Both Minnesota and federal antitrust laws resolve this tension through labor exemptions, which protect the rights of employees to bargain collectively. As explained below, however, these labor exemptions are limited to collective bargaining between employees and employers, and do not provide any exemption to independent businesses who choose to band together in a “union.”

Minnesota’s antitrust law contains two different labor exemptions in section 325D.55. Subdivision 1, in language almost identical to the federal statutory labor exemption, provides that

Nothing contained in [the Minnesota antitrust law] shall be construed to forbid the existence or operation of labor . . . organizations . . . that are instituted for the purpose of mutual help, and not conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade . . . when lawfully carrying out the legitimate objects hereof.

Minn. Stat. § 325D.55, subdiv. 1; *compare* 15 U.S.C. § 17.

Subdivision 3 appears to codify the federal “non-statutory labor exemption,” providing that

Nothing in [the Minnesota antitrust law] shall apply to agreements among employers or agreements among labor unions made for the purpose of furthering the position of any of the agreeing employers or agreeing unions in the course of the collective bargaining process.

Minn. Stat. § 325D.55, subdiv. 3; compare *Mackey v. Nat'l Football League*, 543 F.2d 606, 611-12 (8th Cir. 1976) (“[I]n order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining . . ., certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions.”)

There appears to be no prior Minnesota authority interpreting these exemptions, but they should be interpreted consistently with federal antitrust laws. See *Minnesota Twins*, 592 N.W.2d at 851. Because both Minnesota and federal antitrust laws are broadly construed to protect consumers, exemptions are narrowly construed. See *id.* at 851-52; *Minnesota-Iowa Television*, 294 N.W.2d at 305.

The U.S. Supreme Court has held that a “union” of independent businesses is not exempt from the federal antitrust laws. In *Los Angeles Meat & Provision Drivers Union, Local 626 v. U.S.*, 371 U.S. 94 (1962), several grease peddlers who were “self-employed independent contractors” joined a union and, through the union, proceeded to enter into price-fixing agreements, using “strikes and boycotts against processors who indicated any inclination to deal with grease peddlers who were not union members.” *Id.* at 95-97. The Court affirmed a district court injunction terminating the union membership of these independent contractors, holding that it is “beyond question” that the labor exemption does not “insulate[] a combination in illegal restraint of trade between businessmen and a labor union

from the sanction of the antitrust laws.” *Id.* at 100. Therefore, because a price-fixing conspiracy would otherwise be “subject to dissolution,” the Court held that the independent contractors cannot “immunize themselves from that sanction by the simple expedient of calling themselves ‘Local 626-B’ of a labor union.” *Id.* at 101.

As the Supreme Court has subsequently made clear, “a party seeking refuge in the statutory [labor] exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur.” *H. A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n*, 451 U.S. 704, 717 n.20 (1981). Nor does the non-statutory labor exemption provide any “protection when a union and a nonlabor party agree to restrain competition in a business market.” *Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622-23 (1975).

Thus, unless the relationship between independent child care providers contemplated by Executive Order 11-31 is justified by the state action exemption to the antitrust laws, it is barred by the Minnesota and federal antitrust laws. This fact appears to have been recognized by Governor Dayton, as Executive Order 11-31 specifically purports to invoke the state action exemption. (Exec. Order 11-31 at 3-4.) A leading academic advocate of child care unionization also has recognized that such unions are likely barred by the antitrust laws unless the state action exemption is properly invoked. See Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 Minn. L. Rev. 1390, 1405 & n.67 (2008); see also Peggie R. Smith, *Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers*, 55 Kan. L. Rev. 321, 344 (2007)

(“Federal antitrust law presents a significant barrier to the representation of [family child care] providers.”).

C. By attempting to unilaterally invoke the state action exemption, Executive Order 11-31 exceeds the Governor’s authority.

1. The Governor lacks the power to invoke the federal state action exemption because he cannot unilaterally set state policy.

Executive Order seeks to protect “the right [of licensed registered subsidized family child care providers] to engage in collective action” by invoking “the ‘State Action’ exemption from federal antitrust laws . . . based on the State’s active supervision of licensed family child care providers.” (Exec. Order 11-31 at 3-4.) “The ‘state action doctrine’ immunizes a private party from antitrust liability if (1) the private party acts pursuant to a ‘clearly articulated’ and ‘affirmatively expressed’ state policy to allow the anti-competitive conduct, and (2) the regulatory policy is ‘actively supervised’ by the state itself.” *N. Star Steel Co. v. MidAmerican Energy Holdings Co.*, 184 F.3d 732, 738 (8th Cir. 1999).

But the Governor of Minnesota cannot unilaterally set “a ‘clearly articulated’ and ‘affirmatively expressed’ state policy to allow . . . anti-competitive conduct” by executive order. Article III of the Minnesota Constitution requires a strict separation of powers, and accordingly only the legislature has the power to make law and “determine the expediency of its enactment.” *Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949). Some discretionary application of a law by the executive branch is appropriate, but only “[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in

ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.” *Id.* at 538-39. While the Governor has “great power to see that the laws of the state are faithfully executed,” this power does not allow him to “change or suspend them.” *State ex rel. Lichtscheidl v. Moeller*, 249 N.W. 330, 333 (Minn. 1933).

The executive branch thus lacks the authority, by executive order or otherwise, to establish a new state policy “chang[ing] or suspend[ing]” the federal and state antitrust laws as they apply to one particular industry. *Id.* Current state policy, as expressed by statute passed by the legislature, includes licensed registered family child care providers within the broad coverage of the state antitrust laws and is silent about any exemption from federal antitrust laws. Any new state policy changing or suspending antitrust laws must be passed by the legislature. Accordingly, Executive Order 11-31 exceeds the Governor’s authority by attempting to invoke the state action exemption to the federal antitrust laws to allow collective action by certain independent businesses.

2. No statutory authority exists to support extension of Minnesota’s state action exemption to independent businesses.

Minnesota’s state action exemption⁴ provides that Minnesota’s antitrust laws do not “apply to actions or arrangements otherwise permitted, or regulated by any

⁴ Although Executive Order 11-31 only mentions the state action exemption to the *federal* antitrust laws, presumably the Governor will argue that the Minnesota state action exemption applies as well. If it does not, the collective action contemplated in Executive Order 11-31 is subject to Minnesota’s antitrust law, as

regulatory body or officer *acting under statutory authority* of this state or the United States.” Minn. Stat. § 325D.55, subd. 2(a) (emphasis added). This exemption is to be narrowly construed. *Minnesota-Iowa Television*, 294 N.W.2d at 305. It has been held, for example, to immunize actions that “were specifically authorized by state statute.” *Bloom v. Hennepin County*, 783 F. Supp. 418, 426 (D. Minn. 1992).

No statute authorizes the Governor to offer an antitrust exemption to an industry by allowing independent businesses to join a labor union. The only potential source of such authority cited in Executive Order 11-31 is a single section in the Minnesota Labor Relations Act (MLRA) regarding the Bureau of Mediation Services (BMS): section 179.02.⁵ (Exec. Order 11-31 at 2.) But section 179.02 does not authorize the unionization of independent businesses to exempt them from antitrust laws. Instead, the only arguably relevant authority section 179.02 gives to the BMS is the authority to “appoint special mediators to aid in the settlement of particular labor disputes or controversies.” Minn. Stat. § 179.02, subd. 2. Thus, unless the child care unionization election is a “labor dispute” within the meaning of that term in the MLRA, section 179.02 provides no authority to call that election whatsoever.

Under the MLRA, a “labor dispute” is

explained above.

⁵ Despite the placement of section 179.02 in the MLRA, Defendants’ counsel asserts, incorrectly and without explanation, that “[t]he election is held pursuant to BMS’s dispute resolution authority and not labor relations legislation.” (Defts.’ TI Opp. at 9.) (Citations herein to “TI Opp.” refer to the respective parties’ memoranda in opposition to Plaintiffs’ temporary injunction motion.)

any controversy concerning *employment*, tenure or conditions or terms of *employment* or concerning the association or right of representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms, tenure, or other conditions of *employment*, regardless of whether or not the relationship of employer and employee exists as to the disputants.

Minn. Stat. § 179.01, subd. 7 (emphasis added).

It is notable that each clause of this definition is limited by the term “employment.” The natural reading of this statute is that a “labor dispute” under the MLRA is any dispute about the conditions of employment between employers and current or potential employees. No such dispute about employment is present here, as recognized in the Executive Order itself, which provides that “[n]othing in this Order shall be construed to grant family child care providers status as employees for any purpose.” (Exec. Order 11-31 at 4.) Existing Minnesota law also rejects the notion that independent child care providers are in an employment relationship, providing that “[r]eceipt of federal, state, or local funds by a child care provider either directly or through a parent who is a child care assistance recipient does not establish an employee-employer relationship between the child care provider and the county or state.” Minn. Stat. § 119B.09, subd. 8.⁶

⁶ Intervenor AFSCME, without citing any authority, asserts that this “labor dispute” definition “may include self-employment.” (AFSCME TI Opp. at 13.) This absurd argument would eviscerate the antitrust laws. A “dispute” involving the terms or conditions of self-employment is simply a dispute about the prices that an entrepreneur is receiving in the competitive marketplace, the core concern of the antitrust laws. Nothing in the “labor dispute” definition in section 179.01, or elsewhere in the MLRA, suggests that it extends antitrust immunity to independent entrepreneurs who would like higher market prices to increase their profits.

Because the desire of some licensed registered family child care providers to unionize is thus not a “labor dispute” within the meaning of the MLRA, the Executive Order exceeds the statutory authority of the Governor and the BMS.

D. The asserted rationales for Executive Order 11-31 do not justify compromising antitrust protections.

Defendants and Intervenors suggest that the labor unions created under Executive Order 11-31 will simply be voluntary advocacy organizations. For example, Defendants assert that “[t]he Executive Order merely enables a dialogue to occur between subsidized family child care providers and the Commissioners who regulate the state child care program,” but “does not foreclose others from meeting with the Commissioners on the same issues.” (Defts.’ TI Opp. at 8.) Similarly, AFSCME argues that “[t]he Executive Order merely provides a mechanism for a particular group of citizens with a common interest to elect a representative to meet and confer with executive agencies on their behalf.” (AFSCME TI Opp. at 17.) And the SEIU Intervenors claim that the Executive Order is merely an instruction by the Governor for his subordinates “to engage in non-binding discussions with representatives of Minnesota citizens.” (SEIU TI Opp. at 11.) But if the purpose of Executive Order 11-31 is to allow groups of childcare providers to communicate with state officials about legislation and regulations, it is entirely unnecessary.

Independent businesses of all types commonly form voluntary lobbying or trade organizations to represent their common interests. Even without an executive order granting an antitrust exemption, family child care providers can form an organization to influence the state government without fear of antitrust liability.

See Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim, 784 N.W.2d 834, 840 n.7 (Minn. 2010) (The *Noerr-Pennington* doctrine provides that “because the right to petition the government is constitutionally protected, genuine efforts to influence government decision-making are not subject to antitrust attacks.”). Such voluntary trade organizations are not illegal if they limit themselves to lobbying the government or other activity permitted by antitrust laws. But membership in such an organization does not include a full antitrust exemption, as Executive Order 11-31 apparently seeks to offer. *See California Dental Ass’n v. FTC*, 526 U.S. 756 (1999) (applying antitrust laws to actions taken by a voluntary association of dentists); *Ass’n of Retail Travel Agents, Ltd. (ARTA) v. Air Transp. Ass’n of Am. (ATA)*, 635 F. Supp. 534, 536 (D.D.C. 1986) (“Although a trade association can conspire with its members, mere membership in a trade association does not give rise to an inference of conspiracy.”) (internal citations omitted).

An agreement by a trade organization to exchange price information, for instance, is subject to antitrust scrutiny, both as a potentially illegal agreement in itself or as circumstantial evidence of an underlying price-fixing agreement. *See, e.g., Todd v. Exxon Corp.*, 275 F.3d 191, 198-99 (2d Cir. 2001). Under the proposed unions, family child care providers might agree to exchange price information, as they did in Wisconsin following the issuance of an executive order containing a similar antitrust exemption. (*See* 2008 Wisconsin Agreement⁷ at 19 (discussing

⁷ Agreement Between Wisconsin Department of Health and Family Services and Wisconsin Department of Workforce Development And Wisconsin Child Care Providers Together, American Federation of State, County and Municipal

annual Market Rate Survey).) Defendants and Intervenors have offered no reason why such anticompetitive behavior should be exempted from the antitrust laws, as Executive Order 11-31 apparently does.

Thus, the stated rationale for Executive Order 11-31 offers no support for the potentially harmful exemption it offers certain licensed registered family child care providers from the antitrust laws. No permissible authority or rationale exists for Executive Order 11-31, and it should be enjoined.

CONCLUSION

For the foregoing reasons and those offered by Plaintiffs, the Court should grant Plaintiffs' motions for a temporary injunction and summary judgment.

Dated: January 19, 2012.

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Employees, AFSCME Councils 40 and 48, AFL-CIO, available at [http://wisconsinccpt.unionactive.com/docs/contracts/Child Care Workers Contract 7 28 08.pdf](http://wisconsinccpt.unionactive.com/docs/contracts/Child_Care_Workers_Contract_7_28_08.pdf).

APPENDIX A

AMICI CURIAE CHILD CARE CUSTOMERS

Anthony Bushnell

Betsy Clifford

Rachel Flannelly

Anya Ford

Carrie & Steven Jones

Dan Kennedy

David King

Cari Nelson

Adrienne Owens

Amy Peterson

Crystalina Peterson

Jason Tossey